Judicial Authority, Egalitarianism, and the Demands of Justice

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In *The Constitution in Conflict*,[1] Robert Burt advances a theory of judicial authority and constitutional decision-making. The theory rejects judicial supremacy as an organizing principle of government, and advocates its replacement in the U.S. by a conception of institutional *equality* among the three branches. As I explain below, it also requires Justices to orient themselves by a particular set of concerns in the adjudication of highly divisive constitutional cases. At least two aspects of egalitarianism set it apart from other recent efforts against judicial supremacy. The first one concerns the nature of the book's argument. Professor Burt does not ground the rejection of judicial supremacy in the supposedly limited capabilities of the Supreme Court,[2] its lack of political legitimacy,[3] or the ideological functions that institutional arrangement might have performed.[4] Instead, his argument is based on the value of egalitarianism as a virtue of the political system and the fundamental connection of that value with the history of the United States. A second, important distinction, is that egalitarianism does not propose a model of legislative supremacy. Instead, it sees Court, Congress and the Presidency as part of national mechanism of conflict resolution and construction of constitutional meaning.

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[1] Burt, Robert. *The Constitution in Conflict*. Harvard University Press, 1992
[2] *see* Vermeule, Adrian. *Judging under Uncertainty. An Institutional Theory of Legal Interpretation*. Harvard University Press, 2006
[3] *see* Waldron, Jeremy. *Law and Disagreement*. Oxford University Press, 1999
[4] *see* Hirschl, Ran. *Towards Juristocracy. The Origins and Consequences of New Constitutionalism*. Harvard University Press, 2004

In this paper, I present an account of Professor Burt's egalitarianism in *section I*, and then, in *section II*, I discuss a few themes salient to its treatment of the role of the Supreme Court in a constitutional democracy. My aim here is not as much to provide a conclusive judgment on the merits of the theory, as it is to indicate the potential normative difficulties it may still need to overcome.

I. Egalitarian Authority

The Constitution in Conflict is organized in three parts. In the first, Professor Burt makes a case for the historical legitimacy of the principle of equal authority among the branches of government and for the adoption of a set of egalitarian concerns in judicial review. The argument in this part involves two main points. First, the claims that foundations of a principle of political equality would have emerged from the Founders' pervading concern with social conflict, and would have been inscribed, if only implicitly, into the Constitution itself.[5] Second, a substantive concern that structures and ultimately gives meaning to a scheme of political institutions of equal authority can be derived from an examination of Lincoln's words and action, before and during the Civil War. Having established historical credentials for egalitarian authority, Professor Burt dedicates the second part of the book to an account of the history of judicial review in the U.S.. The section is designed to show how judicial supremacy emerged and became prevalent in the practice of constitutional review.

[5] "[We] cannot grasp the founders' own understanding of the Constitution unless we see the pervasiveness and importance of [the] fear of civil conflict for them. (…) This fear — whether realistic or not — was so deeply written into the interstices of the Constitution that it has pervasively (if subliminally) influenced the decisions of Supreme Court Justices, who have seen themselves as the special custodians of the integrity of the document." *supra* n. 1, at 44.

The third part of the book takes decisions such as *Brown v. Board of Education* and *Brown II* as a starting point to elaborate an egalitarian model of constitutional decision-making by the Supreme Court. It discusses how egalitarianism might have produced better decisions had it been applied in some landmark cases of the second half of the XX Century, and which concrete techniques it may employ.

In the following pages, I describe the argument of parts I and III of the book. Due to the nature of my analysis in section II and the formal restrictions on this paper, a description of part II has been omitted.[6]

The task of theory

According to Professor Burt, much of the work in constitutional theory in the United States has mistakenly focused on the issue of the Court's legitimacy. Profoundly different jurisprudential views, from Robert Bork's originalism to the interpretivism of Ronald Dworkin, have focused on a single, central question: "When the Supreme Court interprets the Constitution, how can it ensure that its interpretation is unimpeachably legitimate?" Privileging this question, however, comes at a cost: it takes judicial supremacy for granted and thus loses not only potential normative guidance but also descriptive ability. Professor Burt illustrates this point with a discussion of Bickel's analysis of *Brown v. Board of Education*. Bickel breaks with the conventional view of the case by claiming that the legitimacy of the Court's decision is always projected onto the future.[7] As he famously put it, "the Court's principles are required to *gain assent*, not necessarily to have it."[8] Hence Bickel's merit to have taken the central question of constitutional theory away from the goal of

[6] I believe, however, that a comprehensive account of the merits of the book cannot dispense with the historical analysis developed therein.
[7] "What is meant, is rather that the Court should declare as law only such principles as will — in time, but in a rather immediate foreseeable future — gain general assent." Quoted id. at 22-23.
[8] Id. at 22.

ensuring legitimacy by the adoption of an interpretive method. Properly understood, claims Professor Burt, constitutional theory ought to be occupied with a different question, more concerned with decision-making rather than interpretation and legitimacy: “How can the Supreme Court properly adjudicate constitutional disputes, notwithstanding its questionable legitimacy to do so?"[9]

Because they are focused on the issue of legitimacy, conventional theories cannot properly account for the decisions of *Brown* and *Brown II*. To a large extent, that is due to their failure to capture the “uncertainty” at the time of the first decision.

