Boston University School of Law
Scholarly Commons at Boston University School of Law

Faculty Scholarship

4-27-2023

The Problem is the Court, Not the Constitution

Jonathan Feingold
Boston University School of Law

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship

 Part of the Civil Rights and Discrimination Commons, Constitutional Law Commons, and the Supreme Court of the United States Commons

Recommended Citation

Jonathan Feingold, *The Problem is the Court, Not the Constitution* , *in* JOTWELL (2023).
Available at: https://scholarship.law.bu.edu/faculty_scholarship/3579

This Response or Comment is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.

BOSTON UNIVERSITY

The Problem is the Court, Not the Constitution

Author : Jonathan Feingold

Date : April 27, 2023

Brandon Hasbrouck, *The Antiracist Constitution*, 102 **B.U. L. Rev.** 87 (2022).

"But first, we must believe." So concludes *The Antiracist Constitution*, where Brandon Hasbrouck confronts an uneasy question: In the quest for racial justice, is the Constitution friend or foe? Even the casual observer knows that constitutional law is no friend to racial justice. In the nineteenth century, *Plessy v. Ferguson* blessed Jim Crow. In the twentieth century, *Washington v. Davis* insulated practices that reproduce Jim Crow. Now in the twenty-first century, pending affirmative action litigation invites the Supreme Court to outlaw efforts to remedy Jim Crow.

Of course, "constitutional law" is not some independent and self-executing thing. It is little more than what five Supreme Court Justices say the Constitution means. We might, accordingly, reframe the opening question and instead ask: Has the Supreme Court been faithful to the Constitution? Hasbrouck offers a bold response. Since at least the fall of the Civil War, the Supreme Court's race jurisprudence has been defined by constitutional infidelity. Hasbrouck views the Constitution as an antiracist document that holds the "tools of abolition democracy." For the antiracists and abolitionists in the room, Hasbrouck has a message: The Constitution is on our side. Do not misread constitutional law for the Constitution. And to reclaim constitutional law, we must first reclaim the Constitution.

I want Hasbrouck to be right. I want a Constitution that distinguishes Jim Crow from affirmative action; grandfather clauses from race-neutral alternatives; racism from antiracism. I want to believe. But the story Hasbrouck tells would indict 150 years of constitutional jurisprudence. Hasbrouck is prepared. To put it in social-media vernacular, he came armed with receipts.

Through a kaleidoscopic highlight reel, Hasbrouck captains a journey through white supremacy in America. But he cautions that the Constitution is not to blame—at least not our Constitution. In Hasbrouck's words, one hears echoes of the late Justice Thurgood Marshall, who on our nation's 200th birthday refused to celebrate the Constitution of our Founders. "While the Union survived the Civil War," Marshall underscored, "the Constitution did not." Our Founders' Constitution died with the Confederacy. Our Constitution rose in its aftermath.

To understand our Constitution, Hasbrouck uplifts "oft-ignored original public meanings of the Reconstruction Amendments." This "originalist" turn builds on scholarship that documents how the Reconstruction Congress used and endorsed race-conscious tools to build a new America. Specifically, Hasbrouck features the arguments of antebellum abolitionists and the Reconstruction Amendment's congressional champions. He also centers an all-too-frequently overlooked constituency: Black Americans. Hasbrouck explores how contemporary Black communities viewed the broader project of Reconstruction—and what this says about the Constitution itself. Black Americans saw the Reconstruction Amendments as integral to a racial project to transform and remake America's social, economic, and political orders. Taken together, these diverse historical sources of original public meaning reveal a document infused with, and animated by, antiracist and abolitionist commitments.

To complement this history, Hasbrouck interrogates the origins of constitutional colorblindness, a judicial philosophy often deployed to defuse antidiscrimination law's liberatory promise and potential. Proponents of colorblindness trace the theory to Justice Harlan's *Plessy* dissent. Writing for himself in one of the Court's most notorious cases, Harlan proclaimed that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." The ritual of invoking Harlan's words holds a certain logic. As with right-wing entities that appropriate civil rights icons like Martin Luther King and *Brown v. Board of Education*, this rhetorical move shrouds racially regressive projects under the veil of

equality itself. Hasbrouck pulls back the veil through a simple yet uncommon tactic: he places Harlan's language in context. As Hasbrouck explains, Harlan was no abolitionist interested in realizing the promise of multiracial democracy. To the contrary, Harlan harbored white supremacist views and believed de jure segregation was unnecessary to uphold America's racial hierarchy. Harlan's words speak for themself: "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty."

The Antiracist Constitution leads to a liberating realization. Those on the front lines fighting for an antiracist and abolitionist America enjoy more than moral authority. They also enjoy constitutional authority. Constitutional law continues to impede racial justice in America. But the problem is not the Constitution. The problem is a Supreme Court whose hostility to civil rights comes *in spite of*, not because of, the Constitution. If such a claim appears bold, one reason is that constitutional fidelity has long been the exception to the rule—the outlier to a constitutional jurisprudence that privileges the status quo over constitutional command.

Against this backdrop, Hasbrouck invites us to reclaim *our* Constitution. This entails more than locating antiracist and abolitionist politics within the Constitution itself. It also requires recuperating color-consciousness as constitutionally compelled, not just constitutionally permitted. It also requires challenging colorblindness as not simply anti-egalitarian, but also anti-Constitution. One might say Hasbrouck calls on us to shift from racial justice defense to racial justice offense. The Constitution has our back. But first, we must believe.

Cite as: Jonathan Feingold, *The Problem is the Court, Not the Constitution*, JOTWELL (April 27, 2023) (reviewing Brandon Hasbrouck, *The Antiracist Constitution*, 102 **B.U. L. Rev.** 87 (2022)), https://conlaw.jotwell.com/the-problem-is-the-court-not-the-constitution/.