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Robert L. Tsai

*Boston University School of Law*

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## Sacred Visions of Law

Robert L. Tsai\*

*ABSTRACT: Around the time of the Bicentennial Celebration of the U.S. Constitution's framing, Sanford Levinson called upon Americans to renew our "constitutional faith." This Article answers the call by explicating the ways in which two landmark constitutional law decisions—Marbury v. Madison and Brown v. Board of Education—have been used by jurists over the years to tend the American community of faith. Blending constitutional theory and the study of religious form, the Article argues that the legal symbols have become increasingly linked in the legal imagination even as they have come to signify very different sacred visions of law. One might think that Marbury, whose facts are unknown to the average American, has spawned an insulated message for legal insiders, while Brown, whose central holding is known by most citizens, acts as a unifying force in judicial thought. In fact, the opposite is true. Serving as a talisman of judicial might, Marbury evokes a popular myth of the reluctant lawgiver, as well as an entrenched juricentric belief in law. Despite its rehabilitation for ordinary Americans, in the minds of judges, Brown, now a generation removed from its date of decision, has come to refract lasting memories of social strife and the closing of the judicial mind. Ultimately, neither legal symbol, as it is understood today, offers a particularly uplifting ideal of justice or the judicial power. But what has grown grotesque can be shorn at the roots, and what has withered may yet be nursed back to vigor.*

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Somewhere, perhaps in an old dream, I have seen this place, or perhaps felt the feeling of this place. . . . This is ancient—and holy.

—John Steinbeck, *To A God Unknown*

## I. INTRODUCTION

Ever since Enlightenment Age philosophers cleaved Western thought in twain with the blade of reason, law has been located in the realm of the profane, its processes treated as distinct from that of the sacred. A popular Biblical saying, “Pay Caesar what belongs to Caesar—and God what belongs to God,”<sup>1</sup> has done much to disable our skill at discerning the similarities between the sovereign and the sacred.<sup>1</sup> As whispered by modernity’s keepers, law is one thing and religion another; law exudes rationality and deals in the secular, while faith is an unruly force beyond law’s ken.

In actuality, life under law not only owes an enormous debt to our spiritual and myth-based traditions, it also continues to share much of its basic texture with religious existence. Law prizes texts, ceremony, and relics; installs iconic figures and prophets; and suffers few contenders for its affections. Like religion, law knits together disparate groups of believers into a single community that transcends human frailty and the obstacles of time. On occasion, American leaders have glimpsed the inescapably sacral quality of law and paid homage to it. Standing on the blood-soaked battlefield at Gettysburg in 1863, Abraham Lincoln spoke movingly of the soldiers who consecrated the earth through their sacrifice and urged the living to dedicate themselves to the “unfinished work” of a “new birth of freedom.”<sup>2</sup>

It is said that we peer into the very soul of the law when we ask exacting questions about its canonical decisions.<sup>3</sup> Indeed, the contours of our

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1. *Mark* 12:17 (The New Jerusalem Bible). When Jesus of Nazareth reportedly was asked by a group of Pharisees and Herodians whether his teachings permitted taxes to be paid to Caesar, his ingenious answer momentarily deflected charges of insurrection while reinforcing the primacy of the sacred. For no person living in First Century Palestine would have seriously taken him to mean that God’s domain was in any way limited by Caesar’s reign. “Master,” those trying to trap him reportedly said to Jesus, “[w]e know that you are an honest man, that you are not afraid of anyone, because human rank means nothing to you, and that you teach the way of God in all honesty. Is it permissible to pay taxes to Caesar or not? Should we pay or not?” *Mark* 12:13–17; *Matthew* 22:15–22; *Luke* 20:20–26. Jesus’ answer, which shows a flash of anger at the “hypocrisy” of his questioners, deftly broadened the inquiry: “Why are you putting me to the test? Hand me a denarius and let me see it. . . . Whose portrait is this? Whose title?” *See id.* at 12:15–16. When they replied, “Caesar’s,” Jesus then gave his answer emphasizing that one’s debt to God, like that owed to Caesar, would have to be repaid. *Id.* at 12:17.

2. President Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), reprinted in LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 536 (1989).

3. *See* LEGAL CANONS 3 (J.M. Balkin & Sanford Levinson eds., 2000) (“The study of canons and canonicity is the key to the secrets of a culture and its characteristic modes of thought.”); *see also* Jill E. Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 826–27 (2004) (positing a theory of canonization that includes leading cases as well as recurring “stories and

constitutional faith can be gleaned through diligent study of the landmark controversies in *Marbury v. Madison*<sup>4</sup> or *Brown v. Board of Education*.<sup>5</sup> But it is far more important how these two cases are assembled in our own time to sustain the symbolic life of the law. Accordingly, I am more interested in how these rulings are utilized as short-hands to cultivate legal belief than in whether a jurist's use of either ruling is faithful to the original holding. My focus is on the descriptive, paying close attention to the actual architecture of symbolic discourse, the purposes with which it has been engaged, and what these discursive patterns reveal about the spiritual dimensions of American law.

These two cases-turned-symbols are worthy of juxtaposition for three interlocking reasons. First, each decision involved a historically momentous exercise of judicial prerogative: *Marbury* was one of the earliest and most extravagant expositions; *Brown* was by far the most controversial.<sup>6</sup> Second, cultural understandings of each ruling are today rhetorically manipulated by judges to extend or retract their sphere of influence to suit their specific needs and the times. That is to say, they have become active—even forceful—implements of institutional influence. Third, over time, the cases have become more tightly joined as two sides of the same coin in the minds of jurists during battles over the project of law itself. For these reasons, diachronic exploration of the rulings promises to offer the most insights about the interdependence of law and culture.

What we discover is eye-opening. While each decision holds a secure place in the pantheon of legal wonders, the lasting influence of each ruling on the legal imagination could not be more different. Even a passing mention of *Marbury* recalls *beginnings*—the case is forever linked with a lawyer's awakening to the wondrous potential of judicial power. More than ever, though, it has also become a vehicle for the perpetuation of popular culture, which insistently—even pathologically—hews to a court-centered view of law.

Whenever *Brown* is referenced by jurists, a vastly different image-reel of experiential and conceptual associations is cued up. Mostly, we are invited to think of *ends*—the final crumbling of the dehumanizing racial caste system or the end of a romantic era in which judging consisted of solving private

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examples"). A work becomes part of the canon because it is representative of a discipline, because it offers usable material for those within a given field, or because the awareness of the work enhances cultural literacy. Any of these alone or in combination can spur the process of canonization.

4. 5 U.S. (1 Cranch) 137 (1803).

5. 347 U.S. 483 (1954).

6. Indeed, largely for these reasons, Daniel Farber, Philip Frickey, and William Eskridge use *Brown* as the primary case study for introducing the topic of constitutional decision-making in their casebook, asking students to learn *Marbury* only after they have encountered and deeply considered *Brown*. DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 50, 58 (2d ed. 1998).

disputes between aggrieved individuals rather than the reformation of government institutions.<sup>7</sup> But perhaps most surprisingly, judges now routinely use *Brown* to symbolize the limits of law, to urge the conservation of institutional resources, and to perpetuate a vision of discretionary lawgiving.

This Article is organized to ascertain what the contemporary jurist believes is significant about this pair of decisions. It also pays attention to how these cases are popularly received. Part II sketches a conception of American law that emphasizes its spiritual and communal dimensions. It then explores with greater particularity the capacity of path-breaking legal decisions to cultivate attachment to our legal order. I call this search for the symbolic modes of communal life *constitutional iconography*.

The Article goes on to examine *Marbury* and *Brown* as symbols “shedding and gathering meaning over time and altering in form.”<sup>8</sup> Part III examines these striking patterns in legal myth-making. Importantly, what judges think about these cases is not always in accord with how academics and citizens feel about them. These communities of legal faith have interacted in different ways to mold prevailing understandings of the two rulings.

Notwithstanding sharp and regular academic warnings about the imperial judiciary, the Supreme Court employs *Marbury* to demand a form of constitutional obedience that is juricentric and hierarchical. Specifically, the decision has spawned a set of catechisms and tropes repeated to spread the myth of the judge as a reluctant lawgiver. It is a technique that plays to widespread support for court-driven mechanisms to protect basic rights. All of this suggests a greater degree of permeability between the ethos of the professional ranks and popular culture.

On the other hand, the structures of meaning evoked by and revealed through poetic use of *Brown* are characterized by a somewhat greater interaction between judicial culture and academic culture. Part IV challenges the facile notion that *Brown* is universally seen as the “Holy Grail of racial justice.”<sup>9</sup> Oddly, although the decision has undergone considerable rehabilitation when it comes to the population at large, it nevertheless

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7. Derrick Bell illustrates this phenomenon when he describes *Brown* as a “symbol of the nation’s ability to condemn racial segregation and put the unhappy past behind us.” DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 130 (2004); see also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 5 (1971) (describing *Brown* as consisting of “mandates to eliminate racially separate public schools established and maintained by state action”); *Watson v. Memphis*, 373 U.S. 526, 529 (1963) (positing that *Brown* authorized the “complete elimination of racial barriers”).

8. VICTOR TURNER, FROM RITUAL TO THEATER 22 (1982). As Turner’s work suggests, a definitive anthropological account is not content with describing symbols as unmoored possibilities of meaning, but is instead attentive to the actual patterns of fashioned meaning, and thus the wax and wane of cultural and political influences. *Id.*

9. BELL, *supra* note 7, at 3.

remains mostly a symbol of despair and limitation in circles frequented by judges. More often than not, for these stewards of the law *Brown* signifies a fear of unleashing social strife, the assertion of jurisdictional boundaries, and the closing of the judicial mind.

The portrait of *Brown*'s sacramentality is further complicated by its relationship to *Marbury*. Since they appeared together for the first time in the 1958 case of *Cooper v. Aaron*,<sup>10</sup> the two decisions have been increasingly linked in the minds of judges as opposing symbols of judicial review. Whereas *Marbury* is held aloft to rally the faithful behind a banner of a vigilant and active judiciary, *Brown* is often hoisted in the very same case to signal judicial retreat and the protection of institutional prestige. This mostly unnoticed trend threatens to turn *Brown* into an anti-canonical ruling while securing *Marbury*'s dominance.

But judges do not bear all of the blame, for litigation is not the only process that affects a legal icon's vitality. How the decisions have been received by intellectual elites more generally reinforces their gestalt properties in juridic thought. Accordingly, Part V considers the influence of academic culture on these two sacred emblems. Treatment of this pair of cases mirrors the telling of religious creation stories and parables. I close by suggesting that a lasting devotion to our constitutional heritage must be made of more inspiring stuff than the combination of these two decisions.

## II. INTERPRETIVE FELLOWSHIP

In *Constitutional Faith*, Sanford Levinson called upon Americans to rediscover the roots of their "constitutional attachment[s]."<sup>11</sup> Along the way, he illuminated a number of striking similarities between the obligations imposed by religious tradition and those demanded by American legal practices. The history of law, like that of religion, can be separated into more and less hierarchical interpretive traditions.<sup>12</sup> Moreover, conceptions

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10. 358 U.S. 1 (1958).

11. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 122–23 (1988).

12. Levinson finds the "catholic" position hierarchical with regard to who possesses the ultimate authority to interpret the law, and one that combines text with custom in reading law. *Id.* at 29. By contrast, he argues that the "protestant" position is more communal as to interpretive authority and reveres text alone. *Id.* I find less persuasive Levinson's claim that the protestant tradition of constitutional interpretation focuses exclusively on text while the catholic tradition holistically embraces unwritten sources of tradition. *Id.* I am not convinced that any interpretive tradition—religious or secular—consistently adheres to text alone. Moreover, by this standard, Jesus of Nazareth, whose ministry emphasized a host of non-textual sources of law such as parables, sayings, miracles, and good works should be categorized as a catholic, when in fact his emphasis on non-hierarchical forms of lawgiving (*e.g.*, the prophetic, charismatic, and care-giving roles) inclines one to label him a protestant. At all events, we need not resolve the question of whether either camp can plausibly claim him. It is enough to stress how each interpretive tradition views the importance of mediating institutions. If we were to say instead that reformist interpretive traditions emphasize the individual's moral capacity to engage in a relationship with the sacred realm without significant institutional mediation, this

of morality and readings of sacred text often stand in uneasy tension for both the citizen of the state and the religious adherent. According to Levinson's account, a constitutional system worthy of the people's devotion avoids idolatry and is leavened by a healthy dose of liberal respect for pluralism.<sup>13</sup>

In the spirit of his humanistic study, I offer an account of *Marbury* and *Brown* informed by attention to sacred forms. The inquiry deepens Levinson's insights by showing the myriad ways in which legal symbols and sayings are utilized to foster belief in the law.

#### A. METHODOLOGY

At its essence, the project is an exercise in constitutional iconography. As I use the term, "constitutional iconography" has a twofold meaning. It refers first and foremost to a discipline: the study of the symbolic systems through which legal culture is constructed. The phrase has a second connotation: the actual set of symbols and expressive rituals in a particular area of law.

Methodologically, this approach differs in some important respects from past intellectual traditions. Classical legal thought, either through arrogance or innocence, denied the permeability of the boundaries drawn and mediated by law. If social activity was not codified in identifiable rules or recognized by institutions, it lay beyond the law's concern.<sup>14</sup> Christopher Columbus Langdell, one of formalism's greatest "theologians," proselytized the "logical integrity of the system as system."<sup>15</sup> In this way, classical thinkers reified legal architecture. Study of the law and allegiance to the law, for all intents and purposes, were indistinguishable.

Realism and its heirs, by contrast, committed a different sin: form was overlooked; boundaries collapsed. In the attempt to achieve a better match between the ideal of law and lived experience, they treated law as little more than the expression of pre-formulated policies or prejudices.<sup>16</sup> Better to

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should suffice to distinguish the two strains of interpretive practice.

13. *Id.* at 51–53.

14. *See generally* H.L.A. HART, *THE CONCEPT OF LAW* (1961); JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (DaCapo Press 1971) (1826–1830); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877–1920*, at 81–93 (1967).

15. This critical assessment came from Oliver Wendell Holmes, Book Review, 14 *AM. L. REV.* 233, 234 (1880). *See generally* LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 13–22 (1996).

16. Morton Horwitz has argued that realism is best understood as a subspecies of twentieth century progressivism and "a continuation of the reformist attack on orthodox legal thought." MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 171 (1992). Crisscrossing these legal intellectual movements are sharply divergent accounts of the legal subject, or humanity's relationship with society. *See* Kathryn Abrams, *The Legal Subject in Exile*, 51 *DUKE L.J.* 27, 32–74 (2001) (identifying three historical stages in law's characterization of human beings).



consciously mold law to reflect the former, realists thought, than to allow law to be unconsciously disfigured by the latter. At its inception, realism energetically attacked concentrations of wealth and political power, but its reformist spirit soon inspired efforts to hone law into a vehicle to achieve private interests more efficiently.

If their progenitors demanded unswerving allegiance to law's most visible manifestations, realists ardently hoped that an appeal to pragmatism would rejuvenate belief in the law. Yet this presented a fresh dilemma: If law was truly just another site of in-fighting, mirroring only narrow needs and wants, it threatened to lose much of its faith-building power among the populace. The closer that law approached the post-classical ideal, the more one began to not only forget her neighbor's concerns, but also undervalue commonalities.

A constitutional iconographer treats law not as a system unto itself or as a displacement of the political sphere but as a series of overlapping domains.<sup>17</sup> Faith is seen as an essential component of law—nurturing, shaping, and enlivening it—without obscuring how law actually operates. Two motives inform the iconographer's project. The first is a desire to recover lost lines of descriptive inquiry from the grip of realism's normative agenda without reproducing an autonomous vision of law.<sup>18</sup>

A second thread, entwined with the first, endeavors to expand our comprehension of the myriad processes that impart legal meaning.<sup>19</sup> These entail not only the formal procedure by which legal rules are crafted and refined, but the whole of legal myth-making, from the weaving of legal lore through popular sayings and vivid metaphors to the formation of cults of personality.

If constitutional iconography embodies a distinctive scholarly outlook, it is the iconographer's task to capture and catalogue the active symbols, rites,

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17. For accounts of law that strive beyond the autonomous, see generally JOHN BRIGHAM, *THE CULT OF THE COURT* (1987); PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* (1997); LEVINSON, *supra* note 11; ROBERT C. POST, *CONSTITUTIONAL DOMAINS* (1995); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE* (2004).

18. See KAHN, *supra* note 17, at 39–40; Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 60–62, 69–70 (2003). Judges and advocates cannot be iconographers in the primary sense that I have discussed, for they do not come to the law with sufficient distance. They are, however, actively engaged in legal myth-making in the secondary sense of the term, for jurists and lawyers themselves are the primary manipulators of law's machinery and its archetypes. This is not to deny the role that academics and citizens play in the maintenance of legal culture, but to emphasize that the professional's use of legal symbolism is authoritative and second-nature in ways that leave her a poor subject for self-analysis.

19. Recent portrayals include Norman W. Spaulding, *Constitution as CounterMonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 992 (2003); Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261 (2004).

frames of signification, and other expressive practices through which membership in interpretive fellowship is actualized.<sup>20</sup> By *interpretive fellowship*, I refer to the communal dimensions of law: defining insiders and outsiders, facilitating understanding of authoritative pronouncements, and instilling a sense of identity, belonging, and mission.

In drawing upon the study of sacred form to enlighten our understanding of constitutional form, I am not arguing that the content of legal rules should be guided by any particular set of religious precepts.<sup>21</sup> Rather, I do so to underscore the similarities between law and religion with a desire to gain an appreciation for the power of symbols—in law, as in religion—to legitimate governing institutions, instill shared values, and organize an interpretive community. If many of my examples come from the Judeo-Christian tradition, it is only because, like it or not, they form a significant part of the body of local knowledge we have inherited.

I begin first with a word or two about the nature of legal faith; I then discuss just how belief in the rule of law is engendered by symbols.

#### B. THE DYNAMICS OF FAITH

Without faith we are nothing; with it, law becomes possible. The essence of American *communitas* is neither unvarnished reason nor fear of violence, but an abiding belief in the rule of law. “The structure of the legal imagination,” Paul Kahn writes, “shares as much with religious belief as with logic.”<sup>22</sup> Indeed, as Kahn argues, adjudication could not take place without a pre-existing culture of faith in the law.<sup>23</sup> Within legal culture, faith and reason are not polar opposites, but mutually supporting phenomena—working to enhance the durability of governing institutions. Faith provides context for and lends legitimacy to actions taken in law’s name.

Conviction and hopefulness—as much as self-rule—are the hallmarks of citizenship in a constitutional democracy. Belief in law transcends death and time, binding a people across generations. This realization, more than any other, helps to explain why citizens would heed prose from an unfamiliar age, setting down promises they had no role in formulating for themselves. The contractarian insists that we are all in privity with those who met in

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20. In other quarters, I have written about the ritualistic quality and historical transformation of fire-inspired metaphors and legal sayings in free speech culture, *Fire, Metaphor and Constitutional Myth-Making*, 93 GEO. L.J. 181 (2004), as well as juridic use of images of social discord to legitimate free speech doctrine, *Speech and Strife*, 67 LAW & CONTEMP. PROBS. 83, 98–100 (2004).

21. This does not mean that they *should* dominate American law’s content in any way. Nor does it deny that other indigenous religions address many of the same issues of communal relationships and self-identity.

22. KAHN, *supra* note 17, at 37.

23. *See id.* at 184 (“Interpretation begins only after the sovereign withdraws. . . . The silence of interpretation is filled by the presence of faith.”).

Philadelphia, bound by their obligations for good or naught.<sup>24</sup> But the very language of contract ill suits the founding experience. Though both require mutuality of interest, contracts are formed among *parties* for well-defined purposes and identifiable periods of time, while covenants extend promises to *descendants* for perpetuity.<sup>25</sup> As Daniel Elazar explains, covenants are witnessed by God, and frequently contain blessings or curses.<sup>26</sup> Prominently displaying these covenantal features, the American Constitution reaches for perfection so as to secure the “blessings of liberty to ourselves and our posterity.”<sup>27</sup>

The words’ ring of inspired purpose was no accident. Far from speaking in pure contractual terms, those who toiled in the vineyard of liberty drew upon the Biblical notion of blood-covenant, describing the “kindred blood which flows in the veins of American citizens, the mingled blood which they have shed in defense of their sacred rights, [to] consecrate their union.”<sup>28</sup> Sworn enemies can enter into a pact with their enmity intact, but a covenant aims to fashion and sustain what James Madison called the “many cords of affection.”<sup>29</sup>

Belief is not the same as acquiescence or fear of violence, two commonly proffered rationales for law’s hold on us. Robert Nozick is one of the leading theorists advocating a “minimal” night-watchman state based on the Lockean fear of one’s neighbors as potential aggressors.<sup>30</sup> Yet he goes

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24. On America’s contractarian tradition, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 58–59 (1967); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 282–91 (1998).

25. In Genesis’s account of the giving of the covenant, Yahweh promises to Abram: “To your descendants I give this country, from the River of Egypt to the Great River.” *Genesis* 15:18–19. Importantly, it is a promise that will be fulfilled over time, after generations of testing. *Id.* at 15:12–16. The covenant is re-consecrated during the age of Exodus once it becomes apparent that greater legal specificity is necessary. *Exodus* 23:31–24:11.

26. See DANIEL J. ELAZAR, *COVENANT AND CONSTITUTIONALISM: THE GREAT FRONTIER AND THE MATRIX OF FEDERAL DEMOCRACY* 7, 29, 38 (1998) (arguing that America’s founding owes more to its covenantal tradition than to its Lockean roots); see also CLINTON ROSSITER, *SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY* 53 (1953).