> “The moral repugnance of race segregation, and the consequent correctness of *Brown*, has by now become an article of faith in our polity. But it was not always so – and certainly not in 1954 when the Justices struggled with this issue. Some might rely on the subsequent history to validate the Court's judgment — pointing out that the Justices correctly predicted the future in condemning race segregation. But this kind of *post hoc* validation does not give much guidance to the Justices themselves when a question appears hotly contested before them in litigation.”[10]

Critics as well as sympathizers of the first decision tend to ignore the circumstances surrounding it, and thus overlook crucial aspects of the responsibility of the Justices at the time. In the case of Brown, the decision against segregation could be perceived by large part of the population, the white South, as a federal imposition that simply disregarded their subjective evaluations. In Justice Jackson’s words, the central difficulty of *Brown* was whether the "real abolition of segregation [would] be accelerated or retarded by what many are likely to regard as a ruthless use of federal judicial power."[11]

Conventional views also fail to accommodate *Brown II*, in which the Supreme Court refused to mandate immediate enforcement of the constitutional right to non-

[9] Id. at 11.
[10] Id. at 16.
[11] Id. 17-18.

segregated education it had previously recognized. Because conventional theories obscure the role of the Supreme Court in producing consensus, they can only regard this case as a sort of step back from first ruling. They tend to see it as an "unprincipled political decision," in contrast to the principled-based 1954 rulig.

> "Critics, then and now, claimed that if the 1954 declaration in *Brown I* was a correct interpretation of the Constitution, then there could be no legitimate reason for delayed enforcement of the black schoolchildren's constitutional rights. In 1955, however, the Court announced that delay — "all deliberate speed" — was permissible. The conventional view, then and now, was that *Brown II* was "politics" — an illegitimate derogation from principle by the Court, though an understandable and perhaps (or perhaps not) wise one. Bickel had a different view."[12]

Bickel, however, allows us to see *Brown II*, whether one agrees or not with it, as proper exercise of judicial authority.

> "In *Brown I* the Court unsettled the previous resolution of the racial conflict that had been imposed by the southern legislatures; and in *Brown II,* the Court refused to impose its own authoritative resolution. The Court thus dramatically signified, first, that race segregation laws were illegitimate impositions because they hurtfully enslaved the black antagonists; and, second, that no legitimate resolution could be imposed on either antagonist, that legitimacy could come only with the "general assent" of both blacks and whites, and that the pursuit of this accommodation should proceed, guided and prodded by local federal judges, 'with all deliberate speed.'"

For Professor Burt, it meant that "courts must not engage in the authoritative resolution of constitutional disputes; courts properly participate in, even provoke, but do not independently and conclusively resolve such disputes."[13]

Professor Burt major disagreement with Bickel though in the latter's claim that anti-majoritarian institutions are exceptional in the United States. For him, that is in fact a

[12] Id. at 20.
[13] Id. at 38.

recurrent feature of their institutional landscape.[14] Hence the historical analysis developed in parts I and II of the book.

> "Bickel began his book by asserting that because judicial review is a "counter-majoritarian force," it is "a deviant institution in the American democracy." This premise coupled with his vision of America as basically united led him to regard *Brown* itself, and the underlying imperative for judicial intervention that arose from the character of the dispute over race segregation, as deviant events in American experience. But he was wrong: *Brown* represented a recurrent and prototypical problem for the American democracy. The problem was not race conflict as such but more fundamentally what race conflict signified."[15]

The Founding

As mentioned above, *The Constitution in Conflict* establishes the historical foundations of egalitarianism around a discussion of how Founders' concerns with civil conflict shaped their vision of authority on the one hand, and Lincoln's example of egalitarianism on the other.

As concerns the Founders, their views about political authority were closely connected to their concern with social conflict: "The Founders were haunted by the prospect of civil warfare (…) and designed the Constitution fundamentally to avert it, based on their analysis of the latent causes of civil war in all social relations."[16] Fear of oppressive majorities was given concrete expression in the Founders' embrace of the ideal of *political unanimity* and their understanding of how this ideal ought to be pursued democratically.[17] "The founders did not envisage a special role for the

[14] "We must understand how deeply the Civil War signified the failure of the founders' ambitions in order to grasp the central problem of social organization as they saw it. The fact is that the founders were haunted by the prospect of civil warfare — not necessarily between North and South, but generally — and they designed the Constitution fundamentally to avert it, based on their analysis of the latent causes of civil war in all social relations." Id. at 38-39.
[15] Id. at 40.
[16] Id. at 48.
[17] "[The founders'] opposition to majoritarian democracy generally was premised on the belief that all social conflict was polarized dispute, with the self-aggrandizing winner likely to oppress the loser. The solution they embraced, in their opposition to organized parties, was to seek political unanimity. This goal was not simply rhetorical for the founders, and it meant much more than grudging or temporary acquiescence by the losers. For

judiciary in pursuit of [that ideal]. Rather, their overall conception of institutional authority, both within the federal structure and between state and federal government, aimed toward this goal."[18] Although Hamilton's defense of judicial supremacy would eventually become prevalent in the U.S., that was definitely not the single view of the Founders on political authority. Madison's views diverged in this regard and his positions, especially as developed them in *Federalist 51*, are discussed at length in *The Constitution in Conflict*.[19]

> "Madison's vision that the Constitution had 'so contrived the interior structure of the government that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.' The fundamental technique that Madison identified for this purpose was division of authority in order to supply 'opposite and rival interests' throughout the governmental structure."[20]

In Professor Burt's reading, Madison's views connects the Founders' concerns with conflict to a conception of institutional design that privileging the judiciary relied on the distribution of powers and a structure of checks and balances that was part of a mechanism to ensure that only "real unanimity" would acquire constitutional status. His argument is not that Madison's stance best expresses the intentions of the Founders. The fundamental point is rather that Madison's account of the workings of government offers a model of institutional organization based on equal authority, and

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the founders, actual — not simply symbolic or ceremonial — unanimity was their goal. We know of course that unanimity as a formal voting rule is a paradoxically crippling requirement for social decision-making. Actual unanimity is, however, the only voting rule that consistently vindicates the democratic principles of equality and self-determination." Id. at 46.

