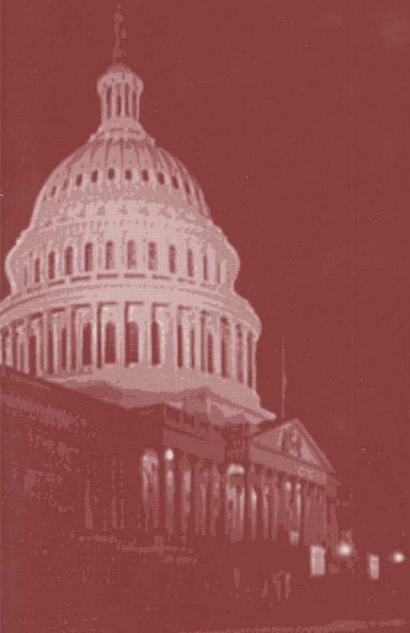
WILLIAM N. ESKRIDGE JR. AND JOHN FEREJOHN

A Republic of Statutes

The New American Constitution



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One or both of us presented chapters from this project to workshops at the Emory University School of Law, the Harvard Law School, the New York University Law School, the University of Pennsylvania School of Law, the University of Texas School of Law, the Vanderbilt Law School, and the Yale Law School, as well as a conference on statutes and constitutionalism held at Banff, Canada. We received helpful comments from participants at those workshops, too numerous to list accurately.

The theoretical points of this book—the centrality of statutes to modern constitutionalism, the notion of "superstatutes," and administrative constitutionalism—have been ones that we have been developing since the millennium began. We have enjoyed excellent feedback as well as inspiration from Bruce Ackerman, Akhil Amar, Lisa Bressman, Steven Calabresi, Philip Frickey, Barry Friedman, Sophia Lee, Sandy Levinson, Roger Noll, Victoria Nourse, Peter Ordeshook, George Priest, Joseph Raz, Larry Sager, and John Yoo.

Each chapter fills out our general theory, within the context of particular superstatutory regimes. In each case, we have benefited from critical comments made by scholars who are more learned in these fields than we are. Thus, chapter 1, on pregnancy discrimination and workplace accommodation of family responsibilities, could not have been written without the benefit of conversations with or feedback from Susan Deller Ross and Sonia Pressman Fuentes, the parents of the Pregnancy Discrimination Act, as well as Justice Ruth Bader Ginsburg and legal scholars Christine Jolls, Kevin Schwartz, and Joan Williams. Chapter 2, on voting rights, builds upon the original work of our friends Brian Landsberg and Bruce Ackerman, with whom we had several conversations, and of the great legal historian David Garrow.

Our colleague George Priest gave us a detailed critique of chapter 3, dealing with the Sherman Act; his comments required us to recast some of our analyses and greatly improved the chapter (errors remain our own, of course). We also received useful comments from Richard Posner, who once helped persuade the Warren Court to apply the law expansively but is now a major critic of such interpretations.

Chapter 4, dealing with social security, draws heavily from the work of political scientist Martha Derthick and conversations with Steven Teles. Although new to legal scholarship, our research associate Amanda Andrade provided unusually keen guidance for chapter 5, on family law. Chapter 6's analysis of the evolving wetlands regulations could not have been written without the expert guidance of Fred Bosselman and Dan Tarlock, whose scholarship, notes to us, and conversations gave us a deeper grasp of the science as well as the law in this area. Our treatment of issues of public finance and money in chapter 7 brought us into an area where we had much to learn, and we learned a lot from conversations with Claire Priest.

In addition to the published scholarship referenced in the endnotes, chapter 8's treatment of our polity's treatment of sexual and gender minorities drew from Eskridge's participation in the California same-sex marriage litigations. Conversations with David Codell, Shannon Minter, and Stephen Reinhardt were particularly helpful. Chapter 9, on the national security constitution, profited from conversations with and feedback from Oona Hathaway, Harold Koh, and John Yoo.