27. U.S. CONST. pmb. (striving for “a more perfect union”).

28. *THE FEDERALIST* NO. 14, at 154 (James Madison) (Benjamin Fletcher Wright ed., 1961); see also *THE FEDERALIST* NO. 2, *supra*, at 9 (John Jay) (“Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs . . .”).

29. In *The Federalist* No. 14, Madison appealed to the “people of America, knit together as they are by so many cords of affection.” *THE FEDERALIST* NO. 14, *supra* note 28, at 84 (James Madison). Cross-cutting my view of covenants and contracts is the approach staked out by Daniel Markovits, who acknowledges that “the conceptual core of contract remains the discrete and self-interested exchange” that “does not rely on affection,” but who nevertheless argues that contract law’s formality and thinness enhance its ability to create lasting communities of respect. Daniel Markovitz, *Contract and Collaboration*, 113 *YALE L.J.* 1417, 1450–51 (2004).

30. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA*, at ix, 10–12 (1974). Nozick argues that only state practices that legitimately address this collective fear of anarchy in Locke’s state of

wrong by overlooking the more robust conception of law envisioned by the framers. Resignation or apprehension rarely inspires enduring bonds—more likely, such a basis for communal relationships breeds suspicion and distrust.

There is in every faith tradition a profound dialectic between conviction and its testing.<sup>31</sup> The stories of Abraham's willingness to ritually slaughter his son Isaac to prove his loyalty and Job's prolonged misery over a titanic wager between Yahweh and Satan attest to this tension between fidelity and ordeal. Similarly, the American legal tradition burgeons with narratives of belief in law forged in the crucible of constitutional conflict—think of the heroism of the revolutionary generation that asserted its independence from the British Crown, or the freedom riders who demonstrated their commitment to racial equality by subjecting themselves to invective, beatings, and firebombs. It is said that devotion that comes too easily may dissipate just as rapidly.

As Lincoln's rousing Gettysburg Address reminds us, law's work is never done.<sup>32</sup> To bind a people through a constitution is to take on an uneasy tension between fidelity to the past and receptivity to change. In law, as in religion, this tension can never be fully resolved, but must always be uneasily negotiated.

Faith alone can fill the yawning gaps left by social compact and surmount the temporal problem of law. In Hebrews 11:1 it is written that "[o]nly faith can guarantee the blessings that we hope for, or prove the existence of realities that are unseen. It is for their faith that our ancestors are acknowledged."<sup>33</sup> The revolutionary leaders' commitments are passed down to each successive generation, and their spirit moves us still, though it is for us to determine whether and how their promises are kept. Stressing the need for periodic renewal of the law, the Supreme Court has said that "[o]ur Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one."<sup>34</sup>

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nature can be morally justified. *Id.* at 113–18. Any more robust conception of the state, Nozick insists, would violate individuals' rights. *Id.* at 149. Note, however, that the founding generation insisted that remaking the constitutional order would not only bring more security, but also maximize happiness. *See generally* U.S. CONST. pmb1; THE DECLARATION OF INDEPENDENCE (U.S. 1776).

31. *See, e.g.,* 1 *Thessalonians* 2:5 ("God . . . tests our hearts.").

32. *See* Lincoln, *supra* note 2.

33. *Hebrews* 11:1–2.

34. *Planned Parenthood v. Casey*, 505 U.S. 833, 901 (1992). Playing a similar refrain, the Book of Hebrews recounts:

It was by faith that Abraham obeyed the call to set out for a country that was the inheritance given to him and his descendants, and that he set out without knowing where he was going. . . . All these died in faith, before receiving any of the things that had been promised, but they saw them in the far distance and welcome them,

It follows that the opposite of faith is not atheism, but agnosticism. One who is agnostic to the project of law displays indifference to the industrious capacity of individuals to make public meaning of their lives. Dante Alighieri described such persons as “neither faithful nor unfaithful to their God, who undecided [stand] but for themselves.”<sup>35</sup> If the adherent holds fast to the possibility of forming “a more perfect union,”<sup>36</sup> the agnostic is wracked by thoughts that words mean nothing; that promises will go unfulfilled. Where this shadow darkens a people’s enterprise, there can be neither religion nor law.

Although faith is trained on what tomorrow may bring, its ultimate ends need not be other-worldly—say, the belief in an afterlife or the existence of angels. Instead, the essence of conviction is keeping alive the possibility of one day being more true to foundational ideals, whatever their ultimate source. As the people have been overheard to play and sing, “freedom is in the trying.”<sup>37</sup> Indeed, early Christianity’s emphasis on the “Kingdom of God” was not about securing a state of bliss after physical death. Rather, with eyes trained on the horizon, the kingdom served as an allegory for a social existence lived *in this world*, within harmonious relationships of mutual respect reinforced by law.<sup>38</sup>

So, too, our constitutional attachments are rooted in real-world dreams for a freer and more egalitarian society. Everywhere the document is marked by ideals and compromises; worthy badges of success and jagged scars of failure.<sup>39</sup> The slavery provisions are the starkest remnants of this country’s earliest pacts with human depravity,<sup>40</sup> whereas the Reconstruction

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recognizing that they were only strangers and nomads on earth. People who use such terms about themselves make it quite plain that they are in search of a homeland. If they had meant the country they came from, they would have had the opportunity to return to it; but in fact they were longing for a better homeland, their heavenly homeland.

*Hebrews* 11:8–16.

35. DANTE ALIGHIERI, *THE DIVINE COMEDY: INFERNO*, canto III, ls. 37–39, (Mark Musa trans., Penguin Books 1984). Dante dooms these unfortunate shades, faithless in life, to wander the vestibule to Hell, forsaken by God and rejected by the Underworld.

36. U.S. CONST. pmbl.

37. Wynton Marsalis, *Freedom Is in the Trying*, in *BLOOD ON THE FIELDS* (1997).

38. See, e.g., GERHARD LOHFINK, *JESUS AND COMMUNITY: THE SOCIAL DIMENSION OF CHRISTIAN FAITH* 16–17 (1982). The centrality of religion’s concern for communal life is demonstrated in the periodic renewal of doctrine and intensive focus on the duties of adherents to one another. See *id.* at 87–122.

39. See U.S. CONST. pmbl. (“[E]stablish[ing] justice . . . and secur[ing] the Blessings of Liberty”); *id.* amends. I–X (Original Bill of Rights); *id.* amends. XIII–XV (Reconstruction Amendments); *id.* amend. XIX (guaranteeing sex equality in voting).

40. See *id.* art. I, § 2 (Three-Fifths Clause); *id.* art. I, § 9 (preventing Congress from banning migration and importation of slaves until 1808); *id.* art. IV, § 2 (Fugitive Slave Clause).

Amendments and the Nineteenth Amendment memorialize the consecration of new commitments to social equality.<sup>41</sup>

Belief in law—not a pre-political calculation of self-interest<sup>42</sup>—has the capacity to unify a polity as scattered and diverse as our own. On this point, consider Felix Frankfurter’s dissenting statement in the great flag salute case that as a judge he considered himself “neither Jew nor Gentile, neither Catholic nor agnostic.”<sup>43</sup> Although he was asserting a kind of neutrality in judging, he was also making a claim about the distinctive nature of the American Creed. He went on to say that “[w]e owe equal attachment to the Constitution and are equally bound . . . whether we derive our citizenship from the earliest or latest immigrants to these shores.”<sup>44</sup>

Justice Frankfurter’s allusion to Paul’s Letter to the Galatians in the *Barnette* decision portrays our constitutional order as a boisterous community united by a common heritage founded on conviction and hopefulness.<sup>45</sup> Call this the *identity molding* function of the rule of law. Just as Paul admonished that social differences should not confer privileged status

41. For a provocative theory that the Nineteenth Amendment guarantees more than women’s suffrage, but rather all of the indices of “equal citizenship,” see generally Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

42. There are those who contend that specific rights precede constitutional formation. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 53–86 (2004) (advancing a rights-based vision of constitutionalism based on natural law tradition). Others believe that certain pre-political principles guide the creation of governing institutions in any just society. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 12 (1971) (defending the principle of justice as fairness from the original position behind a “veil of ignorance”).

43. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting) (opposing the Court’s decision to enjoin compulsory flag salutes). Frankfurter’s dissent was especially bitter because the *Barnette* decision eviscerated his earlier decision in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), upholding the Pledge of Allegiance against a challenge based on “freedom of conscience.” *Id.* at 597–98. We can agree with Frankfurter’s general account of our secular faith, even if we disagree that it was best served by allowing authorities to punish refusal to prostrate oneself to an object of faith.

44. *Barnette*, 319 U.S. at 647.

45. The full quote from the original source is that “[t]here can be neither Jew nor Greek, there can be neither slave nor freeman, there can be neither male nor female—for you are all one in Christ Jesus. And simply by being Christ’s, you are that *progeny* of Abraham, the heirs named in the promise.” *Galatians* 3:28–29. Note that continuity is achieved by linking the existing community to the earlier one constituted by Abraham. This theme is echoed in Paul’s First Letter to the Corinthians:

For as with the human body which is a unity although it has many parts—all the parts of the body, though many, still making up one single body—so it is with Christ. We were baptised into one body in a single Spirit, Jews as well as Greeks, slaves as well as free men, and we were all given the same Spirit to drink.

1 *Corinthians* 12:12–13. Paul’s reference to the fact that “not many of you are wise by human standards, not many influential, not many from noble families” suggests that a minority of the congregation was of a higher social status, and misused their position over the others. *Id.* at 1:26–27. See generally LOHFINK, *supra* note 38, at 87–98.

in the congregants' dealings with one another,<sup>46</sup> so Frankfurter suggests that loyalty to our covenant of higher law takes precedence over race, religious background, or country of origin. This is so even if the people prefer a conception of citizenship that errs on the side of inclusiveness, and is accommodating of difference rather than totalizing.

Paul himself faced a situation in Galatia where Jewish and non-Jewish members of the congregation found themselves split over the basis of community: some insisted that circumcision remained the price of entry whereas others urged—just as vocally—that baptism and adherence to the law were sufficient. In siding with the proponents of the more inclusive position, he reminded congregants of their mutual obligations based on respect and service. Speaking metaphorically of church members as parts of a physical body, Paul argued that social inequality should not be blindly reproduced within the relationships of the faithful.<sup>47</sup>

Paul's concern for "factions" and "troublemakers"<sup>48</sup> within the body of the Church is echoed in Madison's conviction that the disease of factionalism, rooted in man's "reason and his self-love," not be allowed to fester in the body politic.<sup>49</sup> Although the American political tradition emphasizes institutional solutions far more than the Christian one, they share an image of the fallen man, appeal to virtue, and acknowledge the perpetual need for interpretation of shared commitments. Moreover, the ideal of equal respect manifests in the Constitution's concern for the dignitary interests of the individual as well as in practices that encourage comity between sovereign institutions.<sup>50</sup>

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46. Paul was not demanding that existing identities had to be forsaken. Nor was he encouraging a form of willful institutional blindness to social differences in the name of equality. The New Testament is replete with examples that higher social status and greater resources sometimes require the shouldering of different burdens. Asked by a rich man how he might enter the Kingdom of Heaven, Jesus supposedly said, "You need to do one thing more. Go and sell what you own and give the money to the poor, and you will have treasure in heaven; then come, follow me." *Mark* 10:21–22. Understanding the lesson but unable to share his goods in this way, the rich man sadly departs. *Id.* at 10:22; *see also id.* at 10:24–26 ("It is easier for a camel to pass through the eye of a needle than for someone rich to enter the kingdom of God."). Reinforcing this theme, Jesus reportedly encountered two people arguing over which was the greatest. He said to them: "If anyone wants to be first, he must make himself last of all and servant of all." *Id.* at 9:33–37.

47. His solution is repeated in Corinth over a related controversy involving the "strong and the weak": the well-to-do members of the congregation and those who are materially worse off. *See generally* Gerd Theissen, *The Strong and the Weak in Corinth: A Sociological Analysis of a Theological Quarrel*, in *THE SOCIAL SETTING OF PAULINE CHRISTIANITY: ESSAYS ON CORINTH* 121, 121–43 (John H. Schutz ed., 1982).

48. 1 *Corinthians* 1:10 ("Brothers, I urge you, . . . not to have factions among yourselves").

49. THE FEDERALIST NO. 10, *supra* note 28, at 130 (James Madison). Madison did not believe factionalism could be defeated once and for all, but merely that its effects could be isolated and diffused through political arrangements. *Id.*

50. This reading of our founding document harmonizes the seemingly disparate concerns about the integrity of institutions—*i.e.*, the three branches of the federal government, the state,

American law may be shepherded by prophets, judges, and would-be saviors, but it ultimately resides in the hearts and minds of ordinary believers, the true sovereigns.<sup>51</sup> A dusting of faith resembles a pinch of mustard seed, “the smallest of all the seeds on earth. Yet once it is sown it grows into the biggest shrub of them all and puts out big branches so that the birds of the air can shelter in its shade.”<sup>52</sup> If it is well tended, acceptance of law’s reign entwines itself with the political structures erected by humankind, fashions an enduring community, and helps to broaden its empire.

### C. WHEN CASES BECOME ICONS

Every society lives and dies by its symbols. Faith is expressed, celebrated, and extended through them. A function of a particular culture and of the imagination, symbols can be regenerative of the human spirit, energizing people for collective action, or they can be deeply corrosive of existing relationships, discouraging collaboration. Any particular symbol can gain currency or fade over time; but when all of a community’s icons lose their poignancy, a culture itself may be said to have withered away.

The very definition of the term captures its communal and amalgamative qualities: “[t]he word symbol is derived from two Greek words, *syn*, meaning together, and *ballein*, meaning to throw.”<sup>53</sup> “Hence, *symbolon*, a sign, mark or token, impl[ies] the throwing together or joining of an abstract idea and a visible sign of it.”<sup>54</sup>

Human beings and institutions carry on their daily tasks within fields delineated and constructed by symbols, although their boundaries cannot be seen or touched. As Joseph Campbell explains:

The symbolic field is based on the experiences of people in a particular community, at that particular time and place. Myths are so intimately bound to the culture, time, and place that unless the

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the home—with equally protective language about individuals—*e.g.*, expression, belief, political action, bodily integrity.

51. The Declaration of Independence claimed the natural born right of “one people to dissolve the political bands which have connected them to another”; declared that “all political connection between them and the State of Great Britain, is and ought to be totally dissolved”; and seized the levers of self-government. DECLARATION OF INDEPENDENCE, *supra* note 30. Likewise, the Framers invoked the God-given sovereignty of the People in escaping the suffocating confines of the Articles of Confederation. U.S. CONST. pmbl.

52. *Mark* 4:30–32. This saying is multiply attested by the Gospel writers. *See also Matthew* 13:31–32; *Luke* 13:18–19.

53. THOMAS ALBERT STAFFORD, CHRISTIAN SYMBOLISM IN THE EVANGELICAL CHURCHES 17 (1942).

54. *Id.*



symbols, the metaphors, are kept alive by constant recreation through the arts, the life just slips away from them.<sup>55</sup>

So it is in the legal domain. It is not enough to quietly whisper one's allegiance to the law; the people's adoration of law must be re-affirmed openly for all to behold.

A rich body of doctrine recognizes and accommodates the power of symbols. Freedom of expression ensures that professions of faith are seen, unencumbered by governmental interference.<sup>56</sup> The Establishment Clause stands for a closely related set of propositions: the state may infuse secular symbols with sacred force,<sup>57</sup> and it may even make use of once sacred images that have lost their parochial meaning,<sup>58</sup> but the state may not co-opt one religious tradition's undiluted icons as its own.<sup>59</sup> While law can never fully dictate the cultural meaning of a symbol but must take the symbol as it appears to others, law can ensure that man remains the master of his creations.

More important, American law *itself* takes on a rainbow of symbolic forms. Although many signs are pictographic in nature, texts too have been

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55. JOSEPH CAMPBELL, *THE POWER OF MYTH* 72 (1991); see also Clifford Geertz, *Ethos, World View, and the Analysis of Sacred Symbols*, reprinted in CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 126, 127 (1973) ("Sacred symbols . . . relate an ontology and a cosmology to an aesthetics and a morality.").

56. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 837 (1995) (holding that a religious publication was entitled to equal opportunity for funding); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that students wearing anti-war armbands could not be punished by school officials).

57. It was Justice Robert Jackson who famously appreciated that:

[s]ymbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment.

*W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

58. Judge Richard Posner has offered the most elegant and accurate statement on how certain features of Christianity—such as Christmas trees and wreaths—have lost their strong sacred connotations among a critical mass of citizens. See, e.g., *ACLU v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986). The notion that sacred items can lose their religious luster over time and become fair objects of regulation was first recognized by the Supreme Court in the Blue Laws controversy, *McGowan v. Maryland*, 366 U.S. 420, 444–45 (1961).

59. Cf. *Stone v. Graham*, 449 U.S. 39, 41–42 (1980) (per curiam). To do so is not only to confuse the populace over questions of sovereignty and control, but to tarnish the sacred object itself. See *Engel v. Vitale*, 370 U.S. 421, 431–32 (1962) (expressing the view that one of the Establishment Clause's chief purposes is to forbid the state to "degrade religion" or engage in its "unhallowed perversion"); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) ("The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority." (quoting *Watson v. Jones*, 80 U.S. (13 Wall) 679, 730 (1872))).

known to acquire sacred status. Poetry—the artful arrangement of words to evoke deeper cultural beliefs—is the quintessential example of text that takes on this additional dimension.<sup>60</sup> Paul Tillich of the Harvard Divinity School once explained that “[t]here are words in every language which are more than this, and in the moment in which they get connotations that go beyond something to which they point as signs, then they can become symbols.”<sup>61</sup>

It is no different in the law. Under a perfect alchemy of circumstances even sub-propositional language compositions—such as case names, witty legal sayings, and colorful metaphors and metonyms—can acquire a magical quality in the hearts and minds of the people.<sup>62</sup>

Legal precedents become symbols in a variety of ways. Litigation and direct action are the primary processes, but intellectual inquiry, too, plays an important part in generating law’s meaning.<sup>63</sup> Some icons, like *Marbury*, acquire broader communicative significance gradually, finding favor initially among elites, and then among the population at large. Others, such as *Roe v. Wade*<sup>64</sup> or *Brown*, arise against the backdrop of inflamed social passions—they are born with intense, conflicting cultural associations that are only fueled to greater heights by subsequent developments.

Some legal symbols are entirely judge-initiated (*Marbury* falls into this category). Others are driven mostly by citizen mobilization and coordinated litigation campaigns (the turning of *Bowers v. Hardwick*<sup>65</sup> and *Korematsu v. United States*<sup>66</sup> into anti-symbols in the canon are textbook instances of this phenomenon). But what every case-turned-icon shares is repeated usage—even vigorous contestation—and ongoing cultural salience. The moment a ruling transforms into an active symbol, it becomes a visible representation of law.

A case may be said to appear in symbolic form during constitutional litigation when one or more of the following conditions is met: (A) its actual holding is far afield from any of the relevant legal issues in the matter at hand; (B) there is little, if any, attempt by the lawgiver to compare the circumstances of the case with the present context; (C) the facts of a cited decision are obviously incomparable; (D) the case is cited for a legal

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60. See CAMPBELL, *supra* note 55, at 73; PAUL TILlich, *THEOLOGY OF CULTURE* 57 (1959).

61. TILlich, *supra* note 60, at 55–56; see also E. WARWICK SLINN, *VICTORIAN POETRY AS CULTURAL CRITIQUE: THE POLITICS OF PERFORMATIVE LANGUAGE* 23 (2003) (describing poetry as a cultural event that “reconstitutes or reshapes . . . reality in the very act of reiterating its norms”).

62. “Falsely shouting fire in a crowded theater” is a phrase that continues to have salience in contemporary legal thought, as does the legal saying, “burning down the house to roast the pig.” See generally Tsai, *Fire, Metaphor & Constitutional Myth-Making*, *supra* note 20, at 218–26.

63. See *infra* Parts V.B & C.

64. 410 U.S. 113 (1973).

65. 478 U.S. 186 (1986).

66. 323 U.S. 214 (1944).

principle, but that principle is not seriously contested in the present dispute; (E) the case is recycled for an associated saying or quotation that transcends its original context; or (F) a decision from one doctrinal field is borrowed for another legal realm.

Every case is a place-holder of sorts, for a medley of principles, prototypes, and entire modes of speaking. My definition of legal symbolism strives to capture the uses of a case beyond its function in classic analogic argumentation. Here, Tillich offers a useful starting point despite the fact that he inclines toward pre-existing universal truths and has a relatively fixed view of religious culture, believing that symbols cannot be created, but are merely discovered.<sup>67</sup> Tillich identifies five characteristics of symbols: (1) a symbol expresses something non-literal, “transcend[ing] the empirical reality”; (2) a symbol actively participates in current reality through communicative engagement; (3) its meaning both depends upon and influences group assumptions; (4) it “open[s] up dimensions of reality”; and (5) a symbol possesses both “integrating and disintegrating power,” inspiring or discouraging belief.<sup>68</sup>

Seen in this light, symbols serve a multiplicity of functions in maintaining law’s spiritual domain. Instead of serving as a basis for a comparison of like disputes, legal symbolism operates in more free-form ways: to mark the parameters of a cultural debate and set a general mood; to redirect observers’ attentions; to bolster a constitutional actor’s credibility; or to signal to key cultural constituencies or constitutional actors.

Legal icons embolden lawgivers to stay an interpretive course or to blaze a new doctrinal path. Strategically deployed, objects of faith draw the law-abiding faithful together or divide them; facilitate adherence to a set of legal principles and political values or provide a mechanism for subverting them.

Each in its own way, *Marbury* and *Brown* have accumulated these traits as “representative symbols”<sup>69</sup> through the process of constitutional myth-

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67. Tillich claims that “[e]very symbol has a special function which is just *it* and cannot be replaced by more or less adequate symbols.” TILlich, *supra* note 60, at 57–58. His slide here into a notion of fixed or irreplaceable symbols is difficult to square with what historians and anthropologists know to be true: some symbols lose their effectiveness as cultural literacy shifts and social pressures recede; in a new age, fresh symbols may be required to hold a community together.

