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Stuart Chinn

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PART I

INTRODUCTION

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Introduction: Reconstructing Governance

America's history is marked by periods of dramatic reform, during which established political and social hierarchies were undermined. For example, the reforms of Reconstruction in the 1860s dismantled slavery, and a century later the reforms of the civil rights era brought the demise of Jim Crow segregation and voting disfranchisement laws. These kinds of reforms draw the sustained attention of students of American history as crucial break points in the nation's past and as powerful symbols of then-prevailing public moods and sentiments. Further, and even more importantly, these kinds of reforms stand out as testaments to some of the most admirable parts of American political culture. They remind us of the continuing promise of achieving greater equality and inclusiveness in our own time.

And yet, these reforms also present troubling questions once we consider their aftermath. The reforms of Reconstruction may have dismantled slavery and enshrined within the Constitution new principles of legal and political equality across race, but these principles were undermined by the Jim Crow laws that soon followed. While slavery was abolished, legally sanctioned forms of white supremacy in the southern states survived and ultimately enjoyed an extended life in the post-Reconstruction era.

The civil rights era presents striking similarities. One key subset of those reforms was the transformation of judicial and congressional understandings of constitutional equal protection. Beginning with *Brown v. Board of Education*¹ and continuing through the 1960s, a number of

¹ 347 U.S. 483 (1954).

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Supreme Court decisions and civil rights statutes dismantled various facets of Jim Crow in the South, including, perhaps most notably, segregated public schooling. Yet commitments to color blindness and neighborhood schools by southern and northern conservatives helped pave the way for continued de facto racial exclusions, including de facto school segregation (in both the North and South) in the post-*Brown* era.²

Consider also a third example that takes us some ways from matters of race or the South: the passage of the Wagner Act during the New Deal era capped the dismantling of an intricate system of employer-employee relations governed by master-servant common law doctrines.³ Yet despite the Wagner Act's blow to employer interests embodied in the Act's promotion of collective bargaining, employer prerogatives were resurgent in judicial rulings in the late 1930s that dealt with, among other things, employee rights in economic strikes and sit-down strikes. The principled reassertion of employer prerogatives during these years was later reflected and entrenched within the post-World War II system of governance over labor relations as well.

Each of these examples thus suggests not only the possibilities for momentous change in American politics but also the limits attendant upon change. If the reforms during the Reconstruction, the New Deal, and the civil rights eras promised fundamental transformations of the American polity, the aftermath of each demonstrates how that promise can be compromised. Certainly none of these reforms were later reversed or nullified. Slavery never returned to the post-Civil War South, master-servant common law labor doctrines were not categorically resurrected in the late 1930s, and widespread, legally-mandated racially segregated public schools will surely never reappear in the American society. But while each set of reforms marked out important and permanent political changes, conditions in their aftermath also demonstrate the stubborn resilience of older ideas, principles, and institutions that carried elements of the old order into the new.

² Matthew D. Lassiter, *The Silent Majority: Suburban Politics in the Sunbelt South* (Princeton: Princeton University Press, 2006), 132, 244, 249, 304. On de facto school segregation in urban areas of the South, see *ibid.*, 299–300. Although southern public schools have generally been more integrated than others in the nation, trends since the 1990s indicate heightened resegregation. Gary Orfield, “The Southern Dilemma: Losing *Brown*, Fearing *Plessy*,” in *School Resegregation: Must the South Turn Back?*, ed. John Charles Boger and Gary Orfield (Chapel Hill: University of North Carolina Press, 2005), 1, 7–11.

³ Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (New York: Cambridge University Press, 1999).

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What are we to make of the partial changes wrought by legal and political reforms? On the one hand, the persistence of older principles into the postreform order aligns with some fairly common intuitions. We know that the dispersal of authority within the American political system – between states and the federal government and also among the branches of the federal government – makes major reform difficult to achieve. Perhaps, then, it is not so surprising that once the transient conditions for reform have passed, older ideas, values, and social arrangements lodged within discrete pockets of the political system are able to reassert themselves.