[18] However, he continues, "By our time, every institutional element in this interlocking scheme except for the federal judiciary has become more directly open to partisan conflict than the founders had envisaged (or would ever have approved). Accordingly, it is plausible to say that the task of buffering and transcending partisan conflict for which the founders designed their entire scheme has today, by a process of elimination, become focused on the judiciary. Put another way, insofar as their general institutional design was aimed toward unanimity and is thereby relevant to solving the contradiction we have identified in democratic theory, the federal judiciary is the only element of their scheme that remains adapted to implement their solution on our behalf." Id. at 46.

[19] see, Id. at 40-80.

[20] Id. at 60.

remains as legitimate an interpretation as Hamilton's defense of judicial supremacy in *Federalist* 78.[21]

Lincoln

According to Professor Burt, the hallmark of Lincoln's actions as a statesman was his commitment to an egalitarian conception of the meaning of the Republic. Egalitarianism, in this sense, not only means equality of rights between blacks and whites, but even more fundamentally, it means the equal concern with which political authority should address all members of the political community. This was a profoundly anti-majoritarian view, and it expressed a continuous search for mutual consent and avoidance of coercion in the resolution of social conflicts. Lincoln's Presidency was thus marked not only by his resolve in freeing the slaves but at least as much by his desire not to be "to be guilty of despotism in the imagined service of equality."[22] Time and again, and even as commander-in-chief, Lincoln would have displayed in his words and actions that particular concern. From his debates with Stephen Douglas in the senatorial dispute of 1838,[23] to his 1861 Inaugural Address,[24]

[21] Id. at 79.
[22] Id. at 85.
[23] According to Professor Burt, "the core of Lincoln's opposition to majority rule was expressed in his Illinois senatorial election debates with Stephen Douglas." He quotes it: "The doctrine of self-government is right — absolutely and eternally right, but it has no just application, as here attempted. Or perhaps I should say that whether it has such application depends upon whether the negro is not or is a man. If he is not a man, why in that case, he who is a man may, as a matter of self- government, do just as he pleases with him. But if the negro is a man, is it not to that extent a total destruction of self-government, to say that he too shall not govern himself? When the white man governs himself that is self-government; but when he governs himself and also governs another man, that is more than self-government — that is despotism. If the negro is a man, why then my ancient faith teaches me that "all men are created equal;" and that there can be no moral right in connection with one man's making a slave of another. (…) no man is good enough to govern another man, without that other's consent. I say this is the leading principle — the sheet anchor of American republicanism." And concludes that there is "a suggestion of anarchy in this prescription, a connotation of unbridled individualism at odds with sustained communal attachments. From the outset of his political life, Lincoln was aware of and apprehensive about these implications. In his first significant address, to the Springfield Lyceum in I838, Lincoln warned of threats from two directions that could destroy 'the attachment of the people" and "alienat[e] their affections from the government.'" Id. 81-82
[24] "A direct connection can be traced from this 1838 address to Lincoln's confrontation in 1861 with "the essence of anarchy" that he discerned as "the central idea of secession." Id. at 20. In his inaugural address, Lincoln also searched for ways to strengthen "the attachment of the people" and to remedy "the alienation of their affections from the government." He ended his inaugural address with a similar spiritual invocation: "The mystic chords of memory, stretching from every battle-field and patriot grave to every living heart and hearthstone all over this

to the "House Divided" Address,[25] and his attitudes throughout the War,[26] many key episodes of Lincoln political career are interpreted as the expression of this commitment to a vision of political community based on mutual consent and in which coercion could only play a restricted role. Secession, from this perspective, was an aggression by against a political unity that was committed to treating its members as equals and resolving their disputes in an institutional framework conducive to mutual consent. As such, it represented an attack on the very ideas of equality and mutuality embodied in the Union.

> "Many Northerners construed secession as an attack against the Union as such; but Lincoln did not see it in this abstractly reified mode. From his perspective, secession was an assault against the political relationship of equality and mutuality that the Union comprehended. Secession, that is, was as much a breach of the prior commitments to mutual respect for equal status embodied in the Union as was the initial southern demand for the territorial expansion of slavery. Secession was an illegitimate weapon in political conflict among equals, as much as coerced impositions."[27]

That view would validate the use of force against the South. But it also set its limits. Force was not to foreclose the possibility of mutual consent, equality, and respect that structured the Union as a political enterprise.[28]

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broad land, will yet swell the chorus of the Union when again touched, as surely they will be, by the better angels of our nature." Id. at 83.

[25] In his 1858 House Divided Speech, "Lincoln offered this assurance to demonstrate that he honored the southern whites' claims to equality just as he expected them to respect his claims. And this commitment to mutuality dictated that he would take no unilateral act of imposition against them so long as they would desist from aggression against him, as represented by the unconsented extension of slavery into the territories." Id. at 87.

[26] Id. at 88.

[27] Id. at 88.