68. Paul Tillich, *The Meaning and Justification of Religious Symbols*, in RELIGIOUS EXPERIENCE AND TRUTH 3, 3–5 (Sidney Hook ed., 1961); *see also* Cyril C. Richardson, *The Foundations of Christian Symbolism*, in RELIGIOUS SYMBOLISM 1, 3–5 (F. Ernest Johnson ed., 1955) (discussing centering and unifying characteristics of symbols). *See generally* GERTRUDE GRACE SILL, A HANDBOOK OF SYMBOLS IN CHRISTIAN ART, at xi (1975) (“[A] major purpose of Christian art was to instruct, to inspire and solidify Christian faith. From its inception this art was didactic. Its purpose was to teach Christian lessons to a largely illiterate public, through precise and literal visual images.”).

69. *See* TILlich, *supra* note 60, at 55–57. Tillich distinguishes between two kinds of symbols: “representative” symbols, which appear in language, history, religion, and the arts, and

making. Their capacity to convey meaning in non-literal ways is easy enough to grasp. Both icons instantiate the intangible qualities of judicial power, reinforce preferred institutional configurations, and proclaim models of American citizenship.

Not only do these cases demarcate the legal canon, they also serve as vehicles for the continuation of law itself. It would be a colossal mistake, however, to understand interpretive fellowship as a monolithic phenomenon. Symbols appear timeless, but in fact they reveal moments of socio-legal consensus. What is more, how the average citizen cherishes a case, if at all, differs from how a legal specialist appreciates its significance. Thinking more precisely about the phenomenon commonly called “legal culture,” then, is to see it as consisting of three belief-sustaining subcultures with overlapping points of contact: *popular culture* (the hurly-burly realm of the average citizen); *academic culture* (a comparatively more insulated environment organized by experts’ search for social truths); and *professional culture* (a domain geared toward the codification of law).

Because we can never fully escape the institutions and leaders that act and speak on our behalf, it is only fitting that we explore their role in the development of legal iconography. One can uncover the spiritual life of a group by plotting the diachronic patterns of continuity and change in how these manifestations of authority occur. It is to the specific dialogic properties of *Marbury* and *Brown* in the judicial consciousness that I now turn.

### III. *MARBURY* AS A RELIC OF JUDICIAL EMINENCE

A most fruitful path to understanding the nature of America’s community of legal faith is to trace the Supreme Court’s re-imagining of *Marbury v. Madison* over time. A good many scholars have critiqued the logical force of Chief Justice John Marshall’s reasoning in striking down the Judiciary Act provision that gave the Court original jurisdiction to issue writs of mandamus.<sup>70</sup> Others have revisited the historical background of the decision,<sup>71</sup> or, more broadly, explored its place in the discipline of federal

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“discursive” symbols, which appear in mathematics or logic. *Id.*; see also Tillich, *supra* note 68, at 2–5.

70. See, e.g., Susan Low Bloch & Maeva Marcus, *John Marshall’s Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301 (contending that John Marshall “misused” governing precedent in his ruling); James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515 (2001); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1.

71. See, e.g., SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* (1990); Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329; Larry D. Kramer, *Marbury and the Retreat from Judicial Supremacy*, 20 CONST. COMMENT. 205 (2003); James M. O’Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992).

jurisdiction.<sup>72</sup> Surprisingly, there has been little in the way of sustained treatment of the decision's continuing role in the subterranean aspects of constitutional faith-building.<sup>73</sup>

*Marbury* has been cited over the years for several propositions: as the earliest, authoritative statement by the High Court endorsing judicial review;<sup>74</sup> for the values of uniformity and superiority of federal law;<sup>75</sup> and for the more banal point that questions of law are for courts to evaluate.<sup>76</sup> Many of these references are standard fare, but a closer review reveals something more: over time, the case has become the key to unlocking the frame of understanding within which questions of institutional power are answered (or perhaps avoided). *Marbury* has become a sacramental link between present controversy and enduring constitutional mythology.<sup>77</sup>

Observers of the Court have noticed that "Chief Justice William H. Rehnquist and his allies in those decisions have frequently quoted . . . the *Marbury* decision as justification for the court's active role in policing the federal-state boundary."<sup>78</sup> But in truth its impact extends a good deal further than federalism controversies. Lately, the Justices have taken to invoking *Marbury*—often in the most controversial of cases—as a curious non-sequitur.<sup>79</sup> The Court unsheathes *Marbury* to stir the faithful whenever it believes, or desires observers to perceive, that the very project of law is at stake.

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72. See Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989).

73. L.H. LaRue describes *Marbury* as a "symbol," but his analysis of the decision is devoted to the rhetorical moves made by Justice Marshall in the decision itself rather than to its current socio-linguistic significance. See L.H. LARUE, *CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY* 42–69 (1995). For a thoughtful exception to this trend, see Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a "Great Case,"* 38 WAKE FOREST L. REV. 375 (2003).

74. See, e.g., *Mackey v. United States*, 401 U.S. 667, 678 (1971).

75. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997); *Sec'y of State v. Joseph H. Munson, Co.*, 467 U.S. 947, 976 (1984).

76. See, e.g., *United States v. Lopez*, 514 U.S. 549, 575 (1997).

77. This might not always have been so. *Marbury* was not associated with the concept of judicial review until that prerogative became controversial in the late nineteenth century. Davison Douglas argues, becoming a great case only after leading men repeatedly invoked the ruling to defend the judicial sphere from legislative encroachment. Douglas, *supra* note 73, at 386–87, 396–99.

78. Linda Greenhouse, *20-Year Extension of Existing Copyrights Is Upheld*, N.Y. TIMES, Jan. 16, 2003, at A24; see also Timothy Zick, *Marbury Ascendant: The Rehnquist Court and the Power to "Say What the Law Is,"* 59 WASH. & LEE L. REV. 839, 841–44 (2002).

79. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004); *Eldred v. Ashcroft*, 537 U.S. 186, 242 (2003) (Stevens, J., dissenting); *Bush v. Gore*, 531 U.S. 98, 128 n.7 (2000) (Stevens, J., dissenting); *Miller v. French*, 530 U.S. 327, 352 (2000); *United States v. Morrison*, 529 U.S. 598, 616 (2000); *City of Boerne*, 521 U.S. at 516; *Clinton v. Jones*, 520 U.S. 681, 703 (1997); *Lopez*, 514 U.S. at 566.

What's more, liberals as well as conservatives have acquired a taste for its magic, reaching for the device across a stunning expanse of subjects. In the post-war era, *Marbury's* influence has stretched from pure Article III cases<sup>80</sup> to such diverse matters as election law,<sup>81</sup> intellectual property,<sup>82</sup> speech subsidies and restrictions,<sup>83</sup> interstate commerce,<sup>84</sup> governmental immunities,<sup>85</sup> Eighth Amendment jurisprudence,<sup>86</sup> section 5 of the Fourteenth Amendment,<sup>87</sup> and the non-retroactivity doctrine.<sup>88</sup> Notwithstanding the fact the Court exercises uncontroversial jurisdiction over routine matters, jurists of all stripes have found utility in replicating the themes of institutional crisis and judicial independence.

#### A. SHOWCASING LEGAL MIGHT

It would be tempting to conclude that invocation of *Marbury* represents a method of confronting the Court's problematic status in democratic theory.<sup>89</sup> But because the legitimacy of the Judicial Branch is no longer a serious problem in popular culture and because these displays of legal might have become so commonplace in the course of litigation,<sup>90</sup> this development

80. *Miller*, 530 U.S. at 352; *Williams v. Taylor*, 529 U.S. 362, 378 (2000); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995); *Wright v. West*, 505 U.S. 277, 305 (1992); *Allen v. Wright*, 468 U.S. 737, 794 (1984) (Stevens, J., dissenting); *Goldwater v. Carter*, 444 U.S. 996, 1001 (1979) (Powell, J., concurring).

81. *Branch v. Smith*, 538 U.S. 254, 272 (2003); *Bush*, 531 U.S. at 128 n.7 (2000) (Stevens, J., dissenting); *Miller v. Johnson*, 515 U.S. 900, 922 (1995).

82. *Eldred*, 537 U.S. at 242 (Stevens, J., dissenting); *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l*, 534 U.S. 124, 130 (2001); *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980).

83. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001); *City of Chicago v. Morales*, 527 U.S. 41, 74 (1999) (Scalia, J., dissenting); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 604 n.3 (1998).

84. *Morrison*, 529 U.S. at 616; *Lopez*, 514 U.S. at 566.

85. *Clinton v. Jones*, 520 U.S. 681, 703 (1997) (presidential immunity); *Garcia v. San Antonio Metro Transit*, 469 U.S. 528, 567 (1985) (Powell, J., dissenting) (sovereign immunity); *United States v. Nixon*, 418 U.S. 683, 703 (1974) (presidential privilege).

86. *Harmelin v. Michigan*, 501 U.S. 957, 1017 (1991) (White, J., dissenting); *Thompson v. Oklahoma*, 487 U.S. 815, 833 n.40 (1988).

87. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

88. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 107 (1993) (Scalia, J., concurring); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring); *Am. Trucking Ass'ns, v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring).

89. Bickel's comment that "judicial review was a . . . deviant institution in the American democracy" has nourished a more skeptical conception of judicial authority. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 18 (2d ed. 1986).

90. This is not to say that popular culture is of one mind on this. Political movements inspired by legal decisions—such as the anti-abortion movement, or the anti-gay marriage movement—frequently engage the public with cries of judicial overreaching. See, e.g., Editorial, *New Fuel for the Culture Wars*, *THE ECONOMIST*, Feb. 26, 2004, [http://www.economist.com/world/na/displayStory.cfm?story\\_id=2460765](http://www.economist.com/world/na/displayStory.cfm?story_id=2460765) (on file with the Iowa Law Review) (stoking fear among Americans that "some activist judges and local officials" will redefine marriage for the entire nation); Joan Vennoch, *Was Gay Marriage Kerry's Undoing?*, *BOSTON GLOBE*, Nov. 4, 2004,

should not be mistaken for an honest acknowledgement of the Judiciary's design flaw. Rather, these strategically timed utterances are best understood as populist appeals to the people to engage their modern instinct to rally around the Court. In the course of such preemptive legal performances, lyrical sayings, parables, and other idioms complete the faith-building arsenal as much as doctrinal handicraft.

*Marbury* is an effective talisman because it possesses enduring vitality. As Tillich explains: "[e]ven if individual creativity is the medium through which [a symbol] comes into existence (the individual artist, the individual prophet), it is the unconscious reaction of a group through which it becomes a symbol. No representative symbol is created and maintained without acceptance by a group."<sup>91</sup>

At this point, one might object that *Marbury* is part of a closed system of language and ethics accessible only to legal insiders. To the contrary, enlisting *Marbury* in the interpretive task is more of a direct appeal to the dominant beliefs of the people, who in recent years have increasingly adhered to a court-centered view of constitutionalism. Alex Bickel put his finger on this intimate connection between the ruling and our collective self-understanding when he wrote: "We know what the people imagine. They imagine that they rule themselves. And they imagine *Marbury v. Madison*."<sup>92</sup>

To be clear: my claim is not that the average citizen appreciates the intricacies of the original dispute in any real sense, but that he: (1) ardently subscribes to the ethos propagated by its modern formulation, and (2) recognizes, in general outline, what a constitutional actor is after when the decision's sacral quality is invoked.

The legal iconographer understands that displaying *Marbury* as a talisman harkens to an enduring American mythology. According to this heroic fable, courts are the exclusive arbiters of constitutional values and protectors of American freedoms. It is *de rigueur* for widely-read periodicals to celebrate judicial utterances as restorations of "the rule of law."<sup>93</sup> From

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at A15 ("A reference to dangers of activist judges was a frequent part of [President Bush's] campaign stump speech"). At the same time, these same movements should not be seen as repudiations of juricentric culture; quite the contrary, movement leaders view legal strategy and political mobilization to go hand in hand.

91. Tillich, *supra* note 68, at 4.

92. BICKEL, *supra* note 89, at 92. *Marbury* constitutes, in Bickel's estimation:

even more than victor[y] won by arms, one of the foundation stones of the Republic. It is hallowed. It is revered. If it had a physical presence, like the Alamo or Gettysburg, it would be a tourist attraction; and the truth is that it very nearly does have and very nearly is.

*Id.* at 74.

93. See, e.g., David G. Savage, *Court Cases Checked a President's Powers*, L.A. TIMES, July 4, 2004, at A16 (describing "enemy combatant" cases as a "declaration that the rule of law is above the Commander-in-Chief"); see also David Ignatius, Editorial, *The Balance of Justice Amid a War*, WASH. POST, July 2, 2004, at A15 ("America's commitment to the rule of law was reaffirmed [in

time to time popular writings explicitly equate *Marbury* with stability and accountability in the law.<sup>94</sup> But it is only in the post-World War II era that the saying has materialized in abundance, and is only after the rise of the Supreme Court to a prominent position in American life that *Marbury* has become associated with an insistent style of judicial discourse.<sup>95</sup> To many believers, obedience to the law and faith in the courts are one and the same.

Somewhat counter-intuitively, time and distance improve an artifact's potency. *Marbury*'s melody sounds pleasing to the ear because it replays one of the earliest expositions on judicial prerogative, rendered in a bygone era. As time has passed, the decision has become less important for the actual controversy presented. Emptied of its historical freight, it has been reborn as a capacious vessel into which we pour our social and political angst and collective self-understandings.

When the Supreme Court—or any court, for that matter—reaches back to this precedent, one instinctively understands that the Court is signaling its sense that core institutional values are imperiled; reasserting an ancient prerogative; and calling upon adherents to demonstrate the depths of their constitutional faith by supporting the interpretive course charted by the institution. John Leubsdorf has described judicial resort to citations in this manner as using a “hypertext” that “summons up a myth or previous work with a word or two.”<sup>96</sup> When this simple act conjures all of the dramatic rhythms and historical pedigree of the federal judiciary, other constitutional actors are expected to prostrate themselves before the sacred object's brilliance.

As with any sign of faith, *Marbury* elicits sentiments that are impossible to convey through words alone. Whichever substantive body of law the Court has elected to embrace, whatever the facts presented in a given case, activation of *Marbury* envelopes an interpretive move with authenticity and historicity, as much as principled purpose.

This was precisely the effect in the intriguing case of *Thompson v. Oklahoma*,<sup>97</sup> in which the Court established a bright-line constitutional rule against the execution of persons who were younger than sixteen at the time of the offense.<sup>98</sup> Then, as now, symbol and rule interacted in mutually

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*Hamdi v. Rumsfeld*].”); Editorial, *Reaffirming the Rule of Law*, N.Y. TIMES, June 29, 2004, at A26 (same).

94. See, e.g., Editorial, *The Email Note; It's Making the Rounds*, ARK. DEMOCRAT-GAZETTE, Feb. 29, 2004, at 82 (“[T]he rule of law and judicial review . . . are essential to free government. Can you say *Marbury v. Madison*?”); Ann Woolner, *Vote on Funding Betrays Founders' Vision*, L.A. BUS. J., Aug. 11, 2003, at 55 (lauding *Marbury* for “Establishing the Law”).

95. The phrase most lawyers and laypersons associate with *Marbury* was not even repeated by the Court until 1958, in the case of *Cooper v. Aaron*, 358 U.S. 1 (1958) (per curiam). See *infra* Part III.C.

96. John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 478 (2001).

97. 487 U.S. 815 (1988).

98. *Id.* at 838.



reinforcing ways. The surface analysis, hewing closely to well-established doctrinal conventions, proceeded thus: the Eighth Amendment embodies “evolving standards of decency,” most states that employ a minimum age for death eligibility set it at sixteen, juries are disinclined to mete out death to anyone younger, and the international community opposes execution of juveniles.

Simultaneously, the Justices’ surprising invocation of *Marbury* was addressed to the anticipated problem of social perception: namely, the Court’s potential exposure to external criticism given the open-ended nature of the Eighth Amendment and the undeniable consequence that the ruling would compel the reconfiguration of many state practices (i.e., nineteen states had set no age limits for death eligibility).<sup>99</sup> As John Paul Stevens dramatically announced, “That the task of interpreting the great, sweeping clauses of the Constitution ultimately falls to us has been for some time an accepted principle of American jurisprudence. See *Marbury v. Madison*.”<sup>100</sup>

At first blush, the citation to *Marbury* seems entirely out of place, for there was no direct challenge to their interpretive prerogative (certainly no more so than in the usual constitutional case), but any confusion dissipates as soon as one appreciates the importance of legal iconography. By holding out the sacred object, the Court sought to preempt criticism of its place to discern the point at which the contemporary values of the community have evolved from tolerance of state practice to a prohibitory norm.<sup>101</sup>

Legal precepts, like religious ones, can aspire to the universal or the parochial. In this case, the Court drew upon *Marbury*’s legacy to stake out a more inclusive and compassionate vision of law, marked by a higher degree of congruence between American law and international norms than we have been accustomed to witnessing.<sup>102</sup>

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99. *Id.* at 826.

100. *Id.* at 833 n.40.

101. In denying the interpretive difficulties in the Eighth Amendment context, the Court said that “the method [of analysis] is no different.” *Id.* This area of constitutional criminal procedure is, in a word, a mess. In some cases, the Court has resorted to a mechanical tallying up of the number of states that employ the challenged practice. *See, e.g.*, *Tison v. Arizona*, 481 U.S. 137, 154 (1987); *Woodson v. North Carolina*, 428 U.S. 280, 294–95 (1976). But this seems, at best, a recipe for ensuring total congruence between present practice and the scope of the Eighth Amendment, leaving the Amendment to mean nothing more than what the majority of states currently say it means. The theories of the “Cruel and Unusual Punishment” Clause variously trotted out by jurists are not consistently invoked, whether the goal is to spur the abolition of outdated punishments, preserve bodily integrity, *cf. Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), deter “mindless vengeance,” *Ford v. Wainwright*, 477 U.S. 399, 410 (1986), or avoid an appreciable risk of unnecessary suffering, *Zant v. Stephens*, 462 U.S. 862, 884–85 (1983).

102. *Compare Atkins v. Virginia*, 536 U.S. 304, 316–37 n.21 (2002) (noting that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”), and *Lawrence v. Texas*, 539 U.S. 558, 576

Moreover, the ruling dispensed the saving power of the courts to rescue children from those who would treat them as fully-formed adults and extinguish their very existence. In a transcendent moment like this, legal iconography facilitates the formation of a “reconciled community” of the powerful and the weak. Rule and symbol join to paint what Gerhard Lohfink calls a “contrast-society” that stands in tension with the dominant social world and offers counter-ideals to which law should aspire.<sup>103</sup> *Cooper v. Aaron* is the leading example of this, when *Marbury* was pressed into the service of black children brave enough to demand an end to segregated schools in the face of recalcitrant public officials.<sup>104</sup>

In *Legal Services Corp. v. Velazquez*,<sup>105</sup> the Court recapitulated the theme of judicial heroism by acting as the champion of the poverty-stricken. The congressional enactment at issue barred legal services attorneys who received federal funding from attacking “existing law.”<sup>106</sup> On this occasion, the Court declared that it was guarding against the prospect of two-tiers of justice, in which some welfare recipients’ rights are less valued because their lawyers are prevented by federal law from raising arguments challenging the political status quo.<sup>107</sup> Drawing up *Marbury* as a shield for the wretched, Justice Anthony Kennedy’s ruling castigated Congress for impeding the work of legal services lawyers whose indigent clients will often have “no alternative source . . . to receive vital information respecting constitutional and statutory rights bearing upon claimed benefits.”<sup>108</sup> Justice Kennedy, like Justice Stevens, operates within a cultural field demarcated by *Marbury*’s domain. Each has proved himself to be practiced in the art of constitutional myth-making to advance his conception of law.

These days, controversies like *Velazquez*, in which *Marbury* is turned loose on behalf of egalitarian impulses, are relatively scarce. Nor are these dramatic shows of institutional might confined to putting down instances of outright defiance à la *Cooper v. Aaron*. Instead, luxuriant stagings of judicial prowess routinely appear in situations where the Judiciary faces no serious challenge to its jurisdiction and no real danger of political retribution. Consequently, they appear to be motivated by preventative objectives:

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(2003) (referring to the “values we share with a wider civilization” in striking down an anti-sodomy law), *with* *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (rejecting the argument that “sentencing practices of other countries are relevant” to Eighth Amendment analysis).

103. LOHFINK, *supra* note 38, at 122.

104. 358 U.S. 1 (1958). For an extended discussion of *Marbury*’s appearance in *Cooper*, see Part IV.C.

105. 531 U.S. 533 (2001).

106. *Id.* at 538.

107. *Id.* at 546.

108. *Id.* at 546. The Court decided the case on both First Amendment and Article III grounds. By prohibiting legal services lawyers from advancing “vital theories and ideas,” Congress had encroached upon the Judiciary’s “sphere of . . . authority to resolve a case or controversy.” *Id.* at 545, 548 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803)).

avoiding the erosion of public trust in the Judiciary so carefully nurtured over the decades. Indeed, the notion that courts are the very best vehicles for securing freedom today borders on fundamentalism.

B. CATECHISMS OF JUDICIAL CENTRALITY

Because the average citizen is unfamiliar with the details of the case or the fine points of jurisdiction, references to *Marbury* will often be accompanied by a forceful reminder that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>109</sup> It is this phrase that evidences the most visible connection between the Supreme Court’s agenda and popular understandings of law. Recitation of Marshall’s famous words fulfills a special function: as the secular equivalent of religious catechism.

