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## ARTICLE

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### ADMINISTRATIVE CONSTITUTIONALISM AS POPULAR CONSTITUTIONALISM

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#### ABSTRACT

*In the debate about who controls the meaning of the Constitution, popular constitutionalism appears to be losing. Popular constitutionalist methods for popular input into the evolving meaning of the Constitution account for a diminishing fraction of changes to constitutional meaning over time. Social movements remain rare, Congress is increasingly dysfunctional, and recent presidential proclamations and executive orders have not engaged constitutionalism with the degree of specificity necessary to influence the meaning of the Constitution. Focusing on these traditional methods, it appears that judicial supremacy has won and that courts exercise near-exclusive control over the meaning of the Constitution.*

*In this Article, I argue that such appearances are deceiving. As the debate between popular constitutionalism and judicial supremacy faded from legal scholarship a decade ago, new descriptive and normative accounts of agencies as actors involved in determining the meaning of the Constitution have emerged. Administrative agencies, through their statutory implementation and enforcement roles, are involved in the application of constitutional principles embedded in statutes. While agencies lack the popular pedigree of Congress and the President, these implementation and enforcement decisions often involve the people either formally through notice-and-comment rulemaking or informally through interest group and social movement engagement. Although not labeled “popular constitutionalism,” these forms of popular engagement with agencies that have been richly explored in the historical and*

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*normative accounts of administrative constitutionalism should be understood as forms of popular constitutionalism.*

*Beyond connecting administrative constitutionalism to popular constitutionalism, this Article will identify another means by which agencies through their actions involve the people in constitutional meaning determinations. This account requires a shift in focus from the popular inputs into administrative constitutionalism to the outputs from administrative constitutionalism. I show through the example of recent administrative actions enforcing the Fair Housing Act how administrative actions serve as catalysts for popular debate about the constitutional principles embedded in statutes and the means by which these constitutional principles should be applied.*

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## INTRODUCTION

Over a decade ago, Larry Kramer, one of the leading advocates of popular constitutionalism, issued a scholarly call to arms in the fight against judicial supremacy. Lamenting judicial assertions of control over the meaning of the Constitution, Kramer implored scholars to explore institutional alternatives that provide for greater popular input into constitutional meaning determinations. He asserted that we should no longer accept the notion that “popular constitutionalism can’t work, so turn the Constitution over to the Court.”<sup>1</sup> Instead, “[w]e should . . . be asking what kind of institutions we can construct to make popular constitutionalism work, because we need new ones. We need to start rethinking and building institutions that can make democratic constitutionalism possible. And we need to start doing so now.”<sup>2</sup>

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<sup>1</sup> Larry Kramer, *Response*, 81 CHI.-KENT L. REV. 1173, 1182 (2006) [hereinafter Kramer, *Response*].

<sup>2</sup> *Id.*

Despite this call, popular constitutionalism remains a theory in search of a workable method.<sup>3</sup> The theory of popular constitutionalism is rather clear: the people should have the final say in determining the meaning of the Constitution.<sup>4</sup> It counters the notion that the Court is the supreme authority over constitutional meaning—which is the approach preferred by the Supreme Court and many constitutional scholars.<sup>5</sup> Judicial supremacy, the popular constitutionalists argue, is contrary to the Framers' intent, historical constitutional practice, and our democratic system of government.<sup>6</sup>

While clear at the level of theory, the suggested methods for implementing popular constitutionalism remain vague and underdeveloped. Popular constitutionalists agree that the formal process for amending the Constitution under Article V is an inadequate channel for popular input into constitutional meaning.<sup>7</sup> The barriers to passing an amendment through this formal channel are too high, resulting in amendments that are too few and far between to keep up with evolving societal values.<sup>8</sup>

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<sup>3</sup> See, e.g., Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 159, 166 (2012) (describing critics' fears that the institutional solutions that prominent popular constitutionalists suggest to implement popular constitutionalism "are too radical" because they would "undermine judicial authority and result in majoritarian tyranny"); Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People be Trusted?*, 86 WASH. U. L. REV. 313, 340 (2008) ("[P]opular constitutionalists have not yet specified the precise means by which the American people are to provide their answers to the nation's reasonably contested constitutional questions.").

<sup>4</sup> See, e.g., Larry Kramer, "The Interest of the Man": James Madison, *Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 700 (2007) (explaining that the theory of popular constitutionalism "does not assume that authoritative legal interpretation can take place only in courts, but rather supposes that an equally valid process of interpretation can be undertaken in the political branches and by the community at large").

<sup>5</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States."); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution."); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359 (1997) (offering a critique of constitutionalism outside of the courts and a defense of judicial supremacy); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5, 6 (2001) (describing the widespread approval of "the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone").

<sup>6</sup> See, e.g., LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 128-44 (2005) (discussing the history of opposition to judicial authority by Republicans in the early decades of the republic).

<sup>7</sup> See, e.g., Robert Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 380 (2007) [hereinafter Post & Siegel, *Roe Rage*] ("Article V amendments are so very rare that they cannot provide an effective avenue for connecting constitutional law to popular commitments.").

<sup>8</sup> This is reflected in the fact that only seventeen amendments have been ratified in the 225 years since the ratification of the Bill of Rights. Most of these amendments are in the category of procedural amendments rather than amendments that represent the evolving constitutional values of the people.