[28] According to Professor Burt, Lincoln's political egalitarianism would have informed even his position on slavery and his commitment to abolitionism: "Lincoln did believe in the equality principle, and he did abhor slavery. But these moral attitudes did not make him an abolitionist; they were not sufficient for him to override his obligation to respect the equality of southern whites. As Lincoln saw it, this was an obligation entered in the framing of the Union and sealed in the mutual burdens borne by North and South to defend that political relationship against foreign adversaries and to sustain it among themselves. Before the war, and even when he signed the Emancipation Proclamation, Lincoln did not have the same sense of obligation toward black slaves. (…) The change in Lincoln's vision came, and the transformation of emancipation from a subsidiary to an independent war goal followed, from one consequence of the Emancipation Proclamation: that the freed blacks joined Lincoln to fight and die for the Union." Id. at 93-94. Also, Lincoln "viewed both southern slavery and the Missouri Compromise as existing arrangements in the world as he found it. Though he might disapprove of these arrangements, he acknowledged that others endorsed them; and his conjunctive commitments to equality and consent required him to acquiesce in these existing arrangements unless they could be altered on the basis of mutual consent." Id. at 86.

> "Lincoln never retreated from his dedication to persuasion and his aversion to coercive imposition, even while presiding over this country's most destructive war. This is a considerable paradox; but it follows from the paradoxical implications of Lincoln's commitment to equality and mutual consent in all political relations. This commitment excludes all coercion, except as a defensive response to others' unilateral use of force. This response, more- over, can hold true to the principle of equality and mutuality if the defensive coercion is aimed not at the subjugation of the original aggressor but only at the restoration of an equal, mutually consensual relationship. (…) The true measure of Lincoln's stature, as a statesman and political thinker, was the rigorous consistency of his efforts to achieve this goal even as commander-in-chief of the Union army."[29]

Because his attitudes embodied a conception of the purpose and limits of political authority, they transcend the status of a statesman's virtues. Professor Burt believes that in his struggle "toward the elimination of black slavery without subjugating the white slaveholders," Lincoln actually "provided a model for the role of political authority generally, and of judicial authority specifically, in combatting majoritarian tyranny."[30]

The Madison-Lincoln model

Madison and Lincoln converge. The former's conception of institutional balance provides a "practical framework" for the realization of Lincoln's egalitarian ideal. Hence Professor Burt's theory is doubly informed by a notion of equality. On the one hand, equality denotes a balanced distribution of authority among Congress, the Presidency, and the Supreme Court. On the other, equality, understood in terms of equal respect and the concern with mutual consent described above, is a principle that orients the governmental officials in the exercise of that authority:

[29] Id. at 85.
[30] "The central effort in Lincoln's career was to contain, and to aim toward the elimination of, black slavery without subjugating the white slaveholders. Lincoln failed in this effort. But in the struggle itself, he provided a model for the role of political authority generally, and of judicial authority specifically, in combatting majoritarian tyranny." Id. at 77.

> "There is a fundamental underlying connection between Lincoln's relational conception of equality and Madison's political thought. Madison's conception of the proper design for federal political institutions directly parallels Lincoln's practical understanding of the source of both the binding obligation between him (and by extension the white North) and black soldiers and the obligations owed to the Union by the white South. The vivid respect for black equality that arose for Lincoln only in his direct experience of a common enterprise with blacks is, in effect, a practical validation of Madison's insight regarding the interactive implications of the institutional, structure of the Constitution. By. drawing out the connection between Madison's thinking and Lincoln's conception of the binding force of his political relationship with both black slaves and white Southerners, we can ultimately see the reasons why both Lincoln and Madison rejected the idea of judicial supremacy in constitutional interpretation. Madison saw institutional interaction as the means for trans- forming political disputes from self-absorbed factionalism into mutual pursuit of a unifying vision of public virtue. By his conception, respect for mutual equality did not precede political relations but grew from the interactive process by which alienated and potentially hostile rivals come to see one another as reciprocally connected fellow-citizens. Madison's goal was not to override or disregard the subjective passions of factional disputants but instead to transform the disputants' own perspectives by bringing their conflicts into national forums."[31]

Within this structure, social conflicts would be worked out in the long run and through the engagement of different institutional actors.[32]

> "In this enlarged compass for political disputes, Madison imagined, a mindset would naturally emerge that was disposed toward mutually respectful accommodation — the necessary condition for honoring the equality principle. But Madison did not intend to displace the clash of competing self-interests by creating some institutional structure — as he put it, "some power altogether independent of the people'" — that would stand impartially outside this conflict. Madison meant instead to create political institutions where the clash of self-interest might be reflected but diffused so as to promote harmonization. Lincoln's emphatic rejection of the legitimacy of secession rested on a similar commitment to the national institutional framework as a necessary instrument for realizing the equality principle."[33]

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[31] Id. at 96.

[32] In this sense, Lincoln's criticism of the Supreme Court's decision in Dredd Scott "parallels Madison's conception that constitutional interpretation does not belong to the Supreme Court alone *but must take place over a prolonged time involving many different institutional participants* and that no important interpretive issue would be finally settled until, in Lincoln's paraphrase, the resolution had "been affirmed and re-affirmed through a course of years." Id. at 99, added emphasis.