*Catechesis* has been described as “an education in the faith of children, young people and adults which includes especially the teaching of Christian doctrine imparted, generally speaking, in an organic and systematic way, with a view to initiating the hearers into the fullness of Christian life.”<sup>110</sup> Legal doctrine is imparted in analogous fashion, through the teaching of core traditions and modes of life; the unification of mind, body, and mystery through the staging of legal performatives; and finally, the dissemination of conceptions of law as truth (or at least the closest human versions of truth).

The ceremonial recitation of liturgical sayings simultaneously fulfills three functions: (1) *existential induction*; (2) *institutional creation*; and (3) *presentification*.<sup>111</sup> First, repetition of *Marbury*-inspired language allows believers to participate in the community and confirms their place within the legal order. Second, the interplay animates guiding precepts, “enabl[ing] the act of faith to have a concrete content.”<sup>112</sup> It operates to reenact and thus to reaffirm the rule of law.<sup>113</sup> Third, the performance allows law to be internalized and reproduced by the listeners themselves.

While the “duty to say what the law is” formula reminds and instructs the laity, it does so at the risk of inspiring unthinking obedience rather than heartfelt devotion. This danger runs in both directions—just as the believer is encouraged to assent, so too elites who resort to such linguistic cues are

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109. *Marbury*, 5 U.S. (1 Cranch) at 177.

110. The constituent elements of catechisis are “the initial proclamation of the Gospel or missionary preaching through the kerygma to arouse faith, apologetics or examination of the reasons for belief, experience of Christian living, celebration of the sacraments, integration into the ecclesial community, and apostolic and missionary witness.” POPE JOHN PAUL II, APOSTOLIC EXHORTATION CATECHESI TRADENDAE 26 (1979).

111. JEAN LADRIERE, THE PERFORMATIVITY OF LITURGICAL LANGUAGE 60–61 (1973).

112. PAUL TILlich, DYNAMICS OF FAITH 24 (1957).

113. As Paul Kahn explains, *Marbury* constructs a conception of law that is enduring, set apart from politics, legitimated by popular sovereignty, and expressed in coercive interventions. See KAHN, *supra* note 17, at 19–34.

emboldened to rely on heavy-handed mantras to demand rote responses. Symbolic communication may be unavoidable, but one would not want law reduced to nothing more than a series of short-cuts, grunts, and half-whispers.

Because of their resonance, one must always be watchful of the causes in which constitutional mantras are enlisted. Lately, *Marbury's* radiance has been extended for the purpose of advancing a juricentric conception of the constitutional order. That is to say, the people's own faith in the courts has been evoked to cajole, berate, and beat back the very institutions most responsive to the people's concerns.

A good deal of ink has been spilled over the dangers of an imperial judiciary.<sup>114</sup> Nevertheless, as recently as 1995, in *Miller v. Johnson*,<sup>115</sup> the Court cited the holy trinity of judicial prerogative in a single breath: *Marbury*, *Baker v. Carr*, and *Cooper v. Aaron*.<sup>116</sup> Justice Kennedy, writing for the Court, struck down a set of oddly shaped majority black legislative districts in the State of Georgia.<sup>117</sup> The redistricting plan at issue bore the imprimatur of the U.S. Department of Justice, secured through the pre-clearance process under Section 5 of the Voting Rights Act.<sup>118</sup>

Refusing to defer to the Justice Department's expertise, the Court expounded:

Were we to accept the Justice Department's objection itself as a compelling interest adequate to insulate racial districting from constitutional review, we would be surrendering to the Executive Branch our role in enforcing the constitutional limits on race-based official action. We may not do so. See, e.g., *United States v. Nixon* (judicial power cannot be shared with Executive Branch); *Marbury v. Madison* ("It is emphatically the province and duty of the judicial department to say what the law is"); cf. *Baker v. Carr* (Supreme Court is "ultimate interpreter of the Constitution"); *Cooper v. Aaron* ("permanent and indispensable feature of our constitutional system" is that "the federal judiciary is supreme in the exposition of the law of the Constitution").<sup>119</sup>

This *Marbury*-driven flourish is astonishing, revealing not merely the boldness with which the modern Court routinely portrays its own authority,

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114. See, e.g., BICKEL, *supra* note 89, at 17; MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 6–14 (1999); Robert C. Post & Reva Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943, 2026–39 (2003).

115. 515 U.S. 900 (1995).

116. *Id.* at 922 (discussing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Baker v. Carr*, 369 U.S. 186, 211 (1962); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958)).

117. *Miller*, 515 U.S. at 924–25, 928.

118. *Id.* at 925–27.

119. *Id.* at 922 (citations omitted).

but also its sense that legitimacy is more closely aligned with popular sentiment than professional attitudes. To put it another way, the reproduction of legitimacy anxiety has become just another part of a jurist's spiritual weaponry.<sup>120</sup>

What L.H. LaRue memorably described as a story of jurisdictional constraints in its original telling has metamorphosed into an emblem that primarily signifies limits *on other constitutional actors*.<sup>121</sup> The principle of judicial self-limitation has become a symbol of self-empowerment. When it is unveiled in the course of an opinion, *Marbury* can bolster the stature of the Judiciary in the eyes of the faithful (an integrative effect) or undercut the authority of another entity (a disintegrating effect).

In *City of Boerne v. Flores*,<sup>122</sup> the Justices reached for *Marbury* no less than four times in a show of rhetorical force. They did so in order to diminish the scope of Congress's authority under Section Five of the Fourteenth Amendment to enact the Religious Freedom Restoration Act (RFRA).<sup>123</sup> Passed in response to *Employment Division of Oregon v. Smith*,<sup>124</sup> its purpose was to provide statutory protection against incursions on religious liberty by laws of general applicability.<sup>125</sup>

Denying Congress this power, Justice Kennedy's opinion declared that the very notion of judicial review "is based on the premise that the 'powers of the legislature are defined and limited . . .'"<sup>126</sup> The Court's opinion closed by insisting that:

When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles.<sup>127</sup>

Tacked to the end of this pair of key explanatory sentences, *Marbury* accomplished two objectives at once: it limited the sphere of another branch

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120. Cardozo described a judge's tools as part of a "legal armory . . . capable of furnishing a weapon for the fight and of hewing a path to justice." BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 45 (1921).

121. See LARUE, *supra* note 73, at 65.

122. 521 U.S. 507 (1997).

123. *Id.* at 516–18.

124. 494 U.S. 872 (1990). In *Smith*, the Court rejected a free exercise challenge to a state regulation of general applicability invoked against a state employee's sacramental use of peyote. See *id.* at 888–90.

125. *City of Boerne*, 521 U.S. at 512, 515–16.

126. *Id.* at 516 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)). Justice Kennedy's opinion was joined by Rehnquist, Stevens, Thomas, Ginsburg, and Scalia (in part).

127. *Id.* at 536 (citation omitted).

of government and interposed the prestige of the Court in the midst of a contest over law's authorship. Where are the virtues of humility, patience, and foresight that characterized older models of lawgiving? Lost is the interpretive aim on the part of leaders in their dealings with the flock to "build them up and not to break them down."<sup>128</sup>

What is more, it was no cooperative faith tradition to which the High Court demanded other constitutional actors pay fealty, but a sharply vertical vision of law. There was little cause to take umbrage but for the fact that Congress's action contradicted the Court's self-understanding as the exclusive wellspring of our constitutional norms.<sup>129</sup> In support of a court-centered conception of the constitutional process, the Justices not only invoked the "separation of powers" doctrine, they also raised the specter of Congress as rights-destroyer by warning darkly of "shifting legislative majorities" amending the Constitution outside of Article V.<sup>130</sup>

It is doubtful that the heavens would have fallen if the Judiciary undertook a more collaborative reading of the Fourteenth Amendment.<sup>131</sup> In all events, this ostentatious *Marbury*-laden soliloquy betrayed the institution's own aggressive posture.<sup>132</sup> If the judicial power holds out the promise of salvation, then the Court often acts like an Old Testament God jealous of his prerogatives.

*Marbury's* reappearance served another purpose: it reassured the citizenry that courts have believers' best interests at heart. The Justices pointedly minimized the threat of religious discrimination by state actors,<sup>133</sup> thereby underscoring the overpowering sense that the Judiciary, not the political branches, can best be trusted to calibrate the law to protect citizens.<sup>134</sup> Thus unfolded an epic battle over which institution is

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128. *Jeremiah* 24:6–7; see also *1 Thessalonians* 5:11.

129. *Accord* *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) ("The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch.").

130. *City of Boerne*, 521 U.S. at 529.

131. RFRA did not so much impair the Court's capacity to decide questions in the usual Article III sense as it denied the Judiciary the last word on how best to protect religious liberty. The Court could have treated its own interpretations as setting a baseline for equal protection rights rather than a ceiling beyond which the political branches could not venture. See generally Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 *IND. L.J.* 1 (2003).

132. See *City of Boerne*, 521 U.S. at 537.

133. *Id.* at 531 (noting how the hearings on "laws of general applicability which place incidental burdens on religion" produced much discussion that "centered upon anecdotal evidence").

134. The *Boerne* Court's rhetoric foreshadowed its dismissive attitude towards the problem of official age discrimination a few short years later. In *Kimel*, the Court dismissed Congress's 1974 extension of the ADEA to the States as "an unwarranted response to a perhaps inconsequential problem." *Kimel*, 528 U.S. at 89.

authentically called to give voice to the law, played out in constitutional rules and reinforced through legal catechisms.

This certainly was not the first time this scene of *Marbury* worship has played out in the legal domain; nor is it likely to be the last. Still, for those skeptical of the dominant model of judicial authority, a saying from Paul (a fellow interpreter of law) to the faithful gathered at Corinth seems apt: “[T]hough I have all the faith necessary to move mountains—if I am without love, I am nothing.”<sup>135</sup> Alexander Hamilton struck a similar theme in *The Federalist* No. 1: “For in politics, as in religion, it is equally absurd to aim at making proselytes by fire and sword. Heresies in either can rarely be cured by persecution.”<sup>136</sup>

For the modern jurist, the lesson is that the esteem to which other constitutional actors are held impacts the efficacy of legal utterances and the quality of communal relationships. If the bonds of respect are eroded, law loses its poetic vitality, becoming little more than a blunt instrument that leaves dark hues of resentment in its wake.

### C. THE MYTH OF THE RELUCTANT LAWGIVER

One of *Marbury*'s enduring legacies is a set of highly stylized performative utterances that conjure what I call the myth of the reluctant lawgiver, a deeply-embedded archetype. This judicial visage leaps to life from the original decision's language of solemn duty, even if *Marbury* itself is not always explicitly mentioned. Yet when a constitutional actor exhibits reluctance to wield power, one can be reasonably sure that he will ultimately exercise that prerogative.

Emphasizing responsibility over institutional province, the lawgiver takes up his role with palpable reticence. In propounding law, he claims to feel “compelled” or “constrained” to exercise authority “imposed” upon him.<sup>137</sup> There is a piquant populist flavor to this appeal: one can almost picture a jurist lobbying the American people to show compassion for those who are called to interpret the Constitution.

One of the oldest instances of this style of symbolic discourse occurred during the controversy over the Second National Bank. The momentous opinion in *McCulloch v. Maryland* upholding the legislation that established

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135. 1 *Corinthians* 13:2–3.

136. THE FEDERALIST NO. 1, *supra* note 28, at 5 (Alexander Hamilton).

137. The Supreme Court noted:

The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made . . . .

*Pennekamp v. Florida*, 328 U.S. 331, 335 (1946); *see also Connick v. Myers*, 461 U.S. 138, 150 n.10 (1983) (quoting *Pennekamp*).

the Bank may have vindicated Hamilton's Federalist vision for monetary policy, but the language was vintage Marshall: timeless, declarative, expansive.<sup>138</sup> Evincing an acute awareness of the contentious nature of the dispute, the opinion added a gloss of reticence on *Marbury's* duty-bound rhetoric, nearly weeping over the "awful responsibility" bestowed upon the Court by the Constitution to interpret its guarantees.<sup>139</sup> By underscoring the weightiness of his load and appearing to resist a full-throated exercise of power, Marshall sought to cultivate trust and social acceptance of the Court's judgment. Public-mindedness appears to be the orator's motivation rather than a desire for personal aggrandizement.

In the seminal decision of *Trop v. Dulles*,<sup>140</sup> which held denaturalization of an unwanted war deserter to be cruel and unusual punishment, the Justices characterized the interpretive role as "inescapably" theirs.<sup>141</sup> Similarly, in *Thompson v. Oklahoma*, the Court spiced its analysis of death penalty jurisprudence with this hint of regret over its sacred trust: "the task of interpreting . . . the Constitution ultimately falls to us . . ." <sup>142</sup> The signal is as loud as it is clear: No one else is charged with this hallowed task; no one else in her right mind would seek it out.

More recently, we saw this *dramatis personae* unveiled in *Bush v. Gore*,<sup>143</sup> the presidential election case that catapulted George W. Bush into the White House. The *per curiam* decision overturning the Florida Supreme Court's recount order memorably recapitulated the rhetoric of reticence:

None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the

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138. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (emphasis added); see also *Butler v. Michigan*, 352 U.S. 380, 384 (1957) (saying that the Court is "constrained to reverse" obscenity conviction on free speech grounds).

139. *McCulloch*, 17 U.S. at 400 (emphasis added). According to Marshall:

No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps, of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty.

*Id.* at 400–01.

140. 356 U.S. 86 (1958). Here, too, Earl Warren's opinion for the Court rang with the sensation of passive, even regretful, judgment: "That issue confronts us, and the task of resolving it is inescapably ours. . . . When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less." *Id.* at 103–04.

141. *Id.* at 103.

142. 487 U.S. 815, 833 n.40 (1988) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

143. 531 U.S. 98 (2000).



President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.<sup>144</sup>

This clever move recalled *Marbury*'s characterization of judicial review as an essential part of our system of government,<sup>145</sup> though it also obscured the reality that the Court twice exercised its *discretionary* review process to intervene in the electoral process.

Staged hesitance is an effective technique for a faceless institution at once to personify justice and to maintain a studied detachment. In assuming this mystical identity, the Justices convey the impression that their prerogative is being exercised out of sheer "necessity," and that an alternative outcome would amount to abject "surrender."<sup>146</sup> Interpretation is cast as a divine calling. Though others might shirk their responsibility to constitutional ideals, this performance suggests, the Judiciary cannot forsake its destiny. Other tell-tale signs of this type of myth-making include language inviting accolades for tough-mindedness in rendering an unpopular decision<sup>147</sup> or suggesting that others' actions led to the interpretive outcome in a given dispute.<sup>148</sup>

The reluctant hero figure draws upon a number of literary and folkloric analogues: the Once and Future King who is chosen by Providence and makes a triumphal return,<sup>149</sup> or the Judeo-Christian God who periodically sends prophets, judges, and kings to aid his flock, but only after they have lost their way.<sup>150</sup>

The gulf between humility in service and disempowerment through self-aggrandizement is illustrated by the different places of honor accorded the iconic figures of Moses and Saul. Moses, chosen by Yahweh to lead the newly unshackled flock to the Promised Land, is beset by doubts that the people will believe him or heed his words. "Please, my Lord, I have never been eloquent," Moses protests upon learning of his mission, "for I am slow and

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144. *Id.* at 111.

145. *Marbury*, 5 U.S. (1 Cranch) at 177.

146. *See* *Miller v. Johnson*, 515 U.S. 900, 922 (1995) (stating that deferring to the Department of Justice's view that race-based districting complies with the Voting Rights Act "would be surrendering to the Executive Branch our role in enforcing the constitutional limits on race-based official action." (citing *Marbury*, 5 U.S. (1 Cranch) at 177)); *see also* *Marbury*, 5 U.S. (1 Cranch) at 177 (describing the exercise of judicial review as a "necessity" under our form of limited government).

147. *See, e.g.,* *Bush v. Gore*, 538 U.S. 98, 111 (2000); *Planned Parenthood v. Casey*, 505 U.S. 833, 865-66 (1992).

148. *See, e.g.,* *Bush*, 538 U.S. at 111.

149. *See generally* SIR THOMAS MALORY, *LE MORTE D'ARTHUR* (Stephen H.A. Shepherd ed., 2004); T.H. WHITE, *THE ONCE AND FUTURE KING* (1939).

150. *See, e.g.,* *Exodus* 3:1-15; *Judges* 6:7-10; 1 *Samuel* 1:19-28.

hesitant of speech.”<sup>151</sup> God’s anger momentarily kindled at these remarks, but this merely redoubled his faith in his chosen: Moses was given a staff by which to work miracles to convince the faithful, and he gained the assistance of Aaron, whose gift of speech would serve Moses’ cause.<sup>152</sup> There, too, ancient myth and symbols of authority were creatively united to reawaken belief in the law.

By contrast, Saul, Israel’s second king, is abandoned for choosing to carry out Yahweh’s commands in such a way as to accommodate his personal desire for popularity. Ordered to crush Israel’s opponents and lay everything under a curse of destruction, Saul’s army instead “spared . . . the best of the sheep and cattle the fatlings and lambs and all that was good.”<sup>153</sup>

Another striking incarnation of the reluctant lawgiver is revealed in Shakespeare’s *Julius Caesar*, in which the would-be ruler thrice refuses the crown. As Brutus foreshadows in Scene I upon witnessing the excited crowds trailing Caesar’s procession in the public square: “What means this shouting? I do fear the people/Choose Caesar for their king.”<sup>154</sup>

Midway through Scene II of Act I, Brutus pulls aside Casca to inquire about Caesar’s interactions with the common people that day:

Casca: Why, there was a crown offered him; and, being offered him, he put it by with the back of his hand, thus; and then the people fell a-shouting.

Brutus: What was the second noise for?

Casca: Why, for that too.

Brutus: Was the crown offered him thrice?

Casca: Ay, marry, was’t, and he put it by thrice, everytime gentler than other; and at every putting-by mine honest neighbours shouted.

Cassius: Who offered him the crown?

Casca: Why, Antony.

Brutus: Tell us the manner of it, gentle Casca.

Casca: I can as well be hanged as tell the manner of it: it was mere foolery; I did not mark it. I saw Mark Antony offer

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151. *Exodus* 4:10–11.

152. *Id.* at 4:10–17.

153. 1 *Samuel* 15:9. Although Samuel’s intent was to sacrifice this bounty to Yahweh, his actions countermanded Yahweh’s direct command and interposed his personal desire for worship and respect by others. *Id.*

154. THE COMPLETE WORKS OF WILLIAM SHAKESPEARE 950 (W.J. Craig ed., 1919).

him a crown; yet 'twas not a crown neither, 'twas one of these coronets; and, as I told you, he put it by once; but, for all that, to my thinking, he would fain have had it. Then he offered it to him again; then he put it by again; but, to my thinking, he was very loath to lay his fingers off it. And then he offered it the third time; he put it the third time by; and still as he refused it the rabblement shouted and clapped their chopped hands, and threw up their sweaty night-caps, and uttered such a deal of stinking breath because Caesar refused the crown, that it had almost choked Caesar; for he swounded and fell down at it: and for mine own part, I durst not laugh, for fear of opening my lips and receiving the bad air.

Cassius: But soft, I pray you: what! did Caesar swound?

Casca: He fell down in the market-place, and foamed at mouth, and was speechless.

Brutus: 'Tis very like: he hath the falling-sickness.

Cassius: No, Caesar hath it not; but you, and I, / And honest Casca, we have the falling-sickness.

Casca: I know not what you mean by that; but I am sure Caesar fell down. If the tag-rag people did not clap him and hiss him, according as he pleased and displeased them, as they use to do the players in the theatre, I am no true man.<sup>155</sup>

Not only is the scene recounted by Casca deliberately staged by Caesar, its heightened artificiality serves a dual purpose. The simulated quality of Caesar's crowning is exemplified by the informal nature of the setting (the local market), the fake crown offered by Antony, and Caesar's own exaggerated reactions; all of it allows him to reach for the fruits of his ambition while allowing him to deny his intentions. Indeed, "when he [Caesar] came to himself again, he said, if he had done or said any thing amiss, he desired their worships to think it was his infirmity."<sup>156</sup>

But there is another layer of performance. Through the marketplace incident's re-staging by Casca and his fellow conspirators, the audience understands Caesar's performance to be merely a warm-up act in his play for power. Each time Caesar refuses the makeshift crown, the crowd gets progressively more agitated; in the minds of his detractors, Caesar's

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155. *Id.* at 951–52.

156. *Id.* at 952 (recounted by Casca).

reputation and influence grows with each disavowal of sovereign authority. As the conspirators rightly perceive these ominous developments, one's outward pretension to power is inversely related to the willingness of others to cede it. Openly coveting authority will raise another's hackles; denying one's ambition, by contrast, usually softens resistance.

So it is in the realm of constitutional law. In *Marbury*, Marshall leavened his exposition on judicial responsibility with an extravagant disavowal of any motive to "intrude into the cabinet, and to intermeddle with the prerogatives of the executive."<sup>157</sup> This legal-cultural template has been recycled ever since.

The sudden, valiant image of the accidental lawgiver forced to act by unavoidable circumstances is comforting to the citizenry. This type of casting mastered by the American jurist reframes the question of prerogative into one of *motivation*.<sup>158</sup> In doing so, the strategy strives to preempt concerns that the actor is bent on power usurpation, as hesitation is taken as a symptom of the virtues of selflessness and principle. Indeed, the ideal of law—even more so than the romantic view of politics—excludes the corrupting qualities of personal interest. But in personifying the institution in this fashion, the Court is also shading the fact that in most cases tackling the matter in the first place was entirely a discretionary decision, as well as the fact that interpretive choices are neither preordained nor mechanical acts.

Moreover, through feigned reluctance to exercise judicial review, the force necessary to meet the imagined threat to order is accordingly characterized as a temporary, extraordinary state of affairs. This signals that the judicial intervention is, or should be seen as, limited in scope and duration.