We have heard the claim, too, that as Tocqueville observed, the law and the legal profession have an inherently conservative nature⁴ – traits that might prompt us to expect the tempering of radical political changes. Finally, students of the legal process are familiar with the complexities of implementation and judicial interpretation that follow the passage of any major piece of legislation. The incongruities between reform principles and conditions in the aftermath of reform might also be unsurprising in light of the inevitable intervention of other actors in interpreting and implementing reform. Potential tempering of earlier reforms is perhaps especially likely if those actors intervene with distinct motives, and at markedly different moments in time, than the original authors of reform.

Still, even if certain incongruities between reform and its aftereffects may not be totally unexpected, they can hardly be considered obvious. After all, if such pessimistic views on the possibilities of reform were pervasively obvious, why does rhetoric surrounding new legislation and new judicial rulings often connect these events to “new beginnings” or new states of affairs?⁵ Indeed, we often do attribute great meaning to such

⁴ Alexis de Tocqueville, *Democracy in America*, ed. J. P. Mayer, trans. George Lawrence (New York: Harper Perennial, 1988), 264–65, 268–69.

⁵ See, for example, Barack Obama on the Affordable Care Act: “In the end, what this day represents is another stone firmly laid in the foundation of the American Dream. Tonight we answered the call of history as so many generations of Americans have before us. When faced with crisis, we did not shrink from our challenge, we overcame it. We did not avoid our responsibility, we embraced it. We did not fear our future, we shaped it.” Remarks on House of Representatives Passage of Health Care Reform Act, 2010 Weekly Comp. Pres. Doc. 193 (March 21, 2010), <http://www.gpo.gov/fdsys/pkg/DCPD-201000193/pdf/DCPD-201000193.pdf>. Likewise, Lyndon Johnson stated the following on the Voting Rights Act of 1965: “Today is a triumph for freedom as huge as any victory that has ever been won on any battlefield. . . . Today we strike away the last major shackle of those fierce and ancient bonds. Today the Negro story and the American story fuse and blend.” Lyndon Johnson, “Remarks on the Signing of the Voting Rights Act,” August 6, 1965, <http://millercenter.org/president/speeches/detail/4034>.

legal and political acts, and at least at an intuitive level, we often associate such acts with significant social and political changes. The example of Jim Crow and the odd place it holds in any broader narrative of American history is instructive in this regard. The rise of Jim Crow in the late-nineteenth-century South stands out as perhaps the most glaring oddity in American political development precisely because we assume the Reconstruction Amendments were monumental political achievements, and because it is not easy to understand segregated social arrangements and black disfranchisement as logical consequences of those Amendments.

Further, even if one was particularly attentive to the aforementioned conservative influences on American political and legal development, those explanations seemingly offer limited analytical value. With New Deal labor rights or the subsequent transformation of constitutional equal protection, the substance and manner of how elements of the old order carried forward into the new can hardly be intuited by simply referring to law's conservatism, or vaguely nodding to the complexities of judicial interpretation. In the case of the New Deal, only certain kinds of employer prerogatives, framed in certain ways, were resurgent after the passage of the Wagner Act. In the case of the post-civil rights era, only certain kinds of racial exclusions, framed in certain ways, persisted in the constitutional law of equal protection.

All of these examples suggest the need to account for the precise mix of factors that compromise reform aspirations. What structural factors are at play, and which are more important than others? What is the exact sequence of events by which less-radical governing arrangements formally emerge after a moment of reform? Uncovering answers to these questions will at least confirm and give substantive weight to some of our intuitions on conservative tendencies in legal and political development. But beyond this, such answers will also shed light on persistent questions surrounding some of the most important eras in American history, and offer a more conceptually rigorous assessment on the limits and possibilities for achieving political change in American politics.

There is hardly a shortage of scholarly work on the topic of political change in American history. One might expect that among those scholarly works centrally concerned with examining the substance of the political changes ushered in by legal reforms in American history – and that proceed from a theoretical and comparative, multi-case-study approach – some systematic attention to this incongruity might be present given

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its recurrence. We might expect this topic to arise in those studies that encompass major constitutional changes as well, given that postreform incongruities could be even more conspicuous here.