From this point of agreement, popular constitutionalists diverge. One variant of popular constitutionalism argues for a direct form of popular input into constitutional meaning determinations similar to that demanded by the Article V amendment process but without the same high procedural barriers.<sup>9</sup> Central to this account are mass social movements that engage in dialogue with counter-movements and the courts to influence the meaning of the Constitution. The prime example of such direct popular constitutionalism is the second feminist movement of the 1970s.<sup>10</sup> Although the movement failed in its effort to pass the Equal Rights Amendment to protect the equality of the sexes, it did succeed through its dialogue with counter-movements and the courts in changing judicial doctrine to incorporate gender equality principles into the Fourteenth Amendment's Equal Protection Clause.<sup>11</sup> Other twentieth-century examples of direct popular constitutionalism include: (1) the civil rights movement, which inspired a broader principle of racial equality more protective of African Americans and a statutory regime focused on prohibiting racial discrimination;<sup>12</sup> (2) the gun rights movement, which informed a constitutional principle protecting the individual right to bear arms;<sup>13</sup> and (3) the gay rights movement, which influenced the

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<sup>9</sup> See, e.g., 3 BRUCE ACKERMAN, *WE THE PEOPLE* 26-32 (2014) (arguing that constitutional changes through constitutional moments supplement the Article V constitutional amendment process); Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 27 (2005) (contending that "Article III, not Article V, has been the great vehicle of constitutional development" with social movements profoundly shaping judicial interpretations of the Constitution); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 499 (2001) (describing how constitutional change occurs outside of the formal Article V amendment process through the enactment of super-statutes and "dynamic interpretations of the Constitution by the Supreme Court" arising from the influence of identity-based social movements); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001) (identifying a process of constitutional change outside the formal Article V amendment process that involves social movement mobilization, countermobilizations, and dialogue between the people and the courts).

<sup>10</sup> See *infra* Part II.

<sup>11</sup> See, e.g., Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and the Law*, 117 HARV. L. REV. 4, 25 (2003) (noting that the Court's "sex discrimination jurisprudence . . . was educated by the evolving constitutional beliefs and values of nonlegal actors, as manifested by congressional legislation"); Post & Siegel, *Roe Rage*, *supra* note 7, at 385 ("The contemporary constitutional law of sex discrimination . . . first appeared when the Court was able to perceive points of convergence in the nation's understanding of women as equal citizens that emerged within debates between those who opposed and those who embraced the ERA."); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1323 (2006) (arguing that the "equal protection doctrine prohibiting sex discrimination was forged in the Equal Rights Amendment's defeat").

<sup>12</sup> See, e.g., CLAY RISEN, *THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT* 39-114, 240-68 (2014) (describing the instrumental role of the civil rights movement in the passage of the Civil Rights Act of 1964).

<sup>13</sup> See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 239-45 (2008) (describing the influence of a mobilized gun rights movement on

development of constitutional principles of sexual autonomy and anti-discrimination against LGBT people.<sup>14</sup>

Direct popular constitutionalism provides an important popular counterweight to judicial supremacy. But social movements that succeed in changing the Constitution are not that common. The scarcity of examples of direct popular constitutionalism relative to the aggregate number of changes in constitutional meaning that the Court makes suggests that the general pattern of judicial control over constitutional meaning remains mostly undisturbed.

Another variant of popular constitutionalism identifies more indirect forms of popular constitutionalism mediated through elected and accountable institutional actors.<sup>15</sup> For mediated popular constitutionalists, the primary focal points are Congress and the President.<sup>16</sup> The political branches make constitutional meaning determinations through the enactment and enforcement of statutes, executive orders, presidential speeches, and

the decision in *District of Columbia v. Heller* interpreting the Second Amendment to protect an individual right to bear arms).

<sup>14</sup> See, e.g., William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2066 (2002) (describing how “[identity-based social movements] have moved public norms away from understanding race, sex, and sexual orientation as *malign variations* toward understanding them as tolerable and (for race and sex) *benign variations*” (emphasis in original)).

<sup>15</sup> See, e.g., Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 1 (2003) (arguing that Congress can assert its historic role in the creation of constitutional meaning during a time when the “[Supreme] Court employed doctrines of deference to vindicate democratic values in constitutional interpretation, defining the scope of federal power in terms that gave great weight to Congress’s judgments about the nation’s needs and interests”); Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 FORDHAM L. REV. 1837, 1837 (2009) (arguing that constitutional developments in recent decades “are episodes in presidential popular constitutionalism”); see also Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2602 (2003) (describing how popular constitutionalism is mediated through the courts, which “play[] an important role in identifying those constitutional values that achieve widespread popular support over time”).

<sup>16</sup> See, e.g., David L. Franklin, *Popular Constitutionalism as Presidential Constitutionalism?*, 81 CHI-KENT L. REV. 1069, 1081 (2006) (drawing attention to a method of presidential constitutionalism through the use of the Department of Justice’s Office of Legal Counsel); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1338 (2001) (“Congress, not the Court, is often best situated to make the judgments necessary to create a Constitution of relevance to Americans today.”); Robert Post & Reva B. Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1032 (2004) (“Because both the President and the Congress are agents of the people’s will, popular control of constitutional meaning demands that Congress and the President must be free to make and act on their own interpretations of the Constitution.”); Purdy, *supra* note 15, at 1844 (describing presidential inaugural addresses as instruments of presidential constitutional interpretation); see also Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J.L. REFORM 971, 1005-06 (2010) (arguing for the placement of unreviewable constitutional interpretive authority in the federal trial courts); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2064-66 (2010) (arguing for elected state judiciaries as institutions capable of advancing popular constitutionalism).

presidential signing statements.<sup>17</sup> Because Congress and the President are directly elected by the people, their decisions regarding constitutional meaning are considered a form of constitutionalism that is responsive to the values of the people.<sup>18</sup>

Mediated forms of popular constitutionalism through Congress and the President account for a broader swath of constitutional meaning determinations than direct popular constitutionalism. But this more institutionalist account of popular constitutionalism leaves out an important vehicle for popular constitutional lawmaking that has been historically prominent and is even more important today: administrative agencies.<sup>19</sup> Understanding the role of administrative agencies in popular constitutionalism requires disaggregating constitutionalism, linking administrative actions to a form of constitutionalism, and then recognizing the multiple modes of administrative engagement with the public.