The fact that this visage is still assumed in an age of discretionary review reveals not only that it is an entrenched practice, but also that the fable continues to resonate with Americans. Because of our acceptance of *Marbury*-inspired accounts of the rule of law, we instinctively appreciate how each of the acts in the tale should unfold. The peaceful era is followed by the dark times. Once order is rhetorically reestablished through the intervention of the Court, its judgment promises to usher in a golden age. Having vanquished the latest threat to the realm, the Court withdraws and resumes its watchful repose. Joseph Campbell describes this cycle as the

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157. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

158. This is a time-worn, if effective, tactic. Bickel astutely observed how images can be used to legitimize power, noting that this move "obscure[d] the reality that when the Supreme Court declares unconstitutional a legislative act or the act of an elected executive, it thwarts the will of representatives of the actual people of the here and now . . ." BICKEL, *supra* note 89, at 16–17. Whether one accepts or rejects Bickel's premise that judicial review is a countermajoritarian institution, he was absolutely correct that ideals, myths, and images have played a crucial role in constitutional discourse.

“separation-initiation-return” structure of all hero myths.<sup>159</sup> Its absorption and reproduction through constitutional language helps to build support for juristic innovation, sometimes at the expense of other institutional actors.<sup>160</sup>

#### IV. *BROWN*: A TALISMAN OF LIMITATION

Iconographers teach that symbols are most effective when they exude “reverence, simplicity, and sincerity.”<sup>161</sup> Sadly, this cannot be said of *Brown*, the path-breaking ruling declaring racially segregated public education a violation of equal protection of the laws. To be sure, the decision enjoys a special place in popular culture today, but it has been a tarnished relic in professional circles since the very start. *Brown* may have inspired a generation of individuals to take up cause lawyering, but with each passing year the negative connotations of the case have calcified in the psyche of federal judges. The rich symbolic life of the case offers intriguing lessons as to how legal icons propel political change and how they are, in turn, remade by the very societal events that are unleashed.

This polysemous symbol will be dissected in two stages. The initial phase presents a narrative of *Brown*’s evolving place in the popular imagination in which the decision is initially received as a divisive force, but wins broad acceptance among believers over time; this trend is captured in the ruling’s influence on the judicial appointments process. Turning to the case law, the subsequent step explicates the decision’s uncertain state among jurists, who have thus far resisted *Brown*’s rehabilitation. The gulf between law’s shepherds and the laity over one of their most recognizable symbols could not be greater.

##### A. POPULAR REHABILITATION

The “advice and consent” phase of the judicial appointments process is a hotbed of popular sentiment. Through the prism of the Senate’s labors—an institution devoted to the keeping of our civic religion—one can chart the periods of division and consensus over *Brown*’s public meaning.

In the aftermath of the desegregation rulings, elected representatives from Southern states took advantage of judicial appointments to score political points and voice their constituencies’ repudiation of *Brown*. During the confirmation hearings of William Brennan in 1957 and Potter Stewart two years later, both were interrogated over *Brown*’s premises, indicating that the populace had not yet unambiguously embraced the ruling, and

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159. JOSEPH CAMPBELL, *THE HERO WITH A THOUSAND FACES* 30 (2d ed. 1968).

160. *Id.* at 30. Campbell describes the archetypal hero as the “carrier of the shining blade, whose blow . . . will liberate the land.” *Id.* at 16.

161. See STAFFORD, *supra* note 53, at 31.

suggesting that jurists would be wise to take note.<sup>162</sup> Indeed, drawing attention to the decision's fragility in those early days, Senator John McClellan (D-Ark) declared during Stewart's hearing:

This is an issue before the American people today. Some people agree with the court's decision in that case. Others do not. And without condemning the institution of the Supreme Court, I think those who disagree with it have a right to say so and have a right to work within the framework of everything legal to bring about a change if they so feel that a change is desirable.<sup>163</sup>

There was no tenderness expressed for the fledgling symbol; barely a hint of concern offered for the plight of those who suffered under Jim Crow's desolate rule. To the contrary, a plan was conceived in the open to suffocate *Brown's* transformative potential.

In the meantime, a Herculean counter-effort to rescue the symbol was underway, spurred on by a fierce anti-communist program in which the decision burnished America's Cold War credentials. Government officials and opinion leaders eagerly cast the decision as an ecstatic moment of liberation and a glorification of distinctly American values.<sup>164</sup> This collaboration between government, market, and the media had a galvanizing internal effect: As *Brown* served a central component in the

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162. Senator James O. Eastland of the State of Mississippi asked William Brennan: "Do you think the Constitution of the United States could have one meaning this week and another meaning next week?" *Nomination of William J. Brennan, Jr.: Hearings Before the S. Comm. on the Judiciary*, 85th Cong. 38 (1957), reprinted in 6 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1972, pt. Nomination of William J. Brennan, Jr., at 38 (Roy M. Mersky, & J. Myron Jacobstein eds., 1975) [hereinafter SUPREME COURT OF THE UNITED STATES]. Potter Stewart was repeatedly asked by Southern Senators not only whether he was a "creative" judge, but also whether he "agree[d] with the view, the reasoning, and logic applied . . . and the philosophy expressed by the Supreme Court in arriving in its decision in the case of *Brown v. Board of Education* on May 17, 1954." *Nomination of Potter Stewart: Hearing Before the S. Comm. on the Judiciary*, 86th Cong., vol. 1, at 38 (1959), reprinted in [1977 Supp.] SUPREME COURT OF THE UNITED STATES, *supra*, pt. Nomination of Potter Stewart, Hearings, vol. 1, at 38; see also *id.* at 14-18, 39, reprinted in [1977 Supp.] SUPREME COURT OF THE UNITED STATES, *supra*, pt. Nomination of Potter Stewart, Hearings, vol. 1, at 14-18, 39 (questioning by James O. Eastland, Chairman, S. Comm. on the Judiciary); *id.* at 27-28 (questions by Sen. Olin D.T. Johnston, South Carolina); *id.* at 56, 62, reprinted in [1977 Supp.] SUPREME COURT OF THE UNITED STATES, *supra*, pt. Nomination of Potter Stewart, Hearings, vol. 1, at 56, 62 (follow up by Sen. John L. McClellan, Arkansas). See generally STEPHEN L. CARTER, THE CONFIRMATION MESS 66-68 (1994); John Anthony Maltese, *Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush*, 5 J. APP. PRACTICE & PROCESS 1, 6-7 (2003).

163. See *Nomination of Potter Stewart: Hearing Before the S. Comm. on the Judiciary*, 86th Cong., vol. 1, at 34 (1959), reprinted in [1977 Supp.] SUPREME COURT OF THE UNITED STATES, *supra* note 162, pt. Nomination of Potter Stewart, Hearings, vol. 1, at 34.

164. MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS 107-14 (2000).

proselytization of American ideals abroad, it also solidified domestic commitment to racial equality at home.

The decision's sacramentality remained in flux for much of the next two decades, as waves of defiance were met by stalwart judges who finally received the institutional backing promised in the government's legal briefs, and as ordinary citizens spilled onto the sidewalks. During this ritual process unfolding in the courts and the streets, the community of believers engaged a complicated and at times violent exchange over whether and to what extent *Brown* would be an accurate expression of its shared self-understanding.

A series of confirmation fights underscored the transitional quality of *Brown*'s iconic status during this period. With each episode, *Brown* became further cemented in the popular imagination. The first milestone was Thurgood Marshall's elevation to the Supreme Court in 1967. Marshall was subjected to withering questioning during his confirmation hearing, demonstrating that in many quarters *Brown* and those closely associated with its achievement were vulnerable.<sup>165</sup> In the end, the former Director of the NAACP Legal Defense Fund was confirmed as an Associate Justice. Coming on the heels of the enactment of the Civil Rights Act of 1964, Marshall's ascension to the High Court sounded an optimistic note on *Brown*'s future.

The next revelation came during President Nixon's efforts to fill Abe Fortas's vacancy on the Supreme Court. Nixon's opening gambit was to elevate a conservative jurist from the South. But Clement Haynsworth of the Fourth Circuit was rejected in 1969 after several Senators argued that his desegregation opinions revealed him to be "a man who seeks to limit the Brown case, who seeks to slow down integration, who seeks to hang on to segregated ways as long as he can."<sup>166</sup> Nixon's subsequent nominee, G. Harold Carswell, an avowed segregationist before taking the bench, was voted down less than a year later.<sup>167</sup> Although Carswell—like Haynsworth

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165. Marshall was asked whether he believed the Supreme Court to be an "instrument of social change" and whether he was "prejudiced against white people in the South." *Nomination of Thurgood Marshall: Hearing Before the S. Comm. on the Judiciary*, 90th Cong. 159, 161 (1967), reprinted in 7 SUPREME COURT OF THE UNITED STATES, *supra* note 162, pt. Nomination of Thurgood Marshall, at 159, 161 (1975). In an extended exchange, Senator Strom Thurmond of South Carolina took Marshall through a highly detailed tour of constitutional history and interpretation in an effort to show him to be unqualified. *Id.* at 161–69, reprinted in 7 THE SUPREME COURT OF THE UNITED STATES, *supra* note 162, pt. Nomination of Thurgood Marshall, at 161–69 (1975).

166. *Nomination of Clement F. Haynsworth, Jr.: Hearings Before the S. Comm. on the Judiciary*, 91st Cong. 108, 429 (1969) (testimony of Joseph L. Rauh, Jr.). See generally Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383 (2000) (arguing that conservatives had a leading role in securing *Brown*'s status in the upper echelon of canonical decisions).

167. Haynsworth was defeated by a vote of 45–55; Carswell by a vote of 45–51. *Senate Rejects Carswell by 51-45 Margin*, N.Y. TIMES, Apr. 9, 1970, at 1; Warren Weaver, Jr., *Senate Bars Haynsworth, 55-45*, N.Y. TIMES, Nov. 22, 1969, at 1.

before him—promised to uphold *Brown*, his vow rang hollow given his past statements approving white supremacy and his record as a judge on issues of race. The seat was eventually filled by Harry Blackmun.

By the time Nixon appointed William Rehnquist to the High Court in 1971, the lessons from the episode had been learned by all. Unlike the previous nominees, Rehnquist neither hailed from the South nor had a staunch pro-segregation record. In an effort to undermine his fitness for judicial office, Democratic Senators questioned the nominee extensively about *Brown* and his role in crafting a legal memorandum for Justice Robert Jackson that discussed the plaintiffs' claims dismissively and urged the affirmation of *Plessy*.<sup>168</sup> Nevertheless, he was confirmed with ease, as his advice as a young law clerk was deemed not to be disqualifying in light of his repeated pledge to uphold *Brown*.<sup>169</sup>

By the mid-1980s, the popular reconstruction of *Brown* was mostly complete. *The New York Times*, wary of looking gauzy-eyed on previous anniversaries of the decision,<sup>170</sup> in 1984 openly called for dancing in the streets:

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168. Rehnquist's memo to Justice Jackson, which was titled, *A Random Thought on the Segregation Cases*, characterized the school children's claims as asking the Court "to read its own sociological views into the Constitution" and as an invitation to engage in *Lochner*-style jurisprudence. *Nomination of William Hubbs Rehnquist to be Chief Justice of Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 324–25 (1986), reprinted in 12 SUPREME COURT OF THE UNITED STATES, *supra* note 162, at 634–35 (1989). It continued:

[A]ppellants seek to convince the Court of the moral wrongness of the treatment they are receiving. I would suggest that this is a question the Court need never reach; for regardless of the Justice's individual views on the merits of segregation, it quite clearly is not one of those extreme cases which commands intervention from one of any conviction.

*Id.* at 325, reprinted in 12 SUPREME COURT OF THE UNITED STATES, *supra* note 162, at 635 (1989). The memo closed with the following statement:

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrdal's *American Dilemma* [sic].

*Id.*

169. *Nomination of William H. Rehnquist and Lewis F. Powell, Jr.: Hearing Before S. Comm. on the Judiciary*, 92d Cong. 55 (1971), reprinted in 8 SUPREME COURT OF THE UNITED STATES, *supra* note 162, pt. Nomination of William H. Rehnquist and Lewis F. Powell, Jr., Hearings, at 55 (1975) ("[T]o the extent that a decision is not only unanimous at the time it is handed down, but has been repeatedly reaffirmed by a changing group of judges, such as *Brown v. Board of Education*, it seems to me there is no question but what that is the law of the land . . . ." (quoting Rehnquist)).

170. On *Brown*'s tenth anniversary, a coalition was forming behind it, but the project was described as having barely begun. See Editorial, *Decade of Desegregation*, N.Y. TIMES, May 17, 1964, at E10 (saying that "the commitment to equal opportunity is irrevocable, the outcome certain," but cautioning that "its real implementation lies with the people"). In 1979, on *Brown*'s twenty-fifth anniversary, *The New York Times* boldly claimed that "[t]here does not appear to be much to



Anniversaries of Supreme Court decisions don't usually inspire celebration. But nothing less is in order this week, the 30th anniversary of the decision by which the Court struck down its own colossally wrong acceptance of "separate but equal" treatment for blacks and whites in the preceding half century. To celebrate *Brown v. Board of Education* is to celebrate a continuing revolution in America's race relations . . . . It is a living monument, a cause for celebration.<sup>171</sup>

Still, not all is rosy. *Brown's* rehabilitation has come at a high price: anticlassification vernacular, once employed to insulate the decision from attacks on its legitimacy, has completely overtaken the ruling's antisubordination roots.<sup>172</sup> As a result, most Americans today equate the ruling with the simplistic notion that race-consciousness is legally untenable. That is to say, in order to render the case palatable to a broad cross-section of the polity, the vision of law associated with *Brown* has been progressively thinned and flattened.

Rehnquist's elevation to the position of Chief Justice ran into somewhat greater difficulty than his seating as an Associate Justice. The controversy over his *Brown* memo made its reappearance, but it was a feature of his defense that most stood out. His many citations to the decision as a member of the Court were touted by his champions as evidence of his commitment to *Brown* as "good law."<sup>173</sup> There followed no detailed examination of the ways in which Rehnquist had limited its scope. Nevertheless, his apparent validations of *Brown* inoculated him from the fiercest of critiques. Rehnquist was confirmed as Chief Justice, though a record number of Senators—thirty-three—voted "nay" for a confirmed appointee.<sup>174</sup>

Equally important, Robert Bork's confirmation defeat in 1987 illustrated the newfound gravitational pull exerted by *Brown*.<sup>175</sup> In a widely-

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celebrate about school desegregation at the moment . . . ." Editorial, *An Age of Liberation*, N.Y. TIMES, May 17, 1979, at A22. However, it noted that "[t]oday it is clear that *Brown* was monumental because of how it has changed American life. . . . *Brown* initiated much educational reform—and much of the nation's social progress of the last 25 years." *Id.* Deep popular support of the decision is also reflected in editorial statements made on the decision's fiftieth anniversary. See Bob Herbert, *Regressing on Integration*, N.Y. TIMES, Apr. 26, 2004, at A23 (stating that "there is no way to overstate the change set in motion by the brilliant and dogged team of lawyers who developed and worked so hard and long on *Brown v. Board*. . . . [It was] a profound and far-reaching decision . . .").

171. Editorial, *The Enduring Promise of Brown*, N.Y. TIMES, May 17, 1984, at A26.

172. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1497–1500 (2004).

173. See *Nomination of William Hubbs Rehnquist to be Chief Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 302–05 (1986), reprinted in 12 SUPREME COURT OF THE UNITED STATES, *supra* note 162, at 612–15 (1989) (listing the thirty-four cases in which Justice Rehnquist cited the *Brown* decision) .

174. CARTER, *supra* note 162, at 79.

175. See *id.* at 48–49.

read article published in *The New Republic*, Bork had once denounced the integration of public accommodations and decried the sit-ins as “mob”-like behavior.<sup>176</sup> Compounding his problems, when he was asked by the Senate Judiciary Committee which opinion he found to be the most criticized ruling by the High Court, he truthfully but injudiciously offered, “*Brown v. Board of Education*.”<sup>177</sup> Although Bork had always defended *Brown* in originalist terms, his enthusiastic support of the Civil Rights Act of 1964 had an air of deathbed conversion about it.<sup>178</sup> The icon of racial equality was now on the move, and Bork’s earlier writings casting doubt on anti-discrimination laws put him firmly on the wrong side of history. With *Brown*’s power at its apex, Bork’s nomination was soundly defeated, 58–42.<sup>179</sup>

Today, *Brown* signifies the moment when America’s twin bounties of liberty and equality were bestowed upon the oppressed. At least in public, would-be jurists and elected officials must swear allegiance to the idol with a modicum of sincerity. One cannot be called to shepherd the people’s constitution without a show of humility and reverence for their values.

This ebb and flow of ordinary citizens’ affections for *Brown* is confirmed in opinion polls. A Gallup poll taken in 1954 revealed that a bare majority of Americans—52%—agreed with the decision in its infancy, while 44% disapproved.<sup>180</sup> Complicating matters, a full 40% of those polled in 1954 believed that the best route to long-term peace was to permit racial segregation in those areas where it then existed rather than to mandate

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176. Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 21, 23. In the article, Bork vociferously opposed the proposed civil rights laws on the ground that it would deprive businesspeople of their “vital liberty” by forcing them to “serve persons with whom they do not wish to associate.” *Id.* at 22. He also described the legislation as an unjustified imposition of “the morals of the majority self-righteously imposed upon a minority,” likening the banning of racial discrimination in public accommodations to the prohibition of alcohol. *Id.* at 21.

177. *Nomination of Robert Bork: Hearings Before S. Comm. on the Judiciary*, 100th Cong. 132 (1987), reprinted in 14 SUPREME COURT OF THE UNITED STATES, *supra* note 162, at 312 (1990) (testifying that the Fourteenth Amendment’s original promise of equality had to be reinterpreted in light of the false “background assumption” that state-sponsored racial separation was consistent with equal protection of law); see also Robert H. Bork, *Neutral Principles and Some First Amendment Problems* 47 IND. L.J. 1, 14 (1971) (arguing that the Fourteenth Amendment “was intended to enforce a core idea of black equality against government discrimination”).

178. See *Nomination of Robert Bork: Hearings Before S. Comm. on the Judiciary*, 100th Cong. 132 (1987), reprinted in 14 SUPREME COURT OF THE UNITED STATES, *supra* note 162, at 312 (1990).

179. Appealing to society’s newfound commitment to racial equality, Senator Edward Kennedy gave a fiery floor speech that set the tone for what would be a contentious proceeding:

Robert Bork’s America is a land in which . . . Blacks would sit at segregated lunch counters . . . and the doors of the federal courts would be shut on the fingers of millions of Americans for whom the judiciary is—and is often the only—protector of the individual rights that are the heart of our democracy.

133 CONG. REC. 59188-01 (daily ed. July 1, 1987) (statement of Sen. Kennedy), 1987 WL 941258.

180. The Gallup Organization, Gallup Poll (Dec. 31, 1954–Jan. 5, 1955), Westlaw, Poll Database, Question ID: USGallup.54-541 Q24.

integration.<sup>181</sup> Public reaction to *Brown* revealed not only a polarized electorate, but also tolerance for a brand of accommodation over segregation reminiscent of the compromise over slavery reached a century before.<sup>182</sup>

It took the shocking news of intensive and often violent Southern resistance to coax most citizens off the proverbial fence and onto the side of racial equality. By 1961, the number that signaled allegiance to *Brown* had climbed to 66%.<sup>183</sup> When the same poll was conducted in 1994, a generation after the Warren Court made its fateful leap into the abyss, a full 88% of the populace had come to embrace non-discrimination as a central tenet of the American creed.<sup>184</sup> To the faithful, *Brown* is a miracle that cannot be entirely explained by social scientists or opinion-makers. It stands as an act of devotion, its very existence vindicating our hope in the law.

#### B. THE CLOSING OF THE JUDICIAL MIND

Whatever judges might profess in other settings, their feelings for the case-turned-symbol once they take the bench have been another matter entirely. My central claims are threefold. First, while the image of *Brown* is now florid in the public imagination, it has become a fallen memorial for a significant number of legal intellectuals. The searing experience of desegregation has been etched in the minds of the Justices, undermining their own faith in *Brown*'s force. Second, the negative connotations of the case have infected more areas of doctrine than one might have expected. *Brown* now stands as a monument to law's limits and institutional self-regard; it denotes fear and hand-wringing. Third, the ascendance of *Marbury* during the last fifty years as the preeminent symbol of federal judicial authority has coincided with the steady emergence of *Brown* as a counter-symbol of law. But where *Marbury* so often stimulates feigned reluctance as a way of legitimating the actual exercise of juridic prerogative, *Brown* signals genuine, palpable hesitation to wield it.

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181. The Gallup Organization, Gallup Poll (Oct. 15, 1954–Oct. 20, 1954), Westlaw, Poll Database, Question ID: USGallup.54-538 QK13.

182. I am thinking of the Missouri Compromise codified in the Act of March 6, 1820, 3 Stat. 545, 548 which had the effect of permitting slavery where it then existed, but establishing land north of 36°, 30" as a slavery-free zone. Additionally, Maine was carved out of Massachusetts and admitted to the Union as a free state, while Missouri was admitted as a slave state. *Id.*

183. The Gallup Organization, Gallup Poll (May 28, 1961–June, 2, 1961), Westlaw, Poll Database, Question ID: USGallup.61-646 R04. Given three choices in a 1954 poll, 33% of the respondents preferred enforcement of integration "gradually and over a period of years," 22% favored immediate integration, and 40% believed that it would be best to "keep[] segregation in those areas where it has been the practice up to now." The Gallup Organization, *supra* note 181.

184. The Gallup Organization, Gallup Poll (Apr. 22, 1994–Apr. 24, 1994), Westlaw, Poll Database, Question ID: USGallup.422045 Q29.