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Bill Eskridge dedicates this book to Ben and Mei van Eskridge.

John Ferejohn dedicates this book to the memory of his mother, Olga Collazo, who has now returned to her birthplace in Coamo.

CONTENTS

INTRODUCTION: AMERICA'S WORKING CONSTITUTION

This book presents a nontraditional framework for thinking about American constitutionalism. The traditional framework emphasizes the words and structure of the Constitution of 1789, and especially the Bill of Rights and a few other amendments, as interpreted by judges and trumping the political process. Its focus is on limited government and the associated urgency of protecting citizens and especially minorities from government oppression. While this focus is vital to maintaining and protecting our liberal democracy, it neglects the reason why we have a government at all, which is to protect us from each other and from outside enemies. A government strong and decisive enough to protect us is dangerous to liberty, but a government too weak or indecisive to accomplish this primary mission is not worth having at all.

Our framework therefore focuses on the primary instruments of the political process itself—statutes, executive orders, congressional-executive agreements, agency rules—and reveals how those political contrivances have become entrenched, indeed to the point of molding the Constitution itself. These devices have evolved from the early days of the republic to permit the protection of an extensive and flexible system of rights and liberties and other forms of security that exist outside the traditional Constitutional frame. Under our account, the primary governmental actors are legislators, executive officials, and administrators, but the ultimate form of political agency is found in We the People, acting through regular elections and the associated devices of political parties but also by means of political associations and interest groups and through popular social movements. The result, which we call small "c" constitutionalism, does not usually operate as a trump card in the way that the Large "C" Constitution is thought to act. Instead, it is a modality of public life and discourse, facilitating the building and editing of structures within which we as citizens can live

flourishing lives. As a legal matter, small "c" constitutional norms and structures are realities that need to be considered when people and businesses make their plans, administrators implement laws, and judges interpret ordinary statutes and even the Constitution.

From the time the colonies were settled, Americans have demanded rights of various kinds. Which rights those are, and whether they are held by individuals or communities, have always been matters of struggle and contention. Many colonists demanded religious liberties of various kinds, including the right of a community to establish its own church as well as an individual right of worship or conscience. The colonists also wanted the right to move to wherever they wanted and to own their own land and have their contracts respected, to marry and beget heirs without too much state interference, and to claim new lands in the frontier. And they wanted the right to govern themselves—to elect their own legislatures and enact their own laws. This claim eventually brought them into conflict with the British government and its principle of parliamentary sovereignty. From the beginning, American citizens have wanted government to do the things the colonists came for, but also a limited government that would generally respect their rights, both as British subjects and as strong-willed American colonists. In this respect, our democracy was liberal from its beginning.

A government is constitutional when its ordinary laws and regulations are regulated by higher order norms and not merely by the will of governmental officials. These higher norms may be enforced as laws, as has been true in this country since the founding period, or they may be religious commands characteristic of some natural law theories, or norms of political morality that guide what policymakers do, as has been the tradition in the United Kingdom. But more is expected of a liberal constitution than the mere establishment of a regulatory structure to limit what the majority and its representatives may do. A constitutional democracy also demands that our leaders will be chosen by majorities and will be subject to specific normative guidance as to which norms and rights are constitutionally sacred and what precisely can be done to those in the minority on various issues. In short, democratic constitutionalism requires the following: popular choice of political leaders, a normative hierarchy embodying substantive rights, and institutions and procedures for enforcing the hierarchy and at least some of the rights. At least since 1689 Britain was understood to have a constitutional government in this sense, and the colonists understood their own governments to be regulated in the same fashion.