Yet surprisingly, comparative-theoretical studies of political change in American history largely fail to provide any systematic treatment of the incongruities between intended reforms and postreform conditions. Consider four exemplars of scholarly work along these lines by Walter Dean Burnham, Bruce Ackerman, Paul Pierson, and Richard Valelly. Each examines the dynamics of political change from a comparative analysis, drawing on multiple case studies from American history. Furthermore, the theoretical claims of each encompass instances of major constitutional change. However, while important insights emerge from all of these works to provide hints of the complex relationship between legal reform and postreform governing arrangements, none provide a full or convincing account of this relationship. Indeed, the question of how new governing arrangements are constructed after legal reforms are enacted tends to remain lost or obscured by analytical frameworks preoccupied by important, but distinct, concerns.⁶

Burnham and Ackerman approach the topic of political change by focusing on the *initiation* of such changes. For his part, Burnham stands out as one of the most able defenders of the critical realignment perspective, which posits a basic dichotomy in American political history between “normal” elections and “critical” elections.⁷ More ambitious versions of critical realignment theory, such as Burnham’s, emphasize that critical

⁶ A noteworthy exception is Eric Patashnik’s book, *Reforms at Risk* (Princeton: Princeton University Press, 2008). It offers a discussion of postreform development in a diverse array of policy contexts. Whereas Patashnik’s study focuses on more narrowly defined areas of policy, this book focuses on the creation of governance in broad and highly visible areas of constitutional politics. Thus, the variables on which Patashnik focuses in examining policy durability and postreform effects diverge somewhat from the considerations that are at the forefront in this book. See also Sarah Staszak’s relevant discussion of “judicial retrenchment”; Sarah Staszak, “Institutions, Rulemaking, and the Politics of Judicial Retrenchment,” *Studies in American Political Development* 24 (October 2010): 168–89. Finally, although it is less preoccupied with theoretical concerns than the present discussion is, Morton Keller’s rich and expansive historical survey of late-nineteenth-century America details the interplay between reformist ideals (associated with the Civil War) and more traditional ideals, in a number of policy areas. Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge MA: Harvard University Press, 1977).

⁷ Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* (New York: W.W. Norton & Company, Inc., 1970).

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elections inaugurate decisive shifts in public policy that help define the subsequent political equilibrium.⁸ The critical elections he identifies as such are those of 1800, 1828, 1860, 1896, and 1932.⁹

In Burnham's model, the engine for these disruptions, and the reason for their short duration, lies in the peculiar nature of the interaction between socioeconomic development and the American governmental system. Because the two coexist largely autonomously from one another, periodic disruptions in socioeconomic life generate losers who find their concerns not addressed by governmental institutions that simply lack the capacity or the inclination to be responsive to them.¹⁰ The consequence is a slow buildup of societal pressures that finally results in a dramatic disruption to political equilibrium and the arrival of a critical realignment.¹¹ However, just as soon as these pressures break through in this manner, Burnham tells us that they are accommodated and dissipated almost immediately. Once these realignments restabilize the polity, political leaders have no further incentive to push for additional change: "successful routines are established or reestablished for winning office," and "there is no motivation among party leaders to disturb the routines of the game."¹²

Similarly, Ackerman has offered an elaborate normative and descriptive theory for a significant subset of constitutional developments, namely, those developments dramatic and sweeping enough to be called constitutional "transformations."¹³ The conceptual cornerstone of Ackerman's theory is the idea that the United States is a dualist democracy; he posits that lawmaking can occur along either a "normal political" track¹⁴ or along a "higher lawmaking" track.¹⁵ During periods of higher lawmaking, electoral choices by citizens and political choices by governing officials take on a much greater deliberative quality. Decisions made during these periods thus sometimes amount to constitutional

⁸ Ibid., 9–10.

⁹ Ibid., 1. In subsequent writing, Burnham has also identified 1968 as a critical election. Walter Dean Burnham, "Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's *We the People*," *Yale Law Journal* 108, no. 8 (June 1999): 2258.

¹⁰ Burnham, *Critical Elections*, 177–82.

¹¹ Ibid., 181–82.

¹² Ibid., 183.

¹³ Bruce Ackerman, *We the People*, vol. 1, *Foundations* (Cambridge, MA: Harvard University Press, 1991), 59.

¹⁴ Ibid., 230–65.

¹⁵ Ibid., 266–94.

transformations, and when they do, they ultimately have a lasting effect in structuring the substance of subsequent normal politics.¹⁶ Ackerman perhaps goes beyond Burnham, however, to offer a fuller account of the moment of disruption and punctuation. The critical junctures of Ackerman's historical narrative are extended political processes that can take a decade or longer for the relevant institutional bodies to fulfill their various functions.¹⁷ This framework allows him to identify, with greater clarity, the discrete governing principles that define and constitute the change itself.