Popular constitutionalists have glossed over a critical distinction between two aspects of constitutionalism—the distinction between constitutional principle elaboration and constitutional principle application. Direct and mediated forms of popular constitutionalism foreground the people and the people's representatives in the elaboration of constitutional principles. Such principles include gender, racial, and sexual orientation equality; sexual and bodily autonomy; the individual right to bear arms; and the right to marry who one chooses. The articulation of these constitutional principles has captured the imagination of popular constitutionalists. But the level of generality at which these principles are elaborated means that intermediaries are needed to actually regulate conduct. These intermediaries come in the form of standards, rules, and other forms of constitutional principle applications.

For example, the constitutional principle of gender equality requires a standard or rule to determine whether a state employer's exclusion of women from pregnancy benefits or a state-law grant of hiring preferences for veterans over nonveterans (when most veterans are men) is inconsistent with the principle. Social movements, Congress, and the President are certainly involved in the development and enforcement of constitutional principle applications. But such applications typically lack the popular salience of

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<sup>17</sup> Franklin, *supra* note 16, at 1069 (noting that “popular constitutionalism in 2006 may in practice mean presidential popular constitutionalism”); Purdy, *supra* note 15, at 1837 (noting “the role of the President as a popular constitutional interpreter, articulating and revising normative accounts of the nation that interact dynamically with citizens’ constitutional understandings”).

<sup>18</sup> See, e.g., Kramer, *Response*, *supra* note 1, at 1176-77.

<sup>19</sup> No popular constitutionalist scholar has specifically suggested that agencies as institutions are capable and situated to implement popular constitutionalism. For instance, Larry Kramer describes the disagreement about interpretive methods as “centered on which institution or institutions had power to interpret: Congress, the President, the courts, the states, or the community at large.” Larry Kramer, *Generating Constitutional Meaning*, 94 CALIF. L. REV. 1439, 1439 (2006).

constitutional principle elaboration and therefore do not motivate as much social movement activity. Similarly, Presidents, in their platforms and speeches, typically emphasize broader principles over narrower applications.

Statutes and executive orders therefore serve as the primary means of congressional and presidential engagement with constitutional applications. During active periods of lawmaking that involve the enactment of broad statutes with direct constitutional implications, Congress, through its engagement with the people and dialogue with the courts, fills much of the gap in popular constitutional lawmaking. But such active periods of congressional lawmaking are rare. In fact, with the exception of two brief periods—post-9/11 and the first two years of the Obama presidency<sup>20</sup>—the new norm over the past twenty years is one of congressional dysfunction and gridlock in which even ordinary lawmaking is nearly impossible.<sup>21</sup> Presidents have stepped into this breach using executive orders and presidential memoranda as lawmaking devices.<sup>22</sup> But while there are high profile examples, such as President Obama’s memorandum establishing the Deferred Action for Childhood Arrival policy and President Trump’s executive order banning entry into the United States by individuals from mostly Muslim-majority countries, executive orders and presidential memoranda rarely function as tools advancing constitutional principles and applications.<sup>23</sup> Contrary to the current popular constitutionalist account, Congress and the President are not always the primary institutional vehicles for popular engagement with the Constitution. Administrative agencies are critical components of the popular constitutionalist project.

Congress often delegates to agencies the authority to enforce statutes advancing constitutional principles. In their role enforcing statutes implicating constitutional principles, agencies often engage in dialogue with the people and the courts in their development and enforcement of particular constitutional applications. My prior work on administrative constitutionalism emphasizes popular input into administrative actions through the notice-and-

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<sup>20</sup> See Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 94 (2015) (describing these two periods as historically strong periods of congressional lawmaking).

<sup>21</sup> See generally THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006).

<sup>22</sup> See Jessica Stricklin, *The Most Dangerous Directive: The Rise of the Presidential Memoranda in the Twenty-First Century as a Legislative Shortcut*, 88 TUL. L. REV. 397, 410 (2013) (describing presidential memoranda and executive orders as “vehicles to enact significant policy change with the force and effect of law without any legislative interference”).

<sup>23</sup> See Jessica Arco, *A DREAM Turned Nightmare: The Unintended Consequences of the Obama Administration’s Deferred Action for Childhood Arrivals Policy*, 82 GEO. WASH. L. REV. 493, 507-10 (2014) (describing the Obama’s administration deferred action for childhood arrival policy); see also *Protecting the Nation from Foreign Terrorist Entry into the United States*, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

comment rulemaking procedure.<sup>24</sup> But while this is an important aspect of popular engagement with administrative actions, it is neither sufficient nor necessary to satisfy the mandate of popular constitutionalism.<sup>25</sup>

Public engagement with the Constitution requires a catalyst that nationalizes a debate about constitutional principles and their applications. Courageous human acts such as Rosa Parks' decision to disobey a Jim Crow law and sit at the front of a Birmingham bus sparked a civil rights movement that ultimately triggered a national debate about the constitutional meaning of equal protection as applied to race.<sup>26</sup> Books such as Betty Friedan's *The Feminine Mystique* and the creation of the National Organization for Women inspired a second feminist movement focused on women's liberation and a constitutional goal of gender equality.<sup>27</sup> Events like the Black Panthers' armed protest on the steps in the California capitol building and the assassinations of Dr. Martin Luther King and Robert F. Kennedy inspired state and federal gun control measures, which in turn sparked a gun rights movement that advanced a libertarian interpretation of the Second Amendment right to bear arms.<sup>28</sup> From a popular constitutionalist perspective, the importance of these movements was not simply in the constitutional results achieved, but in the process by which the broader public participated centrally in debates about the meaning of the Constitution.