The Constitution of 1789, as immediately augmented by the Bill of Rights (1791), formalized many of these understandings: it asserted a hierarchy of legal norms, recognized certain rights, and created institutions of national government that the framers expected to enforce the hierarchy and at least some of

the rights. All this was done in a written document. But the written Constitution left many things essentially unresolved, including the extent of the franchise for federal and state elections, the precise authority of the president, the extent and reach of the federal judiciary, and the role of judges in enforcing rights. Although it was not the framers' design, the Constitution's high hurdle for formal amendment limited the extent to which the continuing struggle over the content of our democratic constitutionalism—what rights there are; who holds them; how they can be vindicated—could be resolved as a matter of Large "C" Constitutional law. Rather, if we were to fight about these things—and no vital people could refuse to argue and struggle about them—the field of battle could usually not be confined to the text of the Constitution itself. This is our view, but it is not the conventional wisdom in the legal academy.

At least two generations of law professors and media pundits came of age under the inspiring glow of *Brown v. Board of Education* (1954). In *Brown*, the Supreme Court interpreted the Constitution to render unenforceable state and local statutes requiring that public schools be segregated on the basis of race. Since 1954, Linda Carol Brown, the Topeka schoolchild whose parents brought suit, has been the poster child for the United States Constitution. *Brown* and the Browns have been a powerful symbol for a particular vision of the Constitution as a guardian of individual rights, enforced by fearless federal judges like Chief Justice Earl Warren and trumping squalid statutory regimes such as American apartheid. Indeed, some of our country's most sophisticated Constitutional analysts vigorously argue for a "fusion of [C]onstitutional law and moral theory," on the ground that the Constitution invokes public morality by its terms. Implicitly, such theorists are also relying on the popular notion that in the United States all important political and moral questions ultimately end up as Constitutional questions resolved by the U.S. Supreme Court.[1]

It is not crazy for legal academics to think this way. Especially as it has been amended, the Constitution contains a variety of open-textured guarantees that can be read to support a wide range of social movement objectives, from gay marriage to handguns for self-defense to integration to resegregation. And the dramatic choreography of Constitutionalism is hard to beat, as *Brown* and the Equal Protection Clause illustrate. Purchased with the blood of hundreds of thousands, the Reconstruction Amendments were adopted after a great series of confrontations involving the Radical Republican Congress, President Andrew Johnson, state legislatures (including those of southern states seeking readmission), newspapers, male voters, and others not franchised (such as female abolitionists). The content of these intense and sometimes violent deliberations was basically about who must be recognized as a person within the republic, fully entitled to equal concern and respect. And the resolution of these disputes

represents as well as anything our understanding of the basic structure of American civil society.

Because Constitutional change through Article V Amendment requires deliberation, usually over several years, by many different officials and must have the support of large and geographically disparate majorities, such change is usually both legitimate and lasting. Commitments made in this way deserve to be taken seriously and respected. Because the commitments are expected to last a long time, they tend to be broad and elliptical; an example is the Equal Protection Clause, the basis for the NAACP's victory in *Brown* and since then an enduring argument for people of color, language minorities, women, gays, people with disabilities, welfare recipients, the working poor, and nonmarital children. Arbitrating these claims are the justices of the Supreme Court, whose life tenure assures them some insulation from normal politics. For many liberals, the Court is our exemplary deliberative institution.[2]

The foregoing reflects a romantic understanding of the judge-enforced Constitution. It is time to take a more realistic view.

To begin with, the Constitution of 1789 is too old to answer most of the looming social, political, and moral questions that Americans want answered, and there is no process for updating it that is both workable and legitimate. Although the Article V structure has generated some important amendments, it has done virtually no work for an enduring Constitutionalism since 1920, when the Nineteenth Amendment (assuring women the right to vote) took effect. Article V's process, requiring two-thirds support in each chamber of Congress and (much more dauntingly) ratification by three-quarters of the states, is simply too arduous for any but the most process-oriented changes to the Constitution. As a result, Constitutional updating, if any, has fallen to the Court, which most liberals have celebrated. The justices' performance has been erratic—everyone has a long list of the Court's blunders—but the overriding problem is systemic: the Court does not have the legitimacy, the wisdom and expertise, or the enforcement resources to generate important changes in the Constitution.[3]

Moreover, the Constitution, especially as applied by the Court, sets rules applicable to governmental actors, but does not by its own force govern private actors. Heinous as state discrimination was for people of color in earning good educations, exercising the franchise, and riding on municipal buses, even more harmful was the weight of private discrimination against people of color by employers, landlords, banks, real estate agents, hotels, restaurants, lunch counters, professional sports leagues, and country clubs. While norms applicable only to the state may have an educational force, their ability to saturate the public culture is much greater when the norms are applicable to all of us—and

Large "C" Constitutional norms are for the most part not directly applicable to citizens outside government.