Yet even as the decision catalyzed the civil rights movement, all the while its value as a unifying emblem of judicial influence was rapidly eroding. In this sense, then, the story of *Brown's* transformation from decision to universal icon is not simply about a contest over its meaning, it is also a tale in which negative meanings of the symbol have mostly prevailed, while positive connotations have been vanquished.

A case like *Brown* more accurately illustrates the actual breadth of courts' province in the modern age than a *Marbury*, but the swirling crisis with which it was associated is far too fresh, too protracted, and therefore too problematic to serve as a means of gathering the flock.

### 1. Fractured Meanings

The shattered, diluted meanings of *Brown* reveal not only the fragmentation of law, but also that of political faith. Law's shepherds continue to conjure unwelcoming visions with the symbol, defying the cultural transformation that occurred in society as a whole. Furthermore, the federal courts' frustrating experiences with desegregation have affected the path of the law. Both of these factors—the multiplicity and negativity of the legal symbol's cultural associations—have undermined its potential. Consider these trends.

#### a. Weakened Conceptions of Equality

The single most potent line of symbolic deployments of *Brown* remains the construction of the ideal of equal citizenship. While *Brown* is most often unfurled in a case involving race or educational matters,<sup>185</sup> where it heralds a commitment to notions of citizenship and anti-discrimination, it is waved less frequently and with considerably less enthusiasm outside of these contexts.

But as deployments of *Brown* in the discrimination or educational contexts have become more ringing, they have also come to signify a narrower terrain: substantive equality (or antisubordination)<sup>186</sup> has transmuted into color-blindness (or anticlassification);<sup>187</sup> race-conscious

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185. On *Brown's* role in education settings, see *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003); *Shaw v. Hunt*, 517 U.S. 899, 928 (1996) (Stevens, J., dissenting); *Plyler v. Doe*, 457 U.S. 202, 222 (1982); *Ball v. James*, 451 U.S. 355, 372 n.1 (1981) (Powell, J., concurring); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 327 (1978).

186. See *Patterson v. McLean Credit Union*, 49 U.S. 164, 174 (1989) (describing “society’s deep commitment to the eradication of discrimination based on a person’s race or the color of his or her skin”); *Bell v. Maryland*, 378 U.S. 226, 248 n.4 (1964) (raising *Brown* as a symbol for the elimination of the vestiges of slavery).

187. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (“Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Bd. of Educ.*” (citation omitted)); *Fullilove v. Klutznick*, 448 U.S. 448, 516 (1980) (Powell, J., concurring) (“At least since the decision in *Brown v. Board of Education*, the Court has been resolute in its dedication to the principle that the Constitution

admissions are no longer couched in the language of racial justice, but of access to a diverse and stimulating educational experience.

This dynamic is graphically depicted in the pair of affirmative action decisions involving the University of Michigan. Putting an end to the sectarian strife unleashed by its own fractured theology, the High Court sanctioned multiculturalism as a tenet of the American Creed.<sup>188</sup>

For Sandra Day O'Connor's majority opinion in *Grutter v. Bollinger*,<sup>189</sup> the victorious version of *Brown* stands for fair access to educational opportunities—no less and no more. This incarnation of *Brown*, refracted through the prism of *Bakke*, lights the way toward the removal of obstacles to a fair “diffusion of knowledge and opportunity through public institutions of higher learning.”<sup>190</sup> As a result, race-conscious admissions policies enjoy *Brown*'s aura, but barely so. They are constitutionally permissible only if they represent a stop-gap measure and the policies themselves lack mathematical precision as to the value of race actually accorded to any particular individual.<sup>191</sup>

Standing in tension with this understanding of *Brown* is a rendering of the icon as a socio-legal imperative to efface the vestiges of slavery.<sup>192</sup> Quoting a law review article by Stephen Carter, Ruth Bader Ginsburg argues in her *Gratz* dissent that reducing *Brown* to “freedom from categorization . . . is to trivialize the lives and deaths of those who have suffered under racism.”<sup>193</sup> Yet this vision of law has lost much of its drawing power. In the

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envision a Nation where race is irrelevant.” (citation omitted)); *Pers. Adm'r v. Feeney*, 442 U.S. 256, 272 (1979) (“A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.”).

188. Justice Powell's concurring decision in *Regents of the University of California v. Bakke*, 438 U.S. 265, 271–72 (1978), approving diversity but explicitly joined by no other member of the Court, garnered much debate and confusion in the lower courts. Compare *Hopwood v. Texas*, 84 F.3d 720, 724 (5th Cir. 1996) (rejecting the diversity rationale), with *Grutter v. Bollinger*, 288 F.3d 732, 752 (6th Cir. 2002) (approving the diversity goal as a compelling interest), *aff'd*, 539 U.S. 306 (2003).

189. *Grutter*, 539 U.S. at 331.

190. *Id.* (“[E]ducation . . . is the very foundation of good citizenship.” For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individual regardless of race or ethnicity.” (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954))).

191. Robert Post observes that the combined rationale of *Grutter-Gratz* is potentially far-reaching in its acceptance of a linkage between diversity and the legitimacy of public leaders, and that the requirement of “individualized consideration” is undercut by the Court's preference for policies that use race in ways that are not overly “identifiable.” Post, *supra* note 18, at 69–70.

192. *Grutter*, 539 U.S. at 345 (Ginsburg, J., concurring) (describing *Brown* as a symbol of the end of the “law-enforced racial caste system, itself the legacy of centuries of slavery”).

193. *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting). Ginsburg stated:

‘[T]o say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial

past quarter century, governing elites have backed away from modes of discourse that connote large-scale social transformation.

*b. Whither the Living Constitution?*

For a time jurists dispatched the decision freely in support of flexibility in interpretive methodology, particularly with respect to the authoritative use of history. However, the last instance in which *Brown* was cited for this cautionary principle in a majority opinion occurred over a quarter century ago, in the 1976 case of *Elrod v. Burns*.<sup>194</sup> Every effort to activate *Brown* in this fashion since then appears in either a dissenting or concurring opinion—what I call *unrepresentative* instances of legal symbolism.<sup>195</sup>

Such solo flourishes may sparkle brilliantly, but reflect no institutional consensus as to a legal symbol's active meaning. Harry Blackmun's dissenting citation of *Brown* in *Bowers v. Hardwick*<sup>196</sup> and Justice Stevens's unaccompanied reference to it in *Marsh v. Chambers*<sup>197</sup> are the paradigmatic examples of unrepresentative symbolism—they serve more as a hopeful

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oppression is to trivialize the lives and deaths of those who have suffered under racism. To pretend . . . that the issue presented in *Bakke* was the same issue in *Brown* is to pretend that history never happened and that the present doesn't exist.'

*Id.* (alterations in original) (citations omitted) (quoting Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 433–34 (1988)). Justice Ginsburg's opinion was joined by Justices Souter and Breyer. *Id.* at 298.

194. 427 U.S. 347, 354–55 (1976) (“Our inquiry does not begin with the judgment of history, though the actual operation of a practice viewed in retrospect may help to assess its workings with respect to constitutional limitations.”); *see also* *Loving v. Virginia*, 388 U.S. 1, 9 (1967); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669–70 (1966); *Frank v. Maryland*, 359 U.S. 360, 371 (1959).

195. *See* *Planned Parenthood v. Casey*, 505 U.S. 833, 957 (1992) (Rehnquist, C.J., dissenting); *Rutan v. Republican Party*, 497 U.S. 62, 82 (1990) (Stevens, J., concurring); *Bowers v. Hardwick*, 478 U.S. 186, 210 (1986) (White, J., dissenting); *Thornburgh v. Am. Coll. of Obstetricians v. Gynecologists*, 476 U.S. 747, 787–88 (1986) (Burger, J., dissenting); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 466 (1985) (Marshall, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 80 (1985) (O'Connor, J., concurring); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 367 (1985) (Stevens, J., dissenting); *Marsh v. Chambers*, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting); *United States v. Ross*, 456 U.S. 798, 836 n.7 (1982) (Marshall, J., dissenting); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 326–27 (1978) (Opinion of Brennan, White, Marshall and Blackman, J.J.); *Elrod v. Burns*, 427 U.S. 347, 354–55 (1976); *Estes v. Texas*, 381 U.S. 532, 564 (1965) (Warren, C.J., concurring); *Cohen v. Hurley*, 366 U.S. 117, 142 n.23 (1961) (Black, J., dissenting).

196. 478 U.S. at 210 (Blackmun, J., dissenting) (“I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny.” (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954))).

197. 463 U.S. at 816 & n.35 (Brennan, J., dissenting) (“We have recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee.” (citing *Brown*, 347 U.S. 483)).

beacon of future meaning than as a descriptor of a commonly accepted significance.

At all events, jurists usually do not desire to highlight their interpretive innovations, for fear that doing so blunts the persuasive force of their utterances. But on those rare occasions when creativity is acknowledged, *Brown* no longer is viewed by the institution as a whole to be the best vehicle for expressing its commitment to a living Constitution.

*c. Hope Fades*

Early on, *Brown* projected an expansive hope in constitutional remedies, perseverance in matters of principle, and legal possibility.<sup>198</sup> By contrast, where the amulet is raised today to characterize the scope and importance of a constitutional injury, it is usually used to divide the populace or signal the closing of the judicial mind to inventiveness and social complexity. It is alarming to see just how routinely the tumultuous legacy of *Brown* is openly cited for the proposition that the project of desegregation has warped the federal court system, undermined democratic institutions, and promoted cultural conflict.<sup>199</sup> Writing separately in the 1990 case *Missouri v. Jenkins*,

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198. *Puerto Rico v. Branstad*, 483 U.S. 219, 229 (1987); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 727 n.18 (1979) (White, J., dissenting); *Milliken v. Bradley*, 433 U.S. 267, 283 (1977); *Beal v. Doe*, 432 U.S. 438, 461 (1977) (Marshall, J., dissenting); *Castaneda v. Partida*, 430 U.S. 482, 503 n.2 (1977) (Marshall, J., concurring); *Elrod*, 427 U.S. at 354–55; *Gilmore v. City of Montgomery*, 417 U.S. 556, 571 (1974); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972); *Oregon v. Mitchell*, 400 U.S. 112, 126, 133 (1970); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 151–52 (1970); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 455 (1968); *Levy v. Louisiana*, 391 U.S. 68, 71 (1968); *Avery v. Midland County*, 390 U.S. 474, 498 n.2 (1968); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669–70 (1966); *Bell v. Maryland*, 378 U.S. 226, 248 n.4 (1964); *see id.* at 287, 316 (Goldberg, J., concurring); *Reynolds v. Sims*, 377 U.S. 533, 566 (1964); *NAACP v. Alabama*, 377 U.S. 288, 295 n.7 (1964); *NAACP v. Button*, 371 U.S. 415, 445 (1963); *Gomillion v. Lightfoot*, 364 U.S. 339, 349 (1960); *Wolfe v. North Carolina*, 364 U.S. 177, 182 (1960); *Harrison v. NAACP*, 360 U.S. 167, 175 (1959); *Frank*, 359 U.S. at 371 n.15; *Cooper v. Aaron*, 358 U.S. 1, 4 (1958).

199. *Missouri v. Jenkins*, 515 U.S. 70, 87 (1995) (“It would not serve the important objective of *Brown* . . . to seek to use school desegregation cases for purposes beyond their scope.”); *see id.* at 119 (Thomas, J., concurring) (“The District Court’s willingness to adopt such stereotypes stemmed from a misreading of our earliest school desegregation case.”); *see also* *Bush v. Gore*, 531 U.S. 98, 152–53 (2000) (Breyer, J., dissenting); *Freeman v. Pitts*, 503 U.S. 467, 500 (1992) (Scalia, J., concurring) (“[W]e must resolve—if not today, then soon—what is to be done in the vast majority of other districts, where, though our cases continue to profess that judicial oversight of school operations is a temporary expedient, democratic processes remain suspended, with no prospect of restoration, 38 years after *Brown*.”); *see id.* at 509 (Blackmun, J., concurring) (“It is almost 38 years since this Court decided *Brown v. Board*. In those 38 years the students in DeKalb County, Ga., never have attended a desegregated school system even for one day.” (citation omitted)); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 479–80 (1979) (Powell, J., dissenting) (claiming that there is a “now widely accepted view that a quarter of a century after *Brown I*, the federal judiciary should be limiting rather than expanding the extent to which courts are operating the public school systems of our country.” (citation omitted)); *see id.* at 489 (Rehnquist, J., dissenting) (“The school desegregation remedy imposed on the Columbus school system . . . is as complete and dramatic a displacement of local authority by

which overturned a desegregation order that directly raised property taxes, Justice Anthony Kennedy wrote that “[t]he historical record of *Brown v. Board of Education* is not a proud chapter in our constitutional history . . . . But courage and skill must be exercised with due regard for the proper and historic role of the courts.”<sup>200</sup>

The collapse of rule and symbol can be traced to the mid-1970s. Two desegregation opinions authored by Lewis Powell, a judicial moderate, expressed sentiments similar to that of Justice Kennedy, but a full decade earlier. In 1979, Justice Powell dissented from a desegregation ruling in order to give voice to “the now widely accepted view that a quarter of a century after *Brown v. Board of Education*, the federal judiciary should be limiting rather than expanding the extent to which courts are operating the public school systems of our country.”<sup>201</sup> Prophesying *Brown*’s fading light, he announced that America’s need for the decision had come to an end: “The type of state-enforced segregation that *Brown I* properly condemned no longer exists in this country. . . . System-wide remedies . . . lack any principled basis.”<sup>202</sup>

Although Powell spoke for himself and no other, he did so in the wake of the earth-shaking decision of *Milliken v. Bradley*,<sup>203</sup> which imposed substantial curbs on remedies to equalize educational resources and slow the pace of white flight from urban centers.<sup>204</sup> Giving voice to a latent disillusionment now spreading among the federal judiciary, Justice Powell offered this analysis:

Experience in recent years . . . has cast serious doubt upon the efficacy of far-reaching judicial remedies . . . the fact is that restructuring and overseeing the operation of major public school

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the federal judiciary as is possible in our federal system. . . . [A]s this Court recognized in *Brown I* “education is perhaps the most important function of state and local governments.” (citation omitted) (quoting *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977)); *Wright v. Council of Emporia*, 407 U.S. 451, 471 (1972) (Burger, C.J., dissenting) (“The Court does not articulate the standard by which it reaches this conclusion, and its result far exceeds the contemplation of *Brown v. Board of Education*, and all succeeding cases . . . .” (citations omitted)).

200. 495 U.S. 33, 80 (1990) (Kennedy, J., concurring in part & concurring in the judgment). This dissent was joined by Chief Justices Rehnquist, and Justices O’Connor and Scalia. For citations to *Brown* as representative of a period of social strife and institutional defiance, see *Virginia v. Black*, 538 U.S. 343, 355 (2003); see *id.* at 355 (Thomas, J., dissenting); *Milliken v. Bradley*, 418 U.S. 717, 781–82 (1974) (Marshall, J., dissenting); *Adickes*, 398 U.S. at 197; *Louisiana v. United States*, 380 U.S. 145, 149 (1965); *England v. La. State Bd. of Med. Exam’rs*, 375 U.S. 411, 431–32 (1964) (Douglas, J., concurring); *Braden v. United States*, 365 U.S. 431, 446 (1961) (Douglas, J., dissenting); *Harrison*, 360 U.S. at 175; see *id.* at 181–82 (Douglas, J., dissenting); and *Scull v. Virginia*, 359 U.S. 344, 346 (1959).

201. *Penick*, 443 U.S. at 480 (Powell, J., dissenting).

202. *Id.* at 486–87.

203. 418 U.S. 717 (1974).

204. *Id.* at 752–73.



systems—as ordered in these cases—fairly can be viewed as social engineering that hardly is appropriate for the federal judiciary.<sup>205</sup>

A year later, Justice Powell built upon this theme of disaffection: “In all too many cities, well-intentioned court decrees have had the primary effect of stimulating resegregation. . . . The promise of *Brown v. Board of Education* cannot be fulfilled by continued imposition of self-defeating remedies.”<sup>206</sup> The federal courts had begun their inward turn.

Despite the Warren Court’s careful strategy of separating constitutional rule from remedy, by the 1970s *Brown*’s luster had been greatly diminished by judges’ own negative experiences with desegregation remedies and what they perceived to be the public’s reaction to them.

## 2. Spillover Effects

Far from enjoying a renaissance, *Brown* has garnered a sizeable following as a symbol of discontent among law’s custodians in the years since Justice Powell penned his words. The negative associations with desegregation have rapidly spilled beyond the Equal Protection Clause, dramatically altering the substance and direction of the law.

By the 1990s, the Judiciary’s reimagining of *Brown* had crystallized: where before it signaled duty and steadfastness—some of the positive modern connotations of *Marbury*—it now signified the limits of judicial power and an enhanced sense of institutional self-regard. A universal symbol of redemption had been so far eroded that it now mostly stood for a guarantee of formal equality for a very rare social injury.

Instead of legal possibility or an optimistic sense of purpose, to judges and lawyers the case now “signal[s] an end to [an] era” in the nation’s history.<sup>207</sup> Indeed, the case reporters are replete with instances in which mention of the decision perpetuates the belief that *Brown*’s legacy is its role in sparking mobilized resistance or testing the limits of federal authority and expertise.<sup>208</sup>

These themes were played out in the contentious battle over the scope of the right to abortion. In *Planned Parenthood v. Casey*, the plurality opinion transparently explored the idea that the Court’s legitimacy is a “product of substance and perception.”<sup>209</sup> In justifying their decision to affirm the core

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205. *Penick*, 443 U.S. at 487.

206. *Estes v. Metro Branches of Dallas NAACP*, 444 U.S. 437, 438–39 (1980) (Powell, J., dissenting) (citation omitted).

207. *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983); *see also Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Ginsburg & Breyer, JJ., concurring) (“[*Brown*,] after prolonged resistance, yielded an end to a law-enforced racial caste system, itself the legacy of centuries of slavery.”).

208. *See supra* notes 199–200.

209. 505 U.S. 833, 865 (1992) (O’Connor, Kennedy & Souter, JJ.).

of *Roe* on *stare decisis* grounds, Justices Kennedy, O'Connor, and Souter found occasion to discuss *Brown's* legacy.

This elaboration is instructive on three fronts. First, *Casey* occasioned no impassioned defense of *Brown*, no ringing affirmation of law as a progressive force. Instead, the Justices cast *Brown* as a matter in which profound cultural change justified a decisive break from the past. Illustrating the psychological isolation of *Brown* from the day to day affairs of constitutional lawmaking, the plurality wrote: "Society's understanding of the facts upon which a constitutional ruling was sought in 1954," namely, whether state-mandated separation of the races would stigmatize black Americans, "was thus fundamentally different from the basis claimed for the [*Plessy*] decision in 1896."<sup>210</sup> This move characterized *Brown* as an historical anomaly from which general lessons about judicial decision-making should not be drawn.

Second, the members of the plurality conspicuously linked *Roe* and *Brown* as the only two "intensively divisive controversies" in their lifetimes in which a legal ruling "calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."<sup>211</sup> Thus, *Brown* had by that point penetrated the judicial psyche as a "rare" case.<sup>212</sup> The Justices presumed the existence of a fellowship of persons who shared these sentiments, placing *Roe* on similar footing because of public backlash and official resistance associated with the abortion ruling.

Third, *Brown's* symbolism redirected the constitutional law of privacy. Even as members of the plurality gave a ringing endorsement to the importance of remaining steadfast amid the swirling forces of political conflict, they also dramatically reworked doctrine in response to these very dynamics. Almost as if it were a silent nod to *Brown II's* flexible "all deliberate speed" formulation,<sup>213</sup> the *Casey* ruling affirmed the right to abortion, but then scrapped the trimester framework, replacing it with a far more malleable "undue burden" test.<sup>214</sup> As successors to titanic statements of law met by a sustained outcry, each can be seen as a retreat from its predecessor's lofty ambitions.

Perhaps most striking of all is Justice O'Connor's ruling in *Virginia v. Black*<sup>215</sup> approving state authority to outlaw the most aggressive and

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210. *Id.* at 863.

211. *Id.* at 866–67. Interestingly enough, Thurgood Marshall himself made an earlier version of this argument: "When this Court decided *Roe v. Wade* and *Doe v. Bolton*, it properly embarked on a course of constitutional adjudication no less controversial than that begun by *Brown v. Board of Education*." *Beal v. Doe*, 432 U.S. 438, 461 (1977) (Marshall, J., dissenting) (citation omitted).

212. *Casey*, 505 U.S. at 866.

213. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) ("*Brown II*").

214. *Casey*, 505 U.S. at 877.

215. 538 U.S. 343, 355 (2003).

intimidating forms of cross-burning.<sup>216</sup> The opinion invokes and thereby perpetuates *Brown*'s lasting link to racial strife in the judicial imagination. Recounting the history of cross-burning as a tool of racial terror and adding judicial imprimatur to a ban on the most virulent displays, Justice O'Connor reminded Americans that "[t]he decision of this Court in *Brown v. Board of Education*, along with the civil rights movement of the 1950s and 1960s, sparked another outbreak of Klan violence. These acts of violence included bombings, beatings, shootings, stabbings, and mutilations."<sup>217</sup>

In the aftermath of *RAV v. City of St. Paul*,<sup>218</sup> there had been significant doubt as to whether any hate-crimes law that singled out disfavored messages—even historically and sociologically unique speech-acts such as cross-burning—could pass constitutional muster. The Court's use of *Brown* in the *Black* case therefore effectuated a subtle, but crucial, recalibration of First Amendment doctrine to rein in the judicial sphere, thereby permitting a greater degree of political novelty in deterring this fear-inspiring behavior.