[33] Id. at 96-97. "For Madison, as for Lincoln, the rejection of any external locus of social control fundamentally distinguishes their egalitarianism from modern versions that posit some fixed conception of equality that can be authoritatively applied by an "enlightened" or "objective" calculator. In the modern versions, whether the

Judicial Supremacy

Notwithstanding the egalitarian roots identified in the first part of *The Constitution in Conflict*, judicial supremacy became the prevalent organizing principle in the history of the Supreme Court. Professor Burt's narrative of conflict and constitutional decision-making from the early Republic to the late XX century in part II of the book is designed to show how that Court came to "[embrace] a conception of judicial supremacy, with increasingly extensive scope following the Civil War, that was antithetical to the egalitarian conception of political relations that Lincoln represented and the corresponding structure of institutional relations that Madison had conceived."[34]

Egalitarianism in practice

Having established the historical foundations of his theory and discussed the emergence of judicial supremacy as the organizing principle of constitutional politics in the U.S., Professor Burt focuses on the implications of egalitarianism for the question: "How can the Supreme Court properly adjudicate constitutional disputes, notwithstanding its questionable legitimacy to do so?"[35]

Here again, *Brown I* and *II* play a pivotal role. Taken together they exemplify the sort of judicial decision-making that fits in Madison's anti-supremacy views and Lincoln's political virtues held by egalitarianism. Faced with "the prospect of civil violence," the *Brown* Justices "intervened" but, and this is significant, "did not try to impose an

egalitarian principle is formulated in some pre-social contract (such as John Rawls essayed) or through some utilitarian calculus (such as Jeremy Bentham bequeathed to modern econometricians), the formulation depends on the existence of an observer who can stand outside social relations and impartially calibrate equal portions of disputed social resources." Id. at 97.

[34] Id. at 100.

[35] Id. at 11.

immediate, definitive resolution on the disputants."[36] They did establish that school segregation laws were unconstitutional, but did not use their power to subjugate the white South. What is conventionally perceived as an unprincipled political choice in *Brown II*, is understood by Professor Burt as the embodiment of a principle of non-subjugation, in which the Court's refusal to demand immediate de-segregation signified its willingness not to exclude from consideration the subjective views of white Southerners:

> "[The] Court in *Brown* illuminated the lawfulness of ordinary political disputes in this society — that they are conducted against a background of mutually acknowledged equal status and their resolutions depend on persuasion, notwithstanding the apparent electoral format that majority will is imposed on a dissenting minority. "Politics" thus becomes "law" — the resolution of political disputes becomes legitimate — when the disputants mutually disavow coercion. By this criterion, segregation laws were blatantly illegitimate. But by this criterion, no coercive imposition — by blacks against whites or by a judiciary on behalf of blacks — could in itself achieve legitimacy. Judicial coercion invalidating the illegitimate laws properly signified that no lawful resolution of the political dispute between blacks and whites had yet been reached; but judicial coercion, to remain lawful in itself, must do no more than this."[37]

Professor Burt distinguishes two positions within the Court. On the one hand, Frankfurter and "like-minded Justices" believed the "requirements of reason" were a

[36] "[Like] their predecessors from McCullough to Debs, the prospect of civil violence pushed the Justices toward active intervention. Unlike their predecessors, however, the *Brown* Justices did not try to impose an immediate, definitive resolution on the disputants: this was the significance of the Court's decision in Brown II to withhold immediate enforcement of the principles enunciated in Brown I" Id. at 275.

[37] Id. at 283. Hence Professor Burt's parallels between the Court's decisions and Lincoln's actions: "Lincoln's first inaugural address conveyed the same underlying message to southern whites as *Brown I:* that their denial of the equal status of their adversaries (northern whites in 1861**,** southern blacks in 1954) was unacceptable in principle and that the political dispute between these adversaries could be re solved peacefully only on the basis of mutually acknowledged equality. The rhetorical strategy of the two documents was also the same: non-accusatorial and conciliatory in tone but clear and insistent in identifying the fundamental principle at stake. (…) *Brown II* was a *self-conscious* attempt to avoid the mutually destructive warfare and the bitter retaliatory aftermath that Lincoln unsuccessfully attempted to avert. *Brown II* conveyed the same appeal to southern whites that Lincoln expressed in I862, in proposing voluntary, compensated emancipation a few months before issuing his Proclamation: "This proposal makes common cause for a common object, casting no reproaches upon any. It acts not the Pharisee. The change it contemplates would come gently as the dews of heaven, not rending or wrecking anything. Will you not embrace it?" ' The strategy of *Brown II* for vindicating the equal rights of blacks was identical to Lincoln's tactic in upholding the rightful claims of the Union at Fort Sumter: to send food in unarmed ships to hungry men." Id. at 284-5.

distinctively "American creed."[38] From their point of view, the Supreme Court offered institutional means for "reasoned inquiry" on the question of race.[39] On the other hand, Justice Jackson viewed the issue differently,[40] as a dilemma between incommensurable positions. But, although "Jackson's path" was significantly different from Frankfurter's justification, "it leads to the same conclusion."[41]

> "In order to deprive southern whites of their claim to hierarchically superior status, the Court was *obliged — as Jackson* clearly saw — to overrule *Plessy.* As Jackson also saw, however, in order to refuse any superior status to southern blacks, in order to treat them as equal but no more than equal to southern whites, the Court must do nothing more than overrule *Plessy."* [42]

The concern for unanimity in the Court's opinion, so valued by egalitarianism, is another mark of *Brown*, and remained important in a series of other decisions in the period between *Brown I* and *II*.

> "Whatever led the Court from this initial division to its ultimate unanimity in *Brown*, (…) it was clear that all the Justices viewed this unanimity as a critically important achievement that should be sustained in their subsequent responses to the segregation cases. (…)[As] they addressed race segregation in a variety of contexts — in southern election practices, interstate transportation facilities,

[38] "For Frankfurter and like-minded Justices [in the *Brown* Court], the American creed was the embodiment of the requirements of reason — not necessarily because the ideals of individual dignity, equality, and inalienable rights were timeless, absolute truths but because these ideals were the "social ethos, the political creed" held in fact, as Myrdal also put it, by "Americans of all national origins, classes, regions, creeds and colors." The problem in race relations was accordingly that Americans generally, and southern whites in particular, had not yet understood and acknowledged what they already believed. From this perspective, the American race problem could be solved if Americans generally, and southern whites in particular, would engage in reasoned inquiry regarding their own beliefs." Id. at 275.