Finally, and most fundamentally, neither the Constitution, as amended, nor the Supreme Court, even in the glorious *Brown* era, deeply addresses the duties of government to create and guarantee affirmative and positive legal regimes that provide security and structure for American public finance, families, employment and commercial activities, old-age and disability insurance, and national defense. The Constitution contains a few affirmative platitudes, such as the Preamble's admonition that government "promote the general Welfare," but the Supreme Court shrinks from enforcing even those few platitudes, much less announcing positive state obligations on its own. Yet for Linda Carol Brown Smith, Kansas family law structures her married life and probably has more of an impact on her day-to-day life than the Constitution does. Her ability to flourish in America depends much more on the Equal Employment Opportunity Commission, the Social Security Administration, and the Federal Reserve Board than on our nation's Constitutional Court.

These three huge limitations of large "C" Constitutionalism, explored at greater length in chapter 1, have hardly posed a crisis for the American people. As a general matter, the inflexible Constitution has not stopped Americans from undertaking fundamental commitments, creating new rights, abolishing outrageous injustices. The very obduracy of the Constitution has channeled Americans toward the republic of statutes that is the subject of this book. Americans have created statutory and administrative rights and liberties that are both less dramatic and much broader than Large "C" Constitutional rights. Do we have a right not to be subject to arbitrary employment discrimination against us in the labor market? If we do have such a right, why should it not apply against private as well as public employers? We have fundamental Constitutional rights not to be imprisoned or tortured by the state, but do we have a right to state protection against private violence?[4]

The republic of statutes we describe transcends the libertarian bias in Large "C" Constitutional rights. On the libertarian view, the Constitution works by preventing governmental officials from harming people in various ways. We think this is a partial perspective on the Constitution. But it is not even partial when it comes to the statutory or small "c" constitution. As we shall show, statutes commonly provide positive rights to people, providing them with legal means to combat oppression and discrimination. We are open to the possibility that some of the positive rights we explore have a Large "C" Constitutional basis, even though they are not recognized by the Supreme Court. We agree with Larry Sager, who has argued that many Constitutional rights are (and should be) "underenforced" by the judiciary, for institutional reasons. In some instances,

the state action doctrine might be an example of Constitutional underenforcement, but most of the positive rights we describe—from the right to family medical leave (chapter 1), a free market (chapter 3), and old-age pensions (chapter 4)—do not clearly rest on the text or structure of the Constitution. Not only do statutory rights and structures go beyond those required by the Constitution, they interact with Constitutional rights in three interesting ways.[5]

First: Statutes transform Constitutional baselines. The Constitution pervasively depends upon statutes to fill in the huge holes in our governance structure and norms. This is more than mere gap filling. Often, the statutes that fill in Constitutional gaps are themselves transformative, and this was certainly the case with school desegregation. Indeed, what *Brown* means to Americans today is the principle created by statute, not the principle the Supreme Court actually announced in *Brown*. After *Brown*, school districts could no longer categorize and exclude students according to race—but the large majority of districts segregated by law in 1953 remained segregated by practice in 1963. The Constitutional status quo was shattered and the *Brown* norm was transformed by legislation. The Civil Rights Act of 1964 withheld federal funds from public programs discriminating on the basis of race, and the Elementary and Secondary Education Amendments of 1965 greatly expanded the amount of federal money available to local schools. Because those statutes came to be aggressively enforced to require school districts to justify de facto segregation, public school integration occurred all over the country, especially in the South. It was not until 1968, right *after* the 1964–65 statutes, that the Supreme Court even ruled that segregated school districts had an obligation to transition to a *unitary* school system, where there were no discernible black schools and white schools. Although this expanded policy has struggled to produce actual school integration, *Brown*'s public meaning was altered by what we call "administrative constitutionalism" (chapters 1–3).[6]