While Burnham and Ackerman offer keen insight into the dynamics of "higher lawmaking" or transformational moments, what remains unexplored by both is precisely how those moments translate into new systems of governance. For its part, Burnham's account does not address how momentous political reforms are implemented or to what extent they may or may not structure the new equilibrium. Burnham's theory tells us why windows of political change open, but it is bereft of any institutional logic that explains how the window of change is decisively closed and how the new system of governance emerges.

Similarly, Ackerman's model fails to illuminate the link between constitutional reform and subsequent changes in governance because it does not address how the principles of reform are systematically reshaped and redefined as they confront preexisting institutions and rights. As a result, he is unable to explain the nature of the subsequent equilibrium, or era of "normal politics," with much success. For example, one does not easily find hints of the subsequent Jim Crow era in the energetic, egalitarian, reform-minded politics of Reconstruction in the 1860s, the period to which Ackerman pays most attention. Likewise, one does not easily find hints of the subsequent delimitation of labor rights within the more transformative politics of the New Deal era that Ackerman focuses on. By closing his analysis of these historical eras early, Ackerman casts these episodes in an overly transformative light and leaves the descriptive component of his theory with an incongruity: transformative political goals that reformers supposedly achieved during higher lawmaking – according to his model – often find themselves inexplicably subverted or otherwise redirected in the ensuing era of supposed normal politics.¹⁸

¹⁶ Ibid., 58–59, 59n1, 77, 266–94.

¹⁷ Bruce Ackerman, *We the People*, vol. 2, *Transformations* (Cambridge, MA: Harvard University Press, 1998), 123, 126–27, 246–47, 284, 360–61, 373–74.

¹⁸ Others have noted this problem as well. See Michael V. McConnell, *The Forgotten Constitutional Moment*, *Constitutional Commentary* 11, no. 1 (Winter 1994): 115–44.

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Consider next Pierson's theory of positive feedback. Here the question of how postreform governing arrangements are constructed is again obscured, but for a different reason from that seen with the preceding authors: Pierson's preoccupation is with "normal" politics and institutional resilience rather than transformative politics. Pierson tells us that, when operative, positive feedback mechanisms are structures that constrain political actors by narrowing their choices; positive feedback locks in, facilitates, and reinforces certain political choices and developmental paths facing those actors.¹⁹ While some degree of political contestation and contingency usually exists in most contexts, positive feedback reduces the range of possibilities and ensures that certain choices, power dynamics, and institutional arrangements will persist into the future.

There is much in Pierson's analysis that, as with the previous authors, illuminates the dynamics of political change and non-change. However, his focus on the efficacy of positive feedback raises significant, unanswered questions as to how and when exactly potential positive feedback mechanisms begin to bite and become efficacious. And indeed, answers to the latter question are needed for a theory of positive feedback to illuminate how systems of governance are initially constructed after reform.²⁰

Consider in this regard a historical case study that both Pierson and I deal with: the story of post-Reconstruction. Pierson discusses black disfranchisement as a case study of positive feedback at work. As he tells it, initial power asymmetries between Southern Democrats and Republicans – with Southern Democrats emerging victorious and redeeming southern state governments in the late 1870s – served as a positive feedback mechanism that led to the further entrenchment of this initial power

For Ackerman's reply, at least for the specific case of post-Reconstruction, see Ackerman, *Transformations*, 471–126. There is, however, another component of Ackerman's theory that might be relevant: his theory of interpretative "synthesis," where he conceptualizes judicial interpretation as weaving together and synthesizing "higher lawmaking" precedents. *Foundations*, 96–98, 115–16. While my theory of recalibration may converge with Ackerman's metaphor of "synthesis" in some important respects, I believe we differ in that I see recalibration as a component of transformative politics, whereas Ackerman appears to treat "synthesis" as a more or less continuous judicial exercise of fine-tuning.

¹⁹ Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton: Princeton University Press, 2004), 21, 63–71.

²⁰ Orren and Skowronek offer a similar critique of path-dependent arguments in general. Karen Orren and Stephen Skowronek, *The Search for American Political Development* (New York: Cambridge University Press, 2004), 102–04.