[39] "A clear rationale for this course follows from the premises that Myrdal set out and Frankfurter in particular shared. If the race conflict – like all American social conflict – was potentially resolvable by reasoned inquiry, then some institutional means must be found to promote and sustain such inquiry with and among the antagonists. Majoritarian institutions had achieved this goal for labor-conflict, though *Lochner*-like judicial interventions had persistently obstructed and almost defeated the enterprise. But majoritarian institutions could not accomplish this for race conflict, not only because blacks were currently excluded from participation but because, as a consequence of this long-standing systematic exclusion both before and after slavery, southern racial antagonists never had engaged even in rudimentary practices of reasoned argumentation, [unlike labor antagonists]. (…) Accordingly, the Court's task was to devise some institutional means for inducing the racial antagonists to engage in reasoned inquiry. By this means they could be brought to acknowledge their common values and interests and, based on this understanding, reach accommodation on the issues that had previously loomed so large and divisive between them. If majoritarian institutions were not available or suitable for this purpose, judicial institutions beckoned invitingly" Id. at 275-6.

[40] "There was another view, clearly held by Robert Jackson and most likely also by Hugo Black at least: the view that subjugative assumptions remained' deeply rooted and that there was no common ground; no shared commitment to a single American creed, readily accessible in the persistent conflict between southern blacks and whites." Id. at 276.

[41] Id. at 281

[42] Id. at 280-1

> employment relations, and enforcement of residential restrictive covenants, as well as in graduate educational institutions' — the Justices self-consciously sought to avoid open disagreements among themselves that might both mirror and exacerbate the racial conflict reflected in the cases themselves."[43]

For Professor Burt, the importance of unanimity is also expressed in *Cooper v. Aaron* (1958), a case brought to the Court after local resistance to the school de-segregation led the President to send federal troops to Little Rock, AK. In spite of the Court's strong language in support of judicial supremacy and respect for its 1954 decision, the case is presented, more fundamentally, as a "testimony to the uncertainty of Brown" at the time, and recognition by the Justices of the need to widen the "agreement to their enterprise," in order to keep its legitimacy.[44]

The exemplary character of the *Brown* decisions also marks the dynamics between Court, and Congress in the ensuing years. The Justices expected that the other branches would respond affirmatively to the decision, and believed that "nothing would follow from the *Brown* decision unless support voluntarily came from the President and Congress."[45]

> "The Court properly ruled in *Brown* that be cause race segregation laws imposed subjugation, they violated the democratic equality principle and were therefore illegitimate. The Court could do nothing more, however, in principle or in practice than delegitimize the state laws; it could not authoritatively impose a legitimate, reciprocal relationship of acknowledged equality. Such a relationship would have to be worked out, among other places, in the give-and-take of congressional debate."[46]

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[43] Id. at 292. He continues: "The Justices' pursuit of unanimity explains why *Brown II*, in particular, is so difficult to decipher: because it was an amalgam of conflicting views among the Justices them selves, held together only by their mutual commitment to reach accommodation among themselves." Id. ibidem.

[44] "In their embattled opinion, the Court unintentionally testified to the uncertain status of *Brown*.(…) The lesson that the Justices actually applied was different from their adamant insistence on their unchallengeable claim to command. The lesson was that they could establish their authority on continuously soliciting the widest possible agreement to their enterprise – including, but not limited to not limited to, the new Justices (…) who had not previously concurred in *Brown*. *Cooper v. Aaron* was in this sense a continuation of the Justices' effort in the race segregation cases even before *Brown* to act only on the basis of unanimous agreement among themselves." Id. at 290.

[45] Id. at 293.

[46] Id. at 303.

Only around 1963, however, was Congress prepared to take action. And that, according to Professor Burt, was in part due to the delay in the Court's decision of a series of sit-in cases decided only after the enactment of the Civil Rights Act:[47]

> "If the Court majority had come together and had spoken earlier, enactment of this law would have been virtually inconceivable. The constitutional ruling apparently would have solved the problem of public accommodations discrimination — enough so that the other Senators would have abandoned the arduous enterprise of defying and risking general legislative retaliation from the powerfully situated Southerners, whose seniority gave them control over the major Senate committees." [48]

Thus the 1964 Civil Rights Act was crucial in sustaining the *Brown* Court's legitimacy. "If it had not been passed," argues Professor Burt:

> "[the Court's authority] itself would have been diminished — ironically enough by its own authoritative act ostensibly to vindicate the equality principle by invalidating the racially discriminatory application of state trespass laws. The Court would have lost authority if the Civil Rights Act of 1964 had not been passed because that Act ratified the correctness of the Court's ruling in *Brown I*. (…) The fact of legitimation was apparent in the response of southern whites generally to enactment of the i964 Act. Unlike their reaction to the Court's ruling in *Brown*, there was no "massive resistance" to the congressional proscription of public accommodations segregation; there was immediate compliance throughout most of the South (…) The condemnation of race segregation in the 1964 Civil Rights Act thus bestowed legitimacy on the Supreme Court's ruling in *Brown* v. *Board of Education* in a way that the Court could *never* have accomplished on the basis of its authority alone." [49]