Congress and the President also serve as critical catalysts for national constitutional debates. For Congress, the spark is often the adoption of statutes that apply or implicate the Constitution. But it could also be a hearing that

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<sup>24</sup> See Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 576 (2015) (identifying the notice-and-comment rulemaking process as a tool by which agencies can obtain public input and "engage in a deliberative process of constitutionalism resistant to the demands of ordinary politics").

<sup>25</sup> The notice-and-comment procedure is not sufficient because the public involved in the process usually comprises a narrow slice of interested and elite actors. See, e.g., Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RESEARCH & THEORY 245, 252-255 (1998) (finding interest group and other elite actor domination in the notice-and-comment process across environmental, transportation, and civil rights agencies). The notice-and-comment procedure is not necessary because other types of agency actions can involve the public in debates about the meaning of the Constitution. See *infra* Part IV.

<sup>26</sup> See Robert Jerome Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955-1957*, 9 L. & HIST. REV. 59, 59 (1991) ("Considerable attention has naturally focused on the Montgomery bus boycott that signaled the start of the modern civil rights movement in December, 1955, when Rosa Parks refused to go to the back of the bus.").

<sup>27</sup> See Becky Thompson, *Multiracial Feminism: Recasting the Chronology of Second Wave Feminism*, 28 FEMINIST STUD. 336, 338 (2002) ("Normative accounts of the Second Wave feminist movement often reach back to the publication of Betty Friedan's *The Feminine Mystique* in 1963, the founding of the National Organization for Women in 1966, and the emergence of women's consciousness-raising (CR) groups in the late 1960s.").

<sup>28</sup> See ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 247-58 (2013) (tracing the inspirations for and enactment of gun control legislation in the 1960s and the ensuing pushback from supporters of broader gun rights).



Congress holds on a constitutionally-related issue or a judicial confirmation process that raises constitutional issues that draw public attention. Presidents often inspire public debates about the Constitution through their campaigns for the office, through speeches once in office such as the inauguration speech or State of the Union speeches, and through executive actions such as executive orders that apply or implicate the Constitution.

Finally, and most relevant here, administrative agencies also bring about popular constitutional debates through their actions. The impetus can come in the form of a rule adopted through notice-and-comment procedures. But more frequently, the catalyst arises from an agency's decision to initiate or join a lawsuit, a congressional hearing involving agency heads, or agency heads' direct engagement with the people through speeches or opinion editorials.

In this Article, I describe an example of an administrative action setting off a national debate about the application of a constitutional principle: the Department of Housing and Urban Development's (HUD's) decision to intervene in a lawsuit seeking enforcement of a desegregation mandate under the Fair Housing Act. This action triggered a public debate that played out in the media and in 2016 presidential campaign discussions about segregation and federal power that directly implicated the Fourteenth Amendment's Equal Protection Clause.<sup>29</sup>

HUD's action not only catalyzed national debates about critical constitutional issues, it also facilitated a dialogue between the people and the courts. This process points to a final important feature of popular constitutional theory. For most popular constitutional theorists, popular constitutionalism means more than a national debate on a constitutional issue. It also means communicating popular constitutional views to the actor usually responsible for making final determinations about the meaning of the Constitution—courts. Social movements, Congress, the President *and* agencies open the line of communications through actions that serve as catalysts for national constitutional debates. Courts can then act on what they learn through their judicial review of those very catalysts of national constitutional debate, such as statutes, executive orders, agency rules, and agency-involved lawsuits.

In the rest of this Article, I develop the case for administrative constitutionalism as a form of popular constitutionalism. In Part I, I broadly outline the theory of popular constitutionalism and the different methods advanced thus far for public input into constitutional meaning determinations. In Part II, I identify an important oversight in popular constitutionalism: the failure to disaggregate constitutionalism. I separate constitutionalism into two parts—constitutional principle elaboration and

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<sup>29</sup> See *infra* Part IV.

constitutional principle application—and provide examples of both. I show how constitutional applications play a central role in defining the meaning and scope of constitutional principles.

In Part III, I show how agencies are involved in constitutionalism through their enforcement of statutes implicating or advancing constitutional principles. I then theorize about when and how administrative constitutionalism functions as a form of popular constitutionalism by triggering national constitutional debate and creating a communicative pathway between the people and the courts. I conclude Part III by arguing that administrative agencies are now a critical institutional vehicle for popular constitutionalism in the current context of legislative dysfunction. In Part IV, I present an example of administrative constitutionalism as popular constitutionalism: HUD's actions to enforce the affirmatively further fair housing mandate under the Fair Housing Act.