The Topeka School District at issue in *Brown* itself illustrates the critical role played by administrative constitutionalism even in Constitutional lawsuits. In 1955, on remand after *Brown II*, the trial judge ruled that Topeka met the Supreme Court's mandate that there not be formal segregation in the public schools—but of course the schools remained segregated as a matter of practice. It was not until 1974 that this state of affairs was successfully challenged—by the Nixon administration's Department of Health, Education and Welfare (HEW), which ruled that Topeka was in violation of Title VI of the 1964 Civil Rights Act and therefore was barred from receiving millions of dollars in educational funds. Although the district court ultimately ruled that HEW's order could not disturb its own 1955 judgment, in the interim HEW's pressure did bestir Topeka to develop a remedial plan that would actually, rather than formally, desegregate its

public schools. It was this process, jump-started by administrators enforcing statutory requirements, that Linda Brown Smith reentered in 1979.[7]

Second: Legislative and administrative deliberation over time can create entrenched governance structures and norms. Some of the nation's entrenched governance structures and normative commitments are derived directly from the Constitution, but most are found in *superstatutes* enacted by Congress, executive-legislative partnerships, and consensus of state legislatures. This body of law is important in its own right and worthy of dedicated study. The Civil Rights Act of 1964 is a classic example of a statute that has broad constitutional reverberations. Like *Brown*, the 1964 act sought to entrench the principle that discrimination on the basis of race is not acceptable. But the statute went considerably further than *Brown*, for it applied to private as well as public institutions and created an affirmative obligation for state officials to eliminate illegal discrimination. As to the former point, Title VII not only extended *Brown* ideas to private employment but also deepened the bite of *Brown* by pursuing discrimination that was not open or obvious. As to the latter point, Title VI of the 1964 act instantiated the principle that federal funds should not even indirectly contribute to possible race-discriminatory programs. Most broadly, the Civil Rights Act, as applied, reflected a more ambitious norm than *Brown* did—actual *integration*, not just *nonsegregation*. What this ambitious superstatutory norm actually means is a matter of debate, but it cannot be denied that the norm has had a powerful effect on American culture.[8]

The process of deep entrenchment we describe in this book has three features, all illustrated by the 1964 act. First, entrenchment involves public deliberation, explained below. Second, the deliberation involves several institutions cooperating together as well as protecting their own authority. While the impetus for most small "c" constitutional innovations comes from social movements and the private sector, public deliberation is driven by executive officials as well as legislators and, to a lesser extent, judges. Thus, the antidiscrimination norm originating in the civil rights movement gained the force of law when Congress adopted the 1964 act, but it acquired greater specificity when agency officials such as Sonia Pressman and her colleagues in the Equal Employment Opportunity Commission figured out how to apply the statute to get at hidden or unconscious racist employment practices. Third, entrenching deliberation occurs over a long period of time, and the norm does not stick in our public culture until former opponents agree that the norm is a good one (or at least an acceptable idea). The consensus that has formed around the antidiscrimination norm has come rather quickly, but that consensus ought not to obscure the fact that new disputes and polarities have formed around precisely what that norm requires.[9]