Brown and the Civil Rights Act come to viewed, from this perspective, as mutually reinforcing episodes of a relationship built on the premise that no "crushing defeat"

[47] "The civil rights movement by then had made access to public accommodations its most publicly visible demand by conducting "sit-in" demonstrations throughout the South in segregated restaurants and entertainment facilities. The Court was drawn into this issue in litigative challenges to state trespass convictions; the demonstrators' principal constitutional argument was that state enforcement of trespass laws to uphold a property owner's discriminatory motive was prohibited state action, like judicial enforcement of racially restrictive residential covenants proscribed by the Supreme Court in 1948. The first sit-in case raising this argument came to the Court in 1962; but the Court postponed decision and the case was reargued in October 1963, with similar cases from other southern states." Id. at 297.
[48] Id. at 300.
[49] Id. at 300-1.

was to be imposed on the South. As such, they "[vindicate] the hope that James Madison had invested in representative institutions."[50]

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The model of judicial behavior proposed by egalitarianism involves a particular concern for the respect of "subjective evaluations" of the parties and the enlargement of agreement over the Court's decision. It expects Justices to declare the unconstitutionality of state and federal statutes, but at the same time avoid imposing consequences on the defeated. It also requires the Court to behave so that Congress participates in the construction of the constitutional solutions and, hopefully, legitimates the Court's decisions.[51] It is designed to avert the danger of an increasingly hostile, "Manichean politics," in which "adversaries are unwilling to acknowledge even the possibility of common ground," and for this reason, "they cannot imagine a relationship based on mutual respect."[52]

Professor Burt also describes a few "techniques for deciding cases" that may be employed so that the Court's intervention in social conflicts "assures that no combatant conclusively prevails over the other."[53] These techniques include "withholding adjudication of substantive decisions" for "undue vagueness;"[54] using "stringent and narrow statutory construction" and demanding that the legislative authority be specific on conflictive issues;[55] and "middle-tier constitutional

[50] Id. at 309.
[51] Id. at 310.
[52] "The Court did not succeed — and could not succeed — in suppressing conflict because of the Madisonian cast of our constitutional structure, because of ' the competitive, overlapping, and interdependent powers vested among our governance institutions. The Court's chronic conceit, that its constitutional command should be the last word on fundamentally disputed issues, thus recurrently stumbles over the order implicitly established by the Constitution itself." 353. For Burt's concern with the dominance of this type of perverse politics in the U.S., see Id., 353-358.
[53] Id. at 359.
[54] see Id. at 359 (Bickel)
[55] Id. at 362.

scrutiny."[56] Although some of the prescribed techniques were originally proposed by Alexander Bickel to "find middle ground between principle and expediency:"

> "The rationale for the limited character of these interventions is not (…) to calm judicial fears (…) These limitations necessarily follow from the principled justification for judicial action to remedy inequalities without creating judicially imposed inequalities. The equality principle itself demands particularistic, contextually circumscribed, tentatively offered judicial interventions, as opposed to grand style moral philosophizing in the interpretationist mode, or agnostic surrender to majority will."[57]

II. Justice

There is a lot to be said with regard to the historical and interpretive theses of *The Constitution in Conflict*. In fact, a great deal of the normative appeal of egalitarianism turns on how persuasive those theses prove to be. They include the description of the Founders' concerns and their institutional legacy, the interpretation of Lincoln's actions as evidence of a concern with egalitarianism, the interpretation of decisions like *Brown,* and many other ideas presented in the book. Here, however, I will discuss egalitarianism from a different perspective. Instead of assessing the merit of these theses, I will focus on the model of judicial decision-making proposed by egalitarianism and discuss what I consider to be its inherent limitations as a political ideal. So, I start with a question: *Is egalitarian authority compatible with a conception of justice in constitutional democracy?*

[56] Id. at 362-7.
[57] Id. at 367-8.

In order to answer it, I propose we distinguish two central claims within egalitarianism. We have, on the one hand, the institutional rejection of judicial supremacy, and on the other a view of judicial decision-making that orients a judge on how to discharge her functions. Although they are fundamentally connected in the egalitarian theory (rejection of institutional supremacy informs the concerns a judge must have in adjudicating constitutional cases), distinguishing them will help us better understand how egalitarianism may conflict with justice. The problem I believe, is not so much with the institutional rejection of judicial supremacy. Elimination of judicial supremacy is not incompatible with the pursuit of justice in a constitutional state. First, if we consider the legal system as a whole, substitution of judicial supremacy might, in principle, risk the protection of anti-majoritarian rights – but whether that is actually the case turns on the particulars of the institutional context in which those rights would be enforced. Institutional design is essential here because of the possibility of adoption of non-majoritarian controls over the meaning and amendment of constitutional laws (even if those controls are not judicial or judicial, but not final). Second, from the point of view of the judge, parliamentarian supremacy (or an alternative institutional arrangement without judicial supremacy) should not necessarily mean a restriction on a judge's ability to decide cases pursuant to [what she regards as] the demands of constitutional justice. Whether her interpretation will have binding force over subsequent decisions or other courts, and whether it will be reviewed and reversed by some other organ of the government are matters that she may not be able to determine. But as long as her responsibility as a judge involves the

application of constitutional law to particular cases, a change of status in judicial authority does not necessarily need to entail restrictions on her ability to apply constitutional justice.