## I. THEORIES OF POPULAR CONSTITUTIONALISM

Popular constitutionalism is a simple theory with a constellation of approaches that seek to operationalize it. According to the theory, the people should be involved in determining the meaning of the Constitution.<sup>30</sup> Implicit within this normative prescription is the view that the Constitution's meaning is not fully determined by its text. Open-ended textual requirements for freedom of speech, due process, and equal protection combined with implicit principles of federalism and separation of powers require not only interpretation relying on textual tools, legislative history, and past public understandings of meaning, but also construction according to the evolving values of society.<sup>31</sup>

The popular constitutionalist foil is judicial supremacy. According to the more extreme judicial supremacist account, courts should have the exclusive and final say over the meaning of the Constitution; the less extreme account suggests that courts should have the final say in that their judgments about the meaning of the Constitution are final.<sup>32</sup> In the 1950s, the liberal Warren Court planted the seeds of judicial supremacy in its fight against massive resistance from state and local officials to the Court's school desegregation mandate in

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<sup>30</sup> See, e.g., Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 961 n.3 (2004) (“‘Popular constitutionalism’ refers to the idea that authority to interpret and enforce the Constitution is not deposited exclusively or ultimately in courts . . . but remains in politics and with ‘the people themselves.’”).

<sup>31</sup> See Pettys, *supra* note 3, at 339 (“Because many of the Constitution’s provisions are open-ended in their language, the Constitution’s meaning is often highly contested.”).

<sup>32</sup> See Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1550 (2005) (describing two versions of judicial supremacy).

*Brown v. Board of Education*.<sup>33</sup> The Court in *Cooper v. Aaron* explained that its constitutional determinations must prevail over those of the people's representatives because Article III of the Constitution (as interpreted in *Marbury v. Madison*) gave the Court exclusive and final say over the document's meaning.<sup>34</sup> Another principle animating the liberal judicial supremacist argument was that the Court, as a counter-majoritarian institution, needed to have the exclusive and final say over the Constitution in order to protect the rights of minorities against the tyranny of the majority.<sup>35</sup>

In the 1990s, the more conservative Rehnquist Court peeled judicial supremacy away from its liberal, rights-protective roots and advanced an institutional argument for exclusive and final authority over constitutional meaning that was based on separation of powers and federalism. The divergence from the liberal roots of judicial supremacy is perhaps best exemplified by the Rehnquist Court's employment of the doctrine as a justification for striking down democratically enacted laws protective of minority rights.<sup>36</sup> Separation of powers and federalism, according to the Court, prohibited the people's representatives from protecting rights beyond those the Court already protected in its constitutional jurisprudence.<sup>37</sup>

Both manifestations of judicial supremacy agree that the Constitution is not ordinary law whose meaning should be determined through simple majoritarian politics.<sup>38</sup> Instead, the Constitution is considered higher law that requires

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<sup>33</sup> 349 U.S. 294, 301 (1955) (remanding school segregation cases to district courts and instructing them to "enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases").

<sup>34</sup> 358 U.S. 1, 18 (1958).

<sup>35</sup> See, e.g., Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 827-28 (2002) ("Judicial supremacy . . . is regarded 'as a permanent and indispensable feature of our constitutional system' because the Court alone functions as a countermajoritarian institution securing the liberties of individuals and political minorities." (quoting *Cooper*, 358 U.S. at 18)).

<sup>36</sup> See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (finding that employees of the State of Alabama could not recover monetary damages for to the state's failure to comply with the Americans with Disabilities Act); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 66-67 (2000) (finding that Florida state employees could not recover monetary damages for the state's failure to comply with the Age Discrimination in Employment Act); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (striking down a federal act protecting religious freedom as exceeding congressional enforcement authority).

<sup>37</sup> See *Flores*, 521 U.S. at 535-36 (advancing a separation-of-powers and judicial-competency rationale for judicial supremacy over constitutional meaning determinations); see also Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 26-27 (2003) (elaborating on the rationale underlying the Court's claim of judicial supremacy over constitutional meaning determinations in *Flores*).

<sup>38</sup> See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 865 (1999) (construing the judicial-supremacy premise advanced in *Flores* as based on a distinction drawn between constitutional interpretation and ordinary lawmaking).

politically independent courts to make decisions about its meaning on the basis of reasoned deliberation.<sup>39</sup> The only role for the people in constitutional meaning determinations, consistent with the Supreme Court's account of judicial supremacy, is through the Article V amendment process, which provides a deliberative, super-majoritarian means for changing the Constitution.<sup>40</sup>

Popular constitutionalists reject the judicial supremacist account of constitutional meaning determination, but there is some variation within their theories that brings to light differences in popular constitutionalist methodology. In the following, I distinguish between direct and mediated forms of popular constitutionalism.

#### A. Direct Popular Constitutionalism

For some popular constitutionalists, whom I label direct popular constitutionalists, the problem with judicial supremacy is not the assertion that courts have the final say in determining constitutional meaning. Rather, it is the insistence that courts determine the meaning of the Constitution to the exclusion of direct popular input.<sup>41</sup> The basis for this disagreement is both descriptive and normative. As a descriptive matter, direct popular constitutionalists argue that constitutional meaning determinations often occur through dialogue between the people and the courts.<sup>42</sup> For example, constitutional change sometimes occurs when social movements secure support for their rights claims from a broader segment of the people and the people's institutional representatives.<sup>43</sup> The Supreme Court, concerned about preserving its popular legitimacy while functioning as an unelected and unaccountable institution, tethers itself to evolving societal values through recognition of those rights claims that secure broader public support. The

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<sup>39</sup> *Id.*

<sup>40</sup> See *Flores*, 521 U.S. at 529 (rejecting congressional assertion of authority over substantive constitutional meaning determinations because “[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V”).

<sup>41</sup> See Kramer, *Foreword: We the Court*, *supra* note 5, at 10 (rejecting the judicial supremacy claim that the Constitution is ordinary law that is peculiarly the domain of the court and instead insisting the Constitution is popular law “made by the people to bind their governors”).