Consider a distinction drawn from Max Weber's theory of power (or "domination"). One kind of power is based upon the *authority to command*, such as the power delegated by the social contract. The Large "C" Constitution announces a hierarchy of commands. State law rules trump private ordering; valid federal statutory rules trump state law; and the Constitution trumps federal as well as state law. Within that hierarchy, superstatutes fit with other federal laws: they trump state law but must give way to the Constitution. Weber also understood that power can flow from what he termed a "constellation of interests," or a social consensus establishing various norms that people will follow because it is in their interest. Power based on the *force of social norms* operates differently from Weberian authority, and we now suggest that law typically operates within both of Weber's spheres. Indeed, this is the space where we situate superstatutes: like ordinary legislation, their authority yields to the Constitution, but like the Constitution itself superstatutes have generated strong social entrenchment that not only makes them resistant to change but also gives them a power beyond their formal legal ambit. For example, small employers are not covered by Title VII of the 1964 act, and under traditional common law rules (the employment at will doctrine) they are legally free not to hire people of color unless they are covered by state antidiscrimination laws. That Title VII is a superstatute means that its norm will be a weighty reason for the noncovered employer to consider in its own hiring decisions, and for a state supreme court to consider if an employee is sued under contract law. We expect that few noncovered employers would openly discriminate, and if they did most state courts would find a way to overrule such discrimination, perhaps modifying the employment at will doctrine to account for the norm. To repeat: the Weberian power of superstatutes rests upon *both* their authority to command *and* their social gravity that induces people to apply or consider the norm beyond its formal command. Notice the similarity to traditional British constitutionalism, where judges interpreted the common law and ordinary statutes in light of landmark statutes; one finds similar discourse in French and German law as well.[10]

Third: The evolution of Large "C" Constitutional law ought to be guided by legislative and administrative deliberations. The Constitution's rules and purposes are announced at a high level of generality, which has contributed to their social entrenchment but has made authoritative application to specific circumstances more tricky. This dilemma has been ameliorated by the fact that federal superstatutes, agency elaborations, and state statutory convergences do address many of those specific issues, and the extent of their social entrenchment does and should influence Constitutional elaboration. Although the Constitution as a formal matter trumps statutes inconsistent with its terms,

as a practical matter Constitutional law's evolution is generally—and ought to be—influenced by the norms entrenched in other ways, such as by the development of a state statutory consensus, or through the creation of a federal superstatute.

Accordingly, the Supreme Court's proper Constitutional triumphs have been in cases where the Court enforced Constitutional norms consistent with clear statutory consensus, reached after repeated public deliberations and reflecting an overlapping consensus within the polity. *Brown*'s core norm, that public schools should not be racially segregated by law, reflected a state statutory consensus in 1954, whereby virtually all states outside the South had repudiated the school segregation policy, *and* reflected substantial agreement at the national level, consistent with the United States' *amicus* briefs in *Brown* and previous cases. The Warren Court's expansions of *Brown* came in cases that similarly followed statutory principles: *Green v. New Kent County School Board* (1968), whose norm of a school system that is actually *integrated* followed the Civil Rights Act and the Education Amendments as administered; and *Loving v. Virginia* (1967), which followed the convergence of all state legislatures outside the South in holding antimiscegenation laws unConstitutional.[11]

For many Americans, *Brown* was an illustration of a larger point, that the Constitution is our nation's Grand Blueprint and the Guarantor of Its Democracy as well as the Embodiment of Our Highest Aspirations. It is this larger point—this grander myth—that our book questions in a sustained manner. At the same time, we want to present a new and more modest vision. What we are calling small "c" constitutionalism is more mobile in responding to important social movements and social needs, addresses its vision and commands to all Americans and not just government officials, and creates positive structures and affirmative rights in an effort to assure opportunities for personal flourishing by Americans. Modest as this view may appear to be, it is also more demanding of ordinary citizens, for it suggests that there is no "Great Guarantor" of our liberties and insists that, ultimately, the creation and preservation of our freedoms is a never-ending project and a burden that falls on us all.

AMERICA'S REPUBLIC OF STATUTES, TREATIES, AND AGENCY RULES

America's Large "C" Constitution is one of the shortest such documents in the world, and reading the document and its illuminating history would not tell you everything you'd want to know about the fundamental institutions, practices, and norms of our polity, what we shall be calling our small "c" constitution, our working constitution. You would not know where most legal rules