But when we turn to the second component of egalitarianism, things are not so clear. We need first to make sense of how the Lincolnian example translates into a set of duties for the judge. I propose four candidate interpretations. In all of them, the judge ought to continually police the boundary between what is and what is not within her power to decide. So, if we emphasize the institutional aspect of egalitarianism, we may conclude it demands that constitutional decision-making by courts, at least in highly divisive cases, be oriented by a concern with avoiding that the decision preempts congressional action. A different understanding, more focused on the egalitarian element of the theory, may require judges to decide constitutional cases in a way that never disregards "the subjective evaluations of both parties." A third way of interpreting egalitarianism may instruct the judge to take into account the trend of political polarization and decide the case at hand in a way so as not to aggravate it. A fourth reading may require the judge to restrict his rulings to declarations, and not orders.[58] All of them are also easily identifiable in the book. Avoiding decisions that preempt congressional action, preserving the subjective evaluations of the parties, mitigating political polarization, and restricting decisions to declarations – each of these views points to a particular political justification, but they all share the same difficulty. Because they set demands on the judge's ruling, they may conflict with her understanding of what constitutional justice requires in a case at hand. Egalitarianism shapes and constrains the conception of constitutional justice with which it can coexist. *Brown II* actually illustrates this point. One does not need to perceive it as an

[58] Perhaps a fair interpretation of egalitarianism demands that a judge observe all these constraints. But then, we should add to the problems I identify below, the possibility that these demands contradict each other.

"unprincipled political decision" to believe it fell short of meeting the demands of justice in the Constitution. You can actually see it as an effort of egalitarianism and still believe it inconsistent with what the previous ruling in *Brown I* required in terms of justice. This problem seems to run through any of these four formulations of egalitarianism. How incompatible the theory's demands are vis-à-vis the requirements of justice can only be ascertained in particular cases – but the possibility of conflict is always there.

Unless, of course, egalitarianism itself can be described as part of justice. Professor Burt seems closer to such a claim when he associates his theory of judicial authority to a defense of equality between the groups whose views conflict: more precisely, when he affirms a judicial duty not to disregard the "subjective evaluations" of either parties. It is difficult to see though how such duty could be successfully postulated without either distorting the meaning of equality or abandoning a conventional picture of constitutional adjudication. Equality before the law is traditionally understood as the right to make your case in court. It implies an idea of fairness in the legal process, the ability of conflicting parties to inform the judge of the facts and their claims. Therefore, to assert that equality entails a duty on the judge not to disregard the parties' views either means just that she should not violate the guarantees I just described, or it means something different, in which case, it calls for a more elaborate political justification. In order to provide the latter, egalitarian theory seems to rely on a conception of political association, which is developed in reference to the Civil War. Lincoln's openness to negotiation throughout the War and his words about not humiliating the defeated are interpreted in the book to express respect for the white Southerners' equality as members of the political community of the United States. It is not very clear that such concern is the best explanation for his words and actions,

rather than, for example, his concern with avoiding further costs of war, consolidating the Union's victory, anticipating the need of collaboration once the rebels have been defeated, or even more to the point, simply avoiding territorial disintegration.[59] If any of these reasons offered a better explanation to Lincolns actions, the case for egalitarianism as justice would be considerably weakened. If, on the other hand, we abstract from this historical grounding and admit that membership in a political community entails this strong conception of equality as a right "not to have one's subjective evaluations disregarded," we may have to break with the conventional view of adjudication as *telling what the law says* and replacing it with *managing conflicts until all have been convinced*. This in turn might depend on further changes in our understanding of the value and centrality of "subjective evaluations." By the end, we'd be far from any recognizable understanding not only of constitutional adjudication as it has been practiced and justified but also of political justice.

If we change focus away from the protection of subjective evaluations of the parties, a different problem appears. Consider, for instance, leaving room for congressional action and restricting decisions to declarations about the constitutionality of statutes. Both directives seem appropriate expressions of egalitarian concerns; as I mentioned above, they also engender the possibility of conflict with the requirements of justice; and both call for a justification, most likely to be found not in a conception of justice but in some understanding of the relation between political institutions and self-government. Here, however, the best candidate seems to be a conception that places majoritarian institutions at center stage, instead of the more balanced institutional landscape Professor Burt explicitly defends.

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Given the difficulties pointed out above, it seems that the best understanding of egalitarianism's implications for constitutional decision-making would be that judges should decide constitutional controversies in a way that mitigates the trend of polarization in politics. This position involves both a negative perception of polarization (as something detrimental to politics and self-government) and a belief in the power of the Court in aggravating (or alleviating) this problem. Professor Burt argues for both these ideas. But another problem remains. Egalitarianism is not merely a particular version of prudence or judicial practicality: egalitarianism is not a mere disposition to take into account the potential adverse effects of a decision. It presents itself in theoretical form and implies that judges, at least in a specified set of cases, ought to conform to its demands. In order to assume this egalitarian stance, a judge still needs an account of her responsibilities that not only includes such a duty to avoid political polarization, but also gives it a central place. However detrimental and widespread the problem may be, it does not follow from this fact (or even from the establishment of a causal relation between the problem and the Court's decisions) that this is *her* problem. Besides, this justificatory issue is only exacerbated when it requires a ruling that fails to meet the demands of justice in a concrete case.

It seems that no matter how we approach the demands of egalitarianism, we are bound to face two problems: on the one hand, we cannot seem find a description of judicial duties that avoids conflict with the demands of justice in a constitutional state; on the other, any understanding of what those duties entail is bound to reveal difficulties in terms of justification. These two problems seem to arise from the model of judicial decision-making proposed in the book, rather than from any institutional rejection of judicial supremacy.