<sup>42</sup> See Post, *supra* note 11, at 8 (noting that “the Court . . . commonly constructs constitutional law in the context of an ongoing dialogue with culture,” which Post defines as “the beliefs and values of nonjudicial actors”).

<sup>43</sup> See Siegel, *supra* note 9, at 300 (“[I]f judges have played the central role in articulating constitutional norms in the American tradition, their understanding of the Constitution has been deeply shaped by mobilized citizenry, acting through electoral processes, and outside of them.”).

Court then transmits these rights claims through judicial doctrine that shifts the meaning of the Constitution.<sup>44</sup>

The principal example of such direct popular constitutionalism repeated in the literature is the dialogue between the second feminist movement and the Court in the 1970s that led to a change in equal protection doctrine as it related to sex discrimination.<sup>45</sup> The second feminist movement targeted barriers to the equality of women found in law, culture, and societal expectations.<sup>46</sup> Upon reaching adulthood, women were expected to get married and take on the role of homemaker.<sup>47</sup> Legal regulations denied women financial autonomy by giving husbands control over their wives' property and earnings and employment barriers limited many women to jobs as secretaries, teachers, and nurses.<sup>48</sup> The few women who were able to overcome employment barriers and secure opportunities as lawyers, doctors, and engineers often faced pay discrimination and denial of opportunities to advance in their profession.<sup>49</sup> When women became pregnant, they faced more discrimination and were often forced out of the workplace.<sup>50</sup>

The second feminist movement secured an early, unexpected, victory with the addition of sex as a category entitled to protection against employment discrimination under Title VII of the Civil Rights Act of 1964.<sup>51</sup> In the years that immediately followed, the victory proved hollow, as the agency responsible for enforcing Title VII, the Equal Employment Opportunity Commission, failed to enforce the law to protect women from discrimination in the workplace.<sup>52</sup> In the early 1970s, the second feminist movement expanded its focus beyond discrimination in the workplace and societal expectations about gender roles to claims about female bodily autonomy implicated in the abortion debate and societal inaction and insensitivity to

<sup>44</sup> See Eskridge, *supra* note 9, at 419 (“The modern meaning of the Equal Protection Clause owes much more to the power and norms of the civil rights and women’s liberation movements than to the original intent of the Fourteenth Amendment’s framers.”).

<sup>45</sup> See, e.g., Siegel, *supra* note 9, at 308-315 (describing the evolution of the Supreme Court’s sex discrimination doctrine and how it was influenced by the second feminist movement).

<sup>46</sup> See NANCY MACLEAN, *THE AMERICAN WOMEN’S MOVEMENT, 1945–2000*, at 14-20 (2009).

<sup>47</sup> Cf., SHEILA TOBIAS, *FACES OF FEMINISM: AN ACTIVIST’S REFLECTIONS ON THE WOMEN’S MOVEMENT* 4-6 (1997) (describing popular understandings of such traditional gender roles in the nineteenth and twentieth centuries and the works of writers who questioned those roles).

<sup>48</sup> See *id.* at 12-13, 44-45 (discussing the limited rights and employment opportunities women had in the nineteenth century).

<sup>49</sup> See *id.* at 95-96 (describing the difficulties women faced in advancing in such positions due to the expectation that they devote time to giving birth to and raising children).

<sup>50</sup> See, e.g., *id.* at 132 (describing how female public school teachers were often forced to resign when they became pregnant).

<sup>51</sup> Intended as a “killer” amendment, the addition of sex as a category entitled to protection under Title VII was enacted into law under the leadership of a congresswoman from Michigan. See *id.* at 81-82.

<sup>52</sup> See MACLEAN, *supra* note 46, at 14.

rape.<sup>53</sup> The movement sparked congressional passage of the Equal Rights Amendment to the Constitution in 1972, nearly fifty years after it was first introduced in Congress.<sup>54</sup> According to the amendment, “[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”<sup>55</sup>

Although the Equal Rights Amendment came up three states short of the 38 needed for ratification, the movement secured important gains.<sup>56</sup> The EEOC increased its aggressiveness in enforcing Title VII prohibitions on sex discrimination.<sup>57</sup> Congress overruled a Supreme Court decision interpreting Title VII to not protect against pregnancy discrimination.<sup>58</sup> And perhaps most importantly, the Court’s interpretation of the Equal Protection Clause shifted.<sup>59</sup> In the century preceding the second feminist movement, the Court first denied women protection from discrimination outright under the Fourteenth Amendment.<sup>60</sup> When the Court finally did subject a gender discriminatory law to equal protection scrutiny, it upheld the law under the most deferential form of review.<sup>61</sup> In the midst of the second feminist movement in the 1970s, a plurality of the Court in *Frontiero v. Richardson* recognized women as a suspect class, due in part to the fact that women suffered a history of discrimination and lacked political power, and subjected the law discriminating against women to strict scrutiny.<sup>62</sup> In a later decision, a majority of the Court settled on a determination that gender was a quasi-

<sup>53</sup> *Id.* at 23-26.

<sup>54</sup> See *Chronology of the Equal Rights Amendment, 1923-1996*, NAT’L ORG. FOR WOMEN, <https://now.org/resource/chronology-of-the-equal-rights-amendment-1923-1996/> [<https://perma.cc/C9C3-MXMG>].

<sup>55</sup> See THOMAS H. NEALE, CONG. RESEARCH SERV., R42979, THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES 8 (2018).

<sup>56</sup> See *id.* at 1.