Ironically, *Brown*'s legacy has even been invoked to rationalize procedural rules that make it easier for defendants to secure the modification (or the dismantling) of a consent decree, and not just in desegregation cases. The intractable association of *Brown* with the advent of public law litigation is recycled in *Rufo v. Inmates of Suffolk County Jail*,<sup>219</sup> a case that arose from local officials' decision to enter into a consent decree to build a new jail after inmates filed suit alleging inhumane conditions.<sup>220</sup> Years later, the Sheriff moved to modify the decree to permit double bunking and thereby increase the capacity of the institution, a motion vigorously opposed by the inmates.<sup>221</sup>

Byron White's majority opinion in *Rufo*, establishing that any "significant change" could form the basis for a modification to a governing consent decree, explicitly drew on *Brown*'s association with protracted, complex lawsuits, which seems to have lacerated the institution's psyche: "The upsurge in institutional reform litigation since *Brown v. Board of Education*, has made the ability of a district court to modify a decree in response to changed circumstances all the more important."<sup>222</sup>

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216. *Id.* at 363.

217. *Id.* at 355. Justice Thomas would have gone further by treating cross-burning as unprotected conduct rather than presumptively expression. *Id.* at 393 (Thomas, J., dissenting). Reminding readers of the State's campaign of "massive resistance" to *Brown*, he argued that the same legislature that fiercely protected its prerogative over racial segregation would not have enacted an anti-cross burning statute that reached merely racist expression. *Id.* at 394.

218. 505 U.S. 377 (1992).

219. 502 U.S. 367 (1992).

220. *Id.* at 373–75.

221. *Id.* at 376.

222. *Id.* at 380.

It is hard to know precisely what sorts of changes warrant such modification; the Court left this question shockingly open-ended. One thing is clear: maintaining “flexibility” for judges to wade into social life and to extricate themselves cleanly appeared to be the primary motivation.<sup>223</sup> Without saying much else, the Justices’ invocation of *Brown* recalled lasting disappointments over desegregation, the image of overburdened courts, and the intractability of many social problems. As we would come to see in *Bush v. Gore*, this would not be the last time *Brown*’s iconic status was manipulated to promote a form of judicial withdrawal borne of an ethos of institutional self-preservation.<sup>224</sup>

Finally, consider Justice Clarence Thomas’s invocation of *Brown* in the dispute over the constitutionality of the State of Ohio’s school voucher program just three Terms ago. Writing separately in support of the decision in *Zelman v. Simmons-Harris* to uphold the pilot program, Justice Thomas conjured *Brown* as a failed vision of equal education:

Today many of our inner-city public schools deny emancipation to urban minority students. Despite this Court’s observation nearly 50 years ago in *Brown v. Board of Education* that ‘it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education,’ urban children have been forced into a system that continually fails them.<sup>225</sup>

Justice Thomas did not deploy the case analogically to argue that the segregation decision’s internal logic justified the state’s creation of the voucher program; nor could he credibly do so. Instead, *Brown*’s symbolic importance was to relax jurists’ reading of the Establishment Clause so as to permit policy experimentation. The federal courts’ efforts to enforce the Equal Protection Clause did little to ameliorate stark disparities in educational quality, he implied, and now other constitutional guarantees must give way.

By the end of the 20th Century, the ultimate act of socio-legal restoration had been reimagined by law’s shepherds as a diminished sign of discontent. But as the previous decisions illustrate, even a misshapen monument can prove useful in the reconfiguration of legal categories and rules.

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223. The Court held that district courts have “flexibility” in changing the terms of a consent order flowing from institutional reform lawsuits. *Id.* The fact that compliance had become “more onerous” or that one of the parties “misunderstood” the law was also deemed a valid ground to redo a decree. *Id.* at 390, 392.

224. See generally *infra* text accompanying notes 239–244.

225. 536 U.S. 639, 676 (2002) (Thomas, J., concurring).

## C. MARBURY V. BROWN: SYMBOL AND ANTI-SYMBOL

It is customary to understand *Brown* as a decision that is yoked to *Plessy v. Ferguson*.<sup>226</sup> When *Brown* was decided in 1954, this had the effect of reversing the priority of the majority opinion and John Marshall Harlan's dissenting opinion in *Plessy* within the legal canon: Harlan's losing account became tied to *Brown*, while *Plessy*'s majority opinion was relegated to the anti-canon.<sup>227</sup>

In more recent days, however, one can detect an emerging dynamic that is at once fascinating and deeply troubling: *Marbury* and *Brown* have become tethered to each other as symbol and anti-symbol. On these revealing occasions, the warring conceptions of the federal Judiciary's sphere of influence and its self-understanding in the modern age take on greater clarity and significance.

Unleashed in judicial writings, *Marbury* stakes out an expansive vision of law and facilitates social acceptance of judicial control and creativity even as it denies this is happening. As its opposite number, *Brown* undermines or retards judicial lawmaking, whether through the contraction of substantive rights or procedural rules. Linked in this fashion, the rulings also comprise a duality in terms of institutional orientation: the first symbol is suggestive of an other-regarding sensibility; the second, an ethic of bureaucratic self-preservation. Where *Marbury* builds the people's faith in the courts, *Brown* redirects their faith in the law toward the sphere of politics.

The two cases appeared together for the first time in the epic decision of *Cooper v. Aaron*,<sup>228</sup> which rejected the Little Rock school district's request for a stay of integration in light of the State of Alabama's strategies of delay.<sup>229</sup> The symbolic union of *Marbury* and *Brown* in the Court's unanimous opinion was a rhetorical tour de force designed to blunt an unparalleled degree of resistance to the nascent principle of racial equality:

[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land. . . . No state legislator or executive

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226. 163 U.S. 537 (1896). See generally JACK M. BALKIN, WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 12 (2001) ("If *Brown* is a canonical case, *Plessy* has become an anticanonical case, *Brown*'s evil twin.")

227. See generally Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998).

228. 358 U.S. 1 (1958) (per curiam).

229. *Id.* at 4.

or judicial officer can war against the Constitution without violating his undertaking to support it.<sup>230</sup>

This shining moment was short-lived. From *Cooper* onward, the cases-turned-symbols would remain linked, but the cultural-legal connotations of *Marbury* and *Brown* would begin to diverge. *Marbury*, sharpened into an awesome instrument of judicial vigor, carved a path of expanding jurisdiction and doctrinal creativity. At the same time, jurists occasionally raised *Brown* as a shield behind which to urge a hasty retreat from the social landscape. What symbols do, anti-symbols undo.

This thematic *mélange* was sounded in the redistricting case, *Miller v. Johnson*.<sup>231</sup> I have already mentioned the opinion's insistent, highly-charged display of the three-pointed star of *Marbury*, *Cooper v. Aaron*, and *Baker v. Carr* to legitimate its interpretive act.<sup>232</sup> Deferring in any way to the expertise of voting rights officials in the Executive Branch, Justice Kennedy warned ominously, would amount to "surrender" of the judicial role.<sup>233</sup> Again, the rhetoric of solemn duty had the effect of perpetuating the view that the courts are best placed to calibrate and safeguard the rights of the people.

A little noticed fact is that the Justices in *Miller* twice manipulated *Brown* to curb juridic authority. First, the majority deployed the case to signify race neutrality, thus restraining government on substantive grounds from "separat[ing] its citizens into different voting districts on the basis of race."<sup>234</sup>

Second, Justice Stevens, in dissent, deigned to invoke *Brown* as a constraint on the federal courts' sphere of influence. Going further than his fellow dissenters, he argued that those who had lodged objections to the majority black districts did not raise a constitutional injury of the same gravity as the *Brown* plaintiffs, who had been completely excluded from participation in a civic institution on account of their race. In the absence of proof of vote dilution, he suggested, the *Miller* plaintiffs had simply not suffered a constitutional injury.<sup>235</sup>

A similar portrait of dueling legal symbols appeared in *Casey*. Even as the plurality read *Brown* in a way that approved the Court's refusal to reengage a full-bore review of *Roe's* merits,<sup>236</sup> Antonin Scalia's dissent turned to *Marbury* as a counterpoint to discredit the decision as a form of "selective"

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230. *Id.* at 18.

231. 515 U.S. 900 (1995).

232. *See supra* text accompanying notes 115–121.

233. *Miller*, 515 U.S. at 922.

234. *Id.* at 911. The Court clarified that in order to prevail on an equal protection claim a plaintiff must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 916.

235. *Id.* at 931 (Stevens, J., dissenting).

236. *Planned Parenthood v. Casey*, 505 U.S. 833, 854–69 (1992).

judicial review.<sup>237</sup> Exasperated with his colleagues' lack of interest in entertaining *Roe*'s flaws, he complained:

I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version. I wonder whether, as applied to *Marbury v. Madison*, for example, the new version of stare decisis would be satisfied if we allowed courts to review the constitutionality of only those statutes that (like the one in *Marbury*) pertain to the jurisdiction of the courts.<sup>238</sup>

Once again, the citizen-audience was treated to a skirmish between the two icons of juristic influence: one representing a vision of interpretive boldness and principle, the other signifying the conservation of institutional resources and the settlement of law.

These maturing, polar visions of *Marbury* and *Brown* again collided in *Bush v. Gore*.<sup>239</sup> The Justices who overturned the Florida Supreme Court's recount order described their task as fulfilling the "unsought responsibility" to interpret and safeguard the Constitution.<sup>240</sup> This move was a textbook example of mimicry, for *Marbury* itself had characterized judicial review in duty-bound language.

Turning *Marbury* back upon his colleagues in the majority, Justice Stevens's sharply worded dissent—joined by Justices Ginsburg and Breyer—defended the Florida Supreme Court's decision as the quintessential exercise of judicial review: to "say what the law is."<sup>241</sup> A short-hand that had well served the notion of Article III independence was good enough for their state counterparts.

Stevens's maneuver illustrates the degree to which judges—liberals as much as conservatives—now embrace *Marbury* as a vision of law that is decidedly pro-judicial review. Rather than dispute the relevance or propriety of *Marbury* in the contest, Justice Stevens embarked on the same rhetorical

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237. *Id.* at 993 (Scalia, J., dissenting).

238. *Id.* (citation omitted).

239. 531 U.S. 98 (2000) (per curiam).

240. *Id.* at 111. As the majority put it:

None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

*Id.*

241. *Id.* at 128 & n.7 (Stevens, J., dissenting) ("[The Florida Supreme Court's] decisions were rooted in long-established precedent and were consistent with the relevant statutory provisions, taken as a whole. It did what courts do . . ." (citing *Marbury*)).

strategy, pointing out that, according to the same shimmering ideal, the Florida court, too, had an obligation to interpret the law.

At the same time, *Brown* reappeared in Justice Breyer's dissent objecting to the Court's decision to grant certiorari and reach the underlying constitutional question. Just as Stevens had done in *Miller*, Justice Breyer ceremonially raised *Brown* to illustrate that the voters' legal interests did not pose any question involving a "basic human right" so as to justify judicial intervention.<sup>242</sup> Though it is hard to take seriously the suggestion that a constitutional violation must rise to the scale of segregation before the Court may properly assert jurisdiction, drafting the symbol in the service of the passive virtues reinforced the ascendant linkage between *Brown* and the limits of legal power in the judicial imagination.

On the one hand, we see the rhetoric of duty—that ancient dialogic form associated with *Marbury*—composed to license intervention in a highly polarized electoral contest for which political solutions existed. On the other, drawing on a newer self-understanding associated with the discretionary Court, the dissenters suggested that the dispensation of judicial power, polluted by *Brown's* worst connotations, was more akin to an act of *grace*. They did not use such terminology, but the implication is hard to deny: the Article III power is treated as an extraordinary gift as opposed to an entitlement, to be doled out in niggardly fashion.

This development is a stunning victory for the Bickelian vision of a Supreme Court that prizes the "passive virtues,"<sup>243</sup> avoiding legal disputes where principled adjudication proves impossible—an approach that Gerald Gunther famously ridiculed as "100% insistence on principle, 20% of the time."<sup>244</sup> Ironically, while Bickel himself urged careful conservation of judicial resources in order to tackle epic controversies like the segregation cases, contemporary jurists have turned *Brown* into a towering monument to inertia.

The emerging notion of juridic authority as grace has begun to creep into a broad swath of law, from the justiciability doctrines to election law, from privacy to equal protection. Furthermore, the ascendant self-understanding says a great deal about the scale of the modern Court's Olympian detachment from the ordinary workings of law and politics, and the level of confidence with which the institution goes about its work.

Together, the warring notions of juridical prerogative encapsulated in the *Marbury-Brown* dyad lay bare a rather less inspiring image of justice. All too often, one is treated to a display of extravagant power or institutional

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242. *Id.* at 153 (Breyer, J., dissenting). Justice Breyer was joined by three other Justices who favored a remand: Ginsburg, Stevens, and Souter. *Id.* at 144.

243. Bickel famously praised judicial non-intervention under such circumstances as reflecting "passive virtues." See BICKEL, *supra* note 89, at 200.

244. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964).



self-regard. Duty and grace—inseparable, nested notions of judicial review at war—are now more tightly interwoven in the fabric of the law. But this alarming trend in juridic discourse not only cheapens *Brown*'s achievement, it also destabilizes the decision's place in the canon.

An effective way to unsettle a symbol's position in the legal imagination is to advance an alluring, alternate network of cultural associations. Since the 1950s *Brown*'s association with *Plessy* has privileged and glorified *Brown*. The ascendant *Marbury-Brown* duality has the opposite effect: it acts to “break” the circuit of legal meaning conveyed by the *Brown-Plessy* pair, and *Brown* fares less well by comparison. Much, of course, will depend on how persistently the dyad is replicated in the future. The stakes could not be higher: the more the decision is used to urge non-intervention by judges, the more *Brown* approaches anti-canonical status, a realm to which the most despised cases have been relegated.

## V. PROCESSES OF CONSTITUTIONAL MYTH-MAKING

### A. BEYOND TEXT-SPECIFIC ACCOUNTS OF LAW

How has *Marbury* acquired its tell-tale glow? Why, exactly, has *Brown* lost its luster for those who craft law's sacred texts? The first possibility—and the one most often cited by observers—is that there is something intrinsic to the rulings that have produced the feelings that Americans have about them. Exemplifying this internal approach, L.H. LaRue turns to an explication of “the fictions that have made Marshall persuasive” in an attempt to discover why “the national judiciary is strong and self-confident . . . [and] *Marbury* has the place of honor.”<sup>245</sup>

There is certainly much in this account to recommend it. *Marbury*'s language is eminently quotable and universal (offering a treasure trove of memorable maxims), whereas every word in *Brown* is gauged to the precise constitutional question at hand and to say as little as possible (the opinion declined to overrule *Plessy* outright, a sleight-of-hand that fooled no one). The Justices hoped that minimalist rhetoric in the segregation cases would reduce the magnitude of social friction. It is telling that the phrase most people associate with the desegregation cases—“all deliberate speed”—comes not from *Brown I*, but from *Brown II*.<sup>246</sup>

On the other hand, where the actual tone of *Marbury* is grandiose bordering on arrogant, the rhetoric of *Brown* is modest, verging on coy. If we

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245. LARUE, *supra* note 73, at 42–43.

246. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*). The phrase that comes in as a close second does come from *Brown I*, popularized in recent years by debates over same-sex schools and gay marriage: “separate . . . [is] inherently unequal.” 347 U.S. at 495. Not everyone, of course, has found the formulation to be a capitulation to lawlessness. See, e.g., BICKEL, *supra* note 89, at 254 (lauding the formulation for exemplifying Lincolnian tension of principle and expediency that “ease[d] the way to [*Brown*'s] acceptance and effectuation”).

did not know how the rest of the canonization story actually unfolded, the tenor and substance of the decisions alone might very well have led us to very different expectations about which case would become the model for judicial behavior.

If one broadens the lens ever so slightly, the fact of the matter is that it was *easy* for the Marshall Court to strike down the provision of the Judiciary Act that conferred original jurisdiction on the Court to issue writs of mandamus. Doing so required a relatively costless approval of the emerging practice of judicial review,<sup>247</sup> achieved through a delicate dance in which the Court found that William Marbury was entitled to his commission but no actual legal power would be dispensed to force a recalcitrant President to deliver it. By comparison, it was exceptionally hard—even unthinkable—for the Warren Court to strike a decisive blow for racial equality in the absence of a well-formed political consensus at its back. The Justices themselves correctly predicted that their collective act would shake the earth and unleash the Furies. By these lights, *Brown*, not *Marbury*, should have emerged as the shining symbol of the power of the federal courts, constitutional possibility, justice, and redemption.

But it has not. All of this confirms that focusing on the actual historical controversies presented and the tone of the rulings gets us only so far. Whatever is contained in the four corners of the legal decisions cannot satisfactorily account for the intensity of feeling and difference of opinion we have about these two symbols; they cannot explain their contemporary sacramentality. How is it that a case whose facts were mired in the political intrigue of the times has emerged as an enduring and powerful sign of judicial might; while an unprecedented act of devotion to dismantle and delegitimize a racial caste system has fallen so far out of favor among judges?

Despite the republican revival in legal thought, the model of judicial centrality lives on in elite culture. For every skeptical account of judicial lawmaking, four vigorous defenses of judicial review rise from the earth.<sup>248</sup> Thus, even if experts reject its most aggressive formulations, most have no

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247. Most scholars accept that judicial review existed at the time of the Founding, though there remain pronounced disagreements as to how developed the practice was and how exclusive the colonists envisioned the judicial role to be. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 62 (2004).

248. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (advocating process-perfecting justification for judicial review); LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2001) (advancing a theory of interpretation that “destabilizes whatever outcomes are produced by the political process [and] provides citizens with a forum and a vocabulary they can use to continue the argument”); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy*, 17 *CONST. COMMENT.* 455, 455 (2000) (arguing that the Supreme Court’s interpretations “should be taken by all other officials, judicial and non-judicial, as having an authoritative status equivalent to the Constitution itself”); Erwin Chemerinsky, *Progressive and Conservative Constitutionalism as the United States Enters the 21st Century*, 67 *LAW & CONTEMP. PROBS.* 53, 53–62 (2004) (criticizing popular constitutionalism).

interest in challenging the fundamental principle of judicial review. In such a climate, *Marbury*-based language has considerable space in which to flourish.

It turns out that, by comparison, intellectual support for *Brown* has been tepid from the very start. With its elite constituency offering only grudging support, the symbol was ripe for the faith-shaking winds of controversy that would soon come. Making matters worse, the basic structure of academic inquiry into these rulings has ensured an air of ambivalence about the case among each successive generation of lawyers.<sup>249</sup>

Within circles inhabited by legal specialists, *Brown* was hobbled shortly after birth as leading thinkers attacked its premises and reasoning.<sup>250</sup> To be sure, a number of prominent intellectuals rose to *Brown*'s defense over the years,<sup>251</sup> but Wechsler's shade lingered. As a result, the soil itself was too poisoned to sustain the flowering of faith among law's stewards.

By 1958, Alex Bickel was grimly describing the situation involving racial segregation as the "American Algeria," with the project of reform imposing a "heavy drain on the sense of national purpose and integrity. And it was itself adrift."<sup>252</sup> More recently, Michael Klarman has argued that *Brown* added little to the dynamic of racial change in the South, which he believes was already "too powerful to resist," and that in the short run, the ruling actually set back racial progress by polarizing the forces of progress and retrenchment.<sup>253</sup>

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249. I explore the academy's role in entrenching legal symbols in Part V.B.

250. LEARNED HAND, *THE BILL OF RIGHTS* 55 (1958) ("I have never been able to understand on what basis [*Brown*] can or does rest except as a *coup de main*."); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32-35 (1959) (stating that "the question posed by state-enforced segregation is not one of discrimination at all," but instead of competing claims to association, and doubting that there is a "basis in neutral principles for holding that the Constitution demands that the [plaintiffs'] claims for association should prevail").

251. To this day, the most famous defenses of *Brown* remain Charles Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960), and Louis H. Pollak, *A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

252. ALEXANDER M. BICKEL, *supra* note 89, at 255-56. Bickel himself believed that *Brown* was a principled decision, defending it from attack by Columbia law professor Herbert Wechsler. At the same time, Bickel concluded that the segregation cases showed that expediency and flexibility were essential to generating the necessary political and social cooperation to implement new legal norms. *Id.* at 244.

253. Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 150 (1994); see also MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 385 (2004) (claiming that *Brown* "radicalize[d] southern politics"). Klarman's account greatly underestimates the role of symbolism in law and politics by demanding evidence of direct cause-and-effect before giving symbols their due. Although he admits to *Brown*'s importance in forcing Americans to take sides on the explosive question of segregation, he insists, "[t]hat *Brown* forced people to take a position . . . is not to say that it influenced the position they took." *Id.* at 365. Moreover, while Klarman acknowledges that the decision was inspiring to black activists, he argues that the boycotts and sit-ins "can be explained independently of *Brown*." *Id.* at 374. Not only does Klarman reveal a teleological, rather than contingent and

Indeed, the tendency of elites to lay everything negative at *Brown*'s doorstep and to minimize the positive aspects of its legacy has only quickened and deepened over time. To some, the Warren Court's later decisions extending the rights revolution now seemed to have been prefigured by *Brown*.<sup>254</sup> In hindsight, the explosion of public law litigation, the excesses of a law-centered view of society, the sharp realignment and bitter polarization of the two major political parties, and even many of the social ills that afflicted America could be conveniently traced to this act of liberation in 1954.<sup>255</sup>

It is as if time itself had split in two because of this seismic event, and the history of our secular religion would henceforth be understood in two epochs: B.B. ("Before *Brown*") and A.B. ("After *Brown*"). In the second epoch, *Brown* is far more likely to be thought of as holding out "a hollow hope,"<sup>256</sup> signifying the "limits of judicial power,"<sup>257</sup> or tantalizingly, representing unrealized potential.<sup>258</sup>

It is true, of course, that *Brown* remains important to academic belief systems irrespective of what judges and lawyers do—any serious theory of constitutional law labors in its long shadow, and must confront its legacy.<sup>259</sup> But here again, many such treatments have a wistful and disappointed flavor.<sup>260</sup>

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constitutive, view of history, he demands of symbolism what no symbol can prove.

254. See, e.g., Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 6 (1982) ("[W]hether they fully realized it or not, the Justices in *Brown* had committed the federal courts to an enterprise of profound social reconstruction."); Owen Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) ("As a genre of constitutional litigation, structural reform has its roots in the Warren Court era and the extraordinary effort to translate the rule of *Brown v. Board of Education* into practice.").

255. From the vantage point of the close of the 1960s, Alex Bickel later described *Brown* "as the beginning" of a period of great activity by the Warren Court to limit the scope of legislative and executive power. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 7 (1970).

256. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 169 (1992).

257. WILLIAM LASSER, *THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS* 161–70 (1988).

258. Louis Seidman, among others, has made this point in his treatment of equal protection law. See LOUIS MICHAEL SEIDMAN, *CONSTITUTIONAL LAW: EQUAL PROTECTION OF THE LAWS* 146 (2003) ("*Brown* is of continuing significance mostly as a triumphal narrative that, ironically, serves as rhetorical support for the racial status quo and, only occasionally, as a dim reminder of a constitutional world that might have been.").

259. See, e.g., BICKEL, *supra* note 89, at 247–54 (arguing that the "all deliberate speed" formula opened up the necessary colloquy between the courts and political branches); RONALD DWORIN, *LAW'S EMPIRE* 379–92 (1986) (defending *Brown* through Hercules' moral philosophical approach to interpretation); KLARMAN, *supra* note 253, at vii ("Every teacher of constitutional law must ultimately make peace with [it].").

260. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED* 48–49 (1987); CHARLES OGLETREE, *WITH ALL DELIBERATE SPEED* 10 (2004).

A generation later, we have come full circle. Mark Tushnet, a former clerk to Justice Thurgood Marshall and a faithful documentarian of the NAACP's civil rights strategy to dismantle segregation, now warns that "we ought not celebrate the Supreme Court's role in *Brown* as a strong demonstration of how the Court can bring about change on behalf of those who lack political power."<sup>261</sup>

Likewise, Derrick Bell, once a member of the NAACP Legal Defense Fund team charged with enforcing desegregation decrees across the land, today passionately argues that Americans have been worshipping a false idol all along. On reconsideration, *Brown* was a "magnificent mirage" allowing citizens ardently to believe that racial justice had been achieved through fidelity to a veneer of formalism.<sup>262</sup> *Plessy* as symbol should be rescued and revitalized, Bell insists, so that equality of educational opportunity can be realized without the dazzling illusion of integration.<sup>263</sup> Bell optimistically believes that the reinvigorated vessel of *Plessy* would draw citizens and leaders together in a more lasting community than *Brown* ever could.<sup>264</sup>

Critics and defenders of *Brown* have arrived in a similar place of skepticism. It is hard to escape the feeling that *plus ça change, plus c'est la même chose*.

#### B. FABLES OF THE RECONSTRUCTION

Judges were once students. If law schools are important institutions not only passing along technical skills but also nourishing the intellectual soil from which belief in law springs, then surely the academy bears its share of responsibility for the construction and destruction of legal symbols. For not only does the academy serve as a repository of law's possibilities, it also receives individuals who are open to its ministry and eager to enter law's inner sanctum. To fully appreciate the evolution of legal iconography, we must go to this wellspring of faith.

Teachers oversee a strange conversion process that is, by turns, empowering and alienating. Students learn that *Korematsu*<sup>265</sup> is a disfavored decision for its unflagging deference to assertions of national security and fears of treason based on cultural and ethnic characteristics; that *Griswold*'s<sup>266</sup>

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261. TUSHNET, *supra* note 114, at 146.

262. BELL, *supra* note 7, at 4–5.

263. *See id.* at 5, 196 (positing that *Brown* merely "rewir[ed] the rhetoric of equality," instead of "laying bare *Plessy*'s white-supremacy underpinnings and consequences").

264. *See id.* at 20. Put aside the fact that he is largely talking about black and white America, and ignores even Justice Harlan's demeaning terms in speaking about those of Chinese ancestry. Looking backward as he does, Bell cannot seem to distinguish *Brown I* from *Brown II*; nor can he separate *Brown* from the violence and defiance that followed.

265. *Korematsu v. United States*, 323 U.S. 214 (1944).

266. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

reasoning is intellectually sloppy; that *Dred Scott*<sup>267</sup> is to be reviled for its dehumanization of slaves as property and for inflaming the passions for secession and war. By contrast, the High Court's refusal to enjoin publication of the Pentagon Papers is to be celebrated for its vindication of First Amendment values.<sup>268</sup> Though reactions are never uniform, the early impressions students have upon encountering the decisions—negative or positive, relevant or peripheral—later affect whether the cases will re-emerge in public life, and if so, the general cast these rulings will be given during constitutional debate.

Infatuation with judicial power is modeled from the very start through lessons about *Marbury*. Concomitantly, academic culture has stunted the rehabilitation of *Brown*-as-symbol that might otherwise have taken place. In classrooms across the land, law teachers painstakingly present *Marbury* as a foundational case establishing the very basis of federal judicial authority, perhaps in reverential tones,<sup>269</sup> thereby perpetuating the centrality of the legal system.<sup>270</sup> *Marbury*'s gestalt properties pivot around hallowed beginnings—our initial awakening to the power and majesty of law, absorbed at the start of a professional career. Leading treatises and casebooks begin with *Marbury* as the paradigmatic constitutional case.<sup>271</sup> Advanced courses in public law then revolve around the core issues raised by the case, thereby reinforcing the sense that American law springs from this exclusive font.

By contrast, *Brown* is relegated to a unit on questions of race (or buried in a survey of equal protection law) or, worse yet, it is banished to the second year of tutelage, when students' attentions have begun to drift outside the ivy-covered walls. The manner in which we teach *Brown* reinforces the impression that it is mostly about ends. It is about Jim Crow's demise, the death of a purely private model of adjudication, and the end to the veneer of social cohesion that prevailed through the early 1950s.

On this last point, the quasi-evolutionary structure of conventional legal pedagogy could very well underscore a misleading sense of inevitability in

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267. *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

268. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

269. In mostly worshipful terms, Robert McCloskey famously described *Marbury* as a "masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in the another." ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 40 (1960).

270. For this reason, there are professors who refuse to teach *Marbury* at all. See generally Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 *WAKE FOREST L. REV.* 553 (2003).

271. See JESSE H. CHOPER ET AL., *CONSTITUTIONAL LAW* 1 (2001); CHARLES A. SHANOR, *AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION* 12 (2001); KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 3 (2001). But see BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 7, 17 (4th ed. 2000) (beginning with controversy surrounding a national bank, and the resulting decision in *McCulloch v. Maryland*).

the development of the law. Mistaking chronology for progress, one comes to believe that this interpretive path was not only foretold, but appropriate and wise.

If students are invited by teachers to evaluate beginnings at all, it is usually to reflect upon deeply troubled beginnings that might be best forgotten: the start of a painful and shameful period of institutional resistance and bussing, extensive judicial supervision, overreaching, and eventual abandonment of the field. At the invitation of casebook authors and professors, students probe the pseudo-scientific quality of the doll experiment, sense that *Brown* is indefensible as a matter of strict originalism, and reflect upon the “massive resistance” of desegregation orders.<sup>272</sup>

Leading constitutional law casebooks then proceed seamlessly from an analysis of the analytical vulnerabilities of the *Brown* decision to: (1) a theoretical discussion of the dangers of “judicial supremacy” (leading from the language in *Cooper v. Aaron*), but at the cost of implying that the desegregation cases introduced or exacerbated a juricentric view of law; and (2) the practical difficulties (perhaps impossibility) of enforcing desegregation orders.<sup>273</sup> This chapter of our constitutional history continues to receive the most exhaustive treatment in the teaching materials; for no other constitutional norm are students asked to so deeply question the efficacy of legal remedies. This is pessimism as pedagogy, pure and simple.

Some critical commentary is, of course, unavoidable and advised, as there has never been a phenomenon quite like that of the black experience under law in America. And special attention is essential for a fair-minded treatment of the topic and for a dutiful exploration of the fine points of legal craftsmanship. Yet it is hard to deny that the manner in which law teachers organize and present these two cases fosters lasting perceptions of these icons.<sup>274</sup>

In failing to explore the multifaceted and pernicious systems of slavery and segregation in all of their complexity even as we demand special attention to race-based remedies, are many of us unwittingly implying that the cure was worse than the disease? By considering the special challenges of desegregation but spending little time on enforcement difficulties in other constitutional settings, are we sending the message to our students that the

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272. Echoing Senator Harry F. Byrd's (D-Va) famous rallying cry against *Brown*, Erwin Chemerinsky titles his section on the enforcement difficulties of desegregation, “Massive Resistance.” ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 603–15 (2001).

273. See CHERMERINSKY, *supra* note 272, at 605 (“[T]here is no doubt that despite 40 years of judicial action, school segregation continues. Indeed, racial segregation in American schools has been increasing over the past decade.”); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 455–74 (4th ed. 2001) (surveying multiple threads of criticism of *Brown* and concluding with thoughts on the “efficacy of judicial review”).

274. Some scholars have expressed concerns that legal pedagogy unnecessarily fosters the hermeneutics of suspicion. See generally Paul Schiff Berman, *Telling a Less Suspicious Story: Notes Toward a Non-Skeptical Approach to Legal/Cultural Analysis*, 13 YALE J.L. & HUMAN. 95 (2001).

game of substantive equality is not worth the candle? Can we really blame our students if, at the end of the day, *Marbury* conjures more attractive images of judicial authority and prestige, while *Brown* sparks feelings of disillusionment and despair?

After all, *Marbury*, with its sweeping and awe-inspiring rhetoric, appears initially to the novice as a grandiose assertion of raw will despite Marshall's protestations, but upon reflection appears justified by principle (either because judicial review is deemed essential to the very notion of constitutionalism or because it is comforting to see only Marshall's elegant tribute to duty and right). Our teaching of *Brown* involves an inversion of this acculturation process: its spare language initially comes off as principled, but looks more like a naked assertion of political will as students realize that *Brown* was repeatedly applied without elaboration.

By the time the class moves on to other subjects, the damage has been done: *Marbury* as an idol has been uplifted, while *Brown*, for another generation of believers, has been smashed. Having internalized the lesson that law and morality are not synonymous, most lawyers will allow a part of themselves to admire *Brown* because it was a righteous outcome or because it represents a benchmark of cultural literacy. But familiarity will rarely be accompanied by true affection.

What judges say about this pair of cases and how they deploy them in constitutional litigation will continue to dominate—even if they do not decisively determine—their cultural meanings. Insofar as the academy has anything to say, our way out of this situation lies in a reconstructive pedagogy, one that neither romanticizes these extraordinary rulings nor devastates them for falling short of perfection. Neutrality might be impossible to attain, but there is significant room in the law for historical acuity, wisdom borne of experience, and bravery of spirit.

### C. OF CREATION MYTHS AND LEGAL PARABLES

On a fundamental level, each case as it is taught to and absorbed by budding lawyers has a kind of analogue in religious myth-making: creation stories and parables. Creation myths are folk explanations of an existing social reality: how divine power manifested itself in the material world, why the sky is blue, how it is that institutions have come into being, and so forth. As Milner Ball reminds us, “[s]tories of origin locate law, invest it with legitimacy, and so lend it stability.”<sup>275</sup>

Like references to our revolutionary origins or the Constitution's founding, mention of *Marbury* harkens back to the glorious genesis of this country and the blessings of judicial power.<sup>276</sup> One might imagine the

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275. Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2280 (1989).

276. See *John Marshall and the Genesis of the Tradition*, in G. EDWARD WHITE, *THE AMERICAN*



following characterization of this “original and supreme will” guiding the creation of American law:<sup>277</sup> “In the beginning was the Word. Through it, all things came into being, not one thing came into being except through it. What came into being was everlasting freedom, prosperity, and life that was the light of men; and light shines in darkness, and darkness cannot overpower it.”<sup>278</sup> This, at least, is the tale that spills forth from *Marbury*’s contemporary incarnation. Channeled through this symbol, the majestic myth of law’s origins has facilitated an aggressive advancement of judicial priorities even as it has projected an image of stability and steadfastness. It has modeled a great cosmological ladder representing “a structure of hierarchy, order, rank, and degree,” with the High Court at the top of the cosmos.<sup>279</sup>

Religious parables, on the other hand, serve a quite different function: although they, too, are constructed to convey deeper truths about the social-legal order, there is a core ethical component to parables—composed of moral judgment, a greater emphasis on human agency, and a warning that someone else’s misfortune is to be avoided.<sup>280</sup> A parable is structured around the comparison of two experiences in which a hidden truth is revealed through the narrative device and careful, even repeated, consideration on the part of the listener. “The worth of parables as instruments of teaching,” we are told, “lies in their being a test of character and in their presenting of each form of character with that which, as a penalty or blessing, is adapted to it.”<sup>281</sup>

Often there is a subversive element to parables, barely detectible beneath their mysterious and poetical qualities. The parables spun by Jesus of Nazareth were directed at undermining established legal-religious practices and restoring lost faith in ways that were decipherable to ordinary believers, while holding Roman criticism at bay for as long as it was feasible. The technique is aimed at those who “look without seeing and listen without

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JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 6 (1976).

277. This was Marshall’s memorable personification of higher law: “This original and supreme will organizes the government, and assigns to different departments their respective powers.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803).

278. Cf. *John* 1:1–5.

279. NORTHROP FRYE, *MYTH AND METAPHOR: SELECTED ESSAYS, 1974–1988*, at 245 (1990); see also *id.* at 246 (“A vision of the cosmos [is] essentially a structure of authority and degree.”).

280. A parable has been defined as “a method of speech in which moral or religious truth is illustrated from an analogy derived from common experience in life. . . . [T]he teaching of the parable is of universal application, suited for all analogous circumstances and for all succeeding time.” *THE NEW WESTMINSTER DICTIONARY OF THE BIBLE* 700–02 (Henry Snyder Gehman ed., 1970).

281. WILLIAM SMITH, *A DICTIONARY OF THE BIBLE* 481, 482 (F.N. & M.A. Peloubet eds., 1986).

hearing or understanding” and borne of a sense that the parable form alone can break through.<sup>282</sup>

Because of these related attributes, legal parables are powerful vehicles for unraveling the cultural and political paradigms undergirding law’s dominion. Cryptic yet resonant, parables facilitate legal change incrementally. This has certainly been true of *Brown* over the course of the last thirty years, as the decision has both embodied and aided the selective reduction of judicial involvement in whole areas of social life.

If *Brown* is so often used to fashion a legal parable, what are its lessons? Through successive encounters, its hidden truths are revealed to us like a bauble turning in the sun. It is a cautionary tale about misdirected energy, judicial hubris, a failure of follow-through, the undeniable—perhaps irresistible—sway of culture over law, or the emptiness of liberalism or race-conscious remedies.

We ignore parables at our own peril, for the ancient parable of the lamp teaches that:

No one lights a lamp to cover it with a bowl or to put it under a bed. No, it is put on a lamp-stand so that people may see the light when they come in. For nothing is hidden but it will be made clear, nothing secret but it will be made known and brought to light.<sup>283</sup>

If *Marbury*-style iconography cloaks interpretation in law’s mystique, *Brown*’s symbolism aims to uncover and proclaim what is truly at stake.

Law’s spiritual life, in all of its splendor and horror, is refracted through these cases. The combined effect of these two icons on the legal imagination is a diminished, pragmatic vision of judicial authority divorced from any firm conceptions of justice. *Marbury* is not associated with a strong moral-based justification for judicial authority, but rooted in raw bureaucratic power—the considerations that rule the day are accountability, self-preservation, obedience, and efficiency. Marshall’s ringing quotation of Blackstone that “where there is a legal right there is also a legal remedy” has been revealed to illustrate no truism, as the outcome of that controversy itself plainly confirms.<sup>284</sup>

It is always risky to attempt predictions based on a reading of signs. The history of law, like human history generally, is a set of contingencies. Unforeseen events can cause a disruption; a series of small interpretive choices and popular reactions can add up to a quiet legal revolution. More important, law’s appearance can be deceiving. Still, legal symbols do reveal

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282. “The reason I talk to them in parables,” Jesus reportedly explained with a sudden clarity of purpose, “is that they look without seeing and listen without hearing or understanding.” *Matthew* 13:13.

283. *Luke* 8:16.

284. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). That William Marbury was told he had a right but that no writ would issue surely offered cold comfort.

gestalts—the particular interaction between law’s manifestations and the beliefs they express.

Coupled with *Brown*’s aura of a seemingly discredited style of social engineering overseen by the courts, two possible lessons present themselves. One lesson seemingly forecast by the signs is that judicial power is efficacious for the reformation of political relationships such as those founded on federalism and separation of powers, but less so for controversial social projects.

A second configuration in our symbolic discourse is that it is far easier to fulfill a promise of liberty than equality, and that the cleansing force of the Judiciary might be more available for projects involving the one than the other. The relative commitment of resources required by an interpretive outcome often plays a decisive part in the calculus: claims of formal equality, like the kind endorsed by *Romer v. Evans*<sup>285</sup> or the dominant understanding of *Brown*, require less institutional monitoring and are more likely to be founded upon an existing social consensus or to develop such a consensus in the short-run.

This emerging picture is consistent with the Supreme Court’s grand revivification of the constitutional privacy doctrine to encompass sexual autonomy.<sup>286</sup> Striking down laws that criminalize sexual conduct did not require the Judiciary to step far beyond existing cultural mores. Nor did it require any significant expenditure of institutional prestige or judicial oversight. At the same time that privacy law was reborn, more nuanced equality-based claims have faltered, collapsing from the thinness of prevailing conceptions of equality and the weakness of the cultural support behind them.<sup>287</sup>

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285. 517 U.S. 620 (1996).

286. It may seem puzzling that everyone but O’Connor avoids the equal protection argument in *Lawrence*, particularly given Kennedy’s authorship of *Romer*. Many of the Justices surely saw it as an opportunity to strike a blow for freedom under the privacy rationale and erase *Bowers*. On the other hand, the development seems to say as much about a collective avoidance of equal protection jurisprudence out of a sense that cultural consensus has not yet fully formed in support of a stronger conception of gay equality. At a minimum, the Court appeared to be hedging its bets, rallying around a rationale that, if necessary, could be distinguished from other situations looming on the horizon (say, gay marriage). For now, then, *Lawrence* and *Romer* stand as incompletely theorized and un-reconciled ideals of freedom for gays and lesbians.

287. I have in mind not only *Gratz*, which ascribed decisive constitutional significance to the University of Michigan’s decision to quantify the role of race in the admissions process, but also cases like *United States v. Armstrong*, 517 U.S. 456, 470–71 (1996) (rejecting prima facie evidence of equal protection violation), *McCleskey v. Kemp*, 481 U.S. 279, 291–92 (1987) (rejecting claim of racial bias in administration of death penalty despite evidence of racial disparities), *Rice v. Cayetano*, 528 U.S. 495, 499 (2000) (ruling that state could not exclude non-Hawaiians from voting for trustees for public trust devoted to Native Hawaiians), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (subjecting benign racial classifications to strict scrutiny).

Whatever vision of law legitimated by these legal symbols, do we not have an impoverished view of judicial authority? When the road to salvation is not open to all, should we not wonder how this will influence the integrity of our commitments to one another and, ultimately, whether our constitutional faith will endure?

One thing is certain: legal symbols and the narratives they spin can become self-generating after they strike a chord with the citizenry. A convergence of cultural and institutional forces imbues a symbol with a kaleidoscope of related meanings. Once set in motion, the symbol is far easier to sustain than it was to initiate.

#### VI. THE END FOR NOW

When *Marbury* and *Brown* were decided in their respective eras, each marked the affirmative exercise of judicial prerogative amid political or social controversy. In our own time, these icons have acquired very different meanings in the minds of leading lawgivers. *Marbury*—cradled and nurtured by a bold, modern Supreme Court—has perpetuated a picture of our secular religion that is at times sharply vertical, univocal, and awe-inspiring. But it would be a mistake to confuse fear and wonder with heartfelt devotion. For many jurists, *Brown* and its promise of equality guaranteed by the courts remains a shimmering, unattainable ideal; it stands as a naïve, perilous, cacophonous vision of law. What fills this vacuum is a promise of justice that might be agreeable to all, but one that is thin, highly formalistic, and unlikely to rouse the faithful.

If I appear disturbed by *Marbury*'s role in promoting the centrality of the Judiciary to our belief in the law and alarmed by *Brown*'s uncertain place in our hearts, it is not because I believe it must always remain so. Legal symbols have only the valence that society gives them. What has been reduced to rubble may yet be rebuilt. I am reminded of the lyrical words of Psalms 118:22, which reflects an abiding faith in foundational change: "The stone which the builders rejected has become the cornerstone."<sup>288</sup>

Change can occur, but cultural transformation is hard work. If we are to rededicate ourselves to the process of restoration, we must endeavor to reconstruct *Brown* as vigorously as we deconstruct it. If *Marbury* is ever to be toppled from its pedestal, its impoverishment of interpretive fellowship must be revealed for all to see.

What has been done to our legal icons may yet be undone. But it takes time. The cultural accretions have occurred over decades. We shall have to chip away at the encrusted bodies of these two rulings, little by little. And hope for the best.

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288. This saying reflects an enduring Jewish hope in the rebuilding of the Temple—reflecting both a renewal of law and the community of believers, and it is incorporated into the parable of the wicked tenants in *Mark* 12:10; *Matthew* 21:42; and *Luke* 20:17.