<sup>57</sup> For example, the EEOC issued a series of guidelines and regulations addressing varying forms of employment discrimination on the basis of sex. See, e.g., Guidelines on Discrimination Because of Sex, 29 C.F.R. pt. 1604 (2018); Sex as a Bona Fide Occupational Qualification, 29 C.F.R. § 1604.2 (2018); Employment Policies Relating to Pregnancy and Childbirth, 29 C.F.R. § 1604.10 (2018).

<sup>58</sup> See Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2012)) (overriding *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), which held that a pregnancy exclusion from an employer’s disability plan did not violate Title VII of the Civil Rights Act).

<sup>59</sup> See, e.g., Post & Siegel, *Roe Rage*, *supra* note 7, at 382 (“The Court altered its understanding of the Equal Protection Clause even though the Equal Rights Amendment [], which proposed to use the procedures of Article V to amend the Constitution to prohibit discrimination based on sex, was never ratified.”).

<sup>60</sup> See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874) (upholding a state law denying women the right to vote after determining that voting was not a privilege or immunity of citizenship); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1873) (upholding a state law denying women the opportunity to practice law).

<sup>61</sup> See *Goessart v. Cleary*, 335 U.S. 464, 465-66 (1948) (upholding a gender-discriminatory statute using a rational basis form of review).

<sup>62</sup> 411 U.S. 677, 685-88 (1973).

suspect classification and subjected laws that classified on the basis of gender to a lesser, but still rigorous, intermediate form of scrutiny.<sup>63</sup>

Supporting the direct popular constitutionalist account is the fact that the Court's new recognition of a constitutional principle of gender equality was not derived from the Fourteenth Amendment as originally understood and intended.<sup>64</sup> Moreover, it is unlikely that the Court would have recognized this principle in the absence of the second feminist movement; that the more rights-protective Warren Court proved unwilling to recognize the constitutional principle of gender equality provides some support for this prediction.<sup>65</sup> The winds of change in societal values, led by a social movement able to garner support from the broader population and the people's representatives, appeared to inspire judicial recognition of the right to gender equality.

### B. *Mediated Popular Constitutionalism*

Mediated popular constitutionalists suggest that the higher form of lawmaking can also be satisfied when Congress and the President make constitutional meaning determinations in response to claims by mass social movements or widely held societal values.<sup>66</sup> The paradigmatic examples of mediated popular constitutionalism arising from representative institutional engagement with mass social movements are the Civil Rights Act of 1964 and the Voting Rights Act of 1965.<sup>67</sup> These laws were inspired by the surrounding civil rights movement that led to a broader public debate about racial equality and the constitutional requirements of equal protection.<sup>68</sup>

According to these theorists, popular constitutionalism is not merely a description of an important pathway for constitutional change. It is also normatively more desirable than the judicial supremacist alternative. Constitutional change according to the judicial supremacist account should be a judge-only affair. When the text is indeterminate, judges should determine constitutional meaning on the basis of their own value judgments of how the Constitution should respond to new and evolving societal

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<sup>63</sup> *Craig v. Boren*, 429 U.S. 190, 197-98 (1976).

<sup>64</sup> See, e.g., Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 162-64 (1979) (acknowledging that the Fourteenth Amendment was not understood at the time of the Framing to protect women from discrimination).

<sup>65</sup> See *Goessart*, 335 U.S. at 465-66 (“[T]hat women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes . . .”).

<sup>66</sup> See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE* 266-268 (1991) (describing the mediated popular constitutionalism process).

<sup>67</sup> See 3 BRUCE ACKERMAN, *WE THE PEOPLE* 5-7 (2014) (noting that it took the passage of these laws to enshrine civil rights as a “fundamental premise of the modern republic”).

<sup>68</sup> See *supra* note 12.

contexts.<sup>69</sup> But this judicial supremacist argument runs into a difficult question in the context of a democratic republic: why should the values of unelected and unaccountable judges decide the meaning of the Constitution over the values of the people? Or to state differently, what gives judges the authority to impose their values on the people when it is the people who ultimately ratified the Constitution?

For popular constitutionalists, there is no strict separation of law and politics in which the Constitution is law and thus the domain of the courts and ordinary law is politics and the domain of the people and the people's representatives.<sup>70</sup> Instead, the Constitution is the people's law and cannot be separated from politics.<sup>71</sup> This inseparability of law and politics does not mean that the Constitution's meaning should be determined and revised according to the channels of ordinary majoritarian politics. The Article V amendment process suggests that a higher form of politics should be required when constitutional revision is the product of deliberation and engagement with wide segments of the population. Instead, what mediated popular constitutionalists argue is that dialogue between the people, the people's representatives, and the courts satisfies these requirements.<sup>72</sup>

Entirely overlooked in both popular constitutionalist accounts is the role of agencies. Scholars of administrative constitutionalism have revealed through descriptive accounts how agencies are extensively involved in constitutional meaning determinations and have developed theoretical arguments about the practice.<sup>73</sup> I add to the burgeoning theory the argument that administrative constitutionalism is a critical component of the popular constitutionalist project. In the next Part, I argue that constitutional theorists generally, and popular constitutional theorists in particular, have neglected the

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<sup>69</sup> See, e.g., RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL REASONING OF THE AMERICAN CONSTITUTION* 127 (1996) (arguing that "the Constitution requires courts to exercise moral judgment," a task that judges have had to do "since law began").

<sup>70</sup> See Franklin, *supra* note 16, at 1074 ("[O]n the popular constitutionalist understanding, many things we are used to thinking of as questions of ordinary law or policy turn out to be constitutional questions.").

<sup>71</sup> See *id.* ("[P]opular constitutionalism . . . places a heavy responsibility on the people and the popular branches of government to develop, articulate, and carry out their own constitutional visions.").

<sup>72</sup> See, e.g., Post, *supra* note 11, at 37 ("The articulation of constitutional law thus requires 'that judges . . . participate in a dialogue with other organs of government, and with the people as well.'" (quoting Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992))).

<sup>73</sup> For historical accounts of administrative constitutionalism, see, for example, Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010); Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847 (2018); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015). For more doctrinal or theoretical accounts of administrative constitutionalism, see generally WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013); Ross, *supra* note 24.



role of agencies because they typically fail to disaggregate constitutionalism. Popular constitutionalists usually address constitutionalism at the level of constitutional principal elaboration, while administrative constitutionalism is often at the level of constitutional principle application. I show that the popular constitutionalists' fixation on principles comes at a cost in terms of understanding not only the role of constitutional applications in shaping principles, but also the role of institutions like administrative agencies in the project of constitutionalism. In Part III, I argue that administrative agencies in their application of constitutional principles serve as critical catalysts for popular engagement with constitutional meaning, particularly in this current era of political dysfunction and legislative stasis.

## II. DISAGGREGATING CONSTITUTIONALISM

Constitutionalism is not a singular action. Instead, it has three different components. The first component involves the interpretation of text. Interpretations of text through the use of textualist tools, legislative history, or the examination of contemporaneous public meaning rarely yield clear answers about the constitutional meaning of the many open-ended constitutional provisions that are often at the center of constitutional debates and controversies.<sup>74</sup> The second and third components, the elaboration of and application of constitutional principles, are therefore the primary focal points in constitutional meaning determinations involving open-ended constitutional text. Constitutional principles “can be understood as the general sense of obligation of the constitutional text.”<sup>75</sup> Since it is often impossible to pin down the specific meaning of open-ended, vague text, those that determine constitutional meaning elaborate broader principles derived from sources such as “contemporaneous statements of purpose, contemporary social movement expressions of values, and Americans’ generalized sense of justice.”<sup>76</sup> These principles are elaborated at different levels of specificity, but what distinguishes them from the third component of constitutionalism—constitutional applications—is that they usually do not dictate an outcome in a particular dispute about the constitutional permissibility of a state action. Instead, principles must be applied. The third component of constitutionalism, constitutional applications, “comprise[s] the rules, standards, and evidentiary requirements employed to resolve specific constitutional disputes.”<sup>77</sup>

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<sup>74</sup> See, e.g., Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 16 (2011) (acknowledging that some constitutional texts “are inherently open-ended and cannot be understood using only semantic methods”).

<sup>75</sup> Ross, *supra* note 24, at 540.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 541.

### A. Direct Popular Constitutionalism

Popular constitutionalists focus on the elaboration of constitutional principles in their advocacy for a popular role in constitutional meaning determinations. The social movements that the direct popular constitutionalists describe have advanced principles of race and gender equality, the individual right to bear arms, and LGBTQ rights, among others. Rarely do social movements advocate at the level of specific constitutional applications. To the extent that they do, such advocacy has been the near-exclusive domain of the more elite elements of the movement.<sup>78</sup> One explanation for social movements' neglect of constitutional applications is that they often lack the salience necessary to attract the popular support and media attention to influence elites, elected officials, and ultimately courts. Furthermore, to the extent that constitutional applications require deciding issues that are sources of latent divisions within a movement, it is politically prudent to leave any choice between constitutional applications undecided.

For example, the second feminist movement pushed a constitutional amendment that would have established in the Constitution's text the principle of equal rights for women.<sup>79</sup> As a principle, equal rights attracted popular support and media attention. Elites rallied around the cry of equal rights for women, and the combination of social movement pressure, elite support, and media attention contributed to Congress's decision to pass the amendment with the necessary supermajority support.<sup>80</sup> A majority of Americans supported the ERA from the first time a polling organization asked the question in the early 1970s until the struggle for ratification officially ended in 1982.<sup>81</sup>

The principle of equal rights for women was broad and meant different things to different movement supporters. The more liberal activists saw the amendment as a tool to bring fundamental changes to gender roles, while the more conservative traditionalists saw the amendment as formally recognizing equal rights without necessarily upending the status quo.<sup>82</sup> According to

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<sup>78</sup> See, e.g., Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436-78 (2005) (describing the dominance of social movement and interest group elites in the constitutional advocacy surrounding the constitutionality of affirmative action in higher education).

<sup>79</sup> See JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 8-9 (1996) (discussing the historical origins of the Equal Rights Amendment).

<sup>80</sup> See *id.* at 8-12 (tracing the gradual accumulation of support for the Amendment leading up to its passage).

<sup>81</sup> *Id.* at 14.

<sup>82</sup> See *id.* at 26 (noting that while some supported the Amendment "only insofar as they [thought] it [was] compatible with the status quo," the Amendment's more active advocates viewed it as a "vehicle for bringing about substantive changes in men's and women's lives").

political scientist Jane J. Mansbridge, the implicit strategy of the movement supporting the Equal Rights Amendment “was to get people to agree to the principle of equal rights, enshrine that principle in the Constitution, and then let the Supreme Court decide what this principle actually meant in practice.”<sup>83</sup> In other words, the constitutional amendment would recognize the principle, but the courts would be responsible for applying it.

Direct popular constitutionalists have more broadly embraced this view of constitutionalism. The dialogue between social movements and the courts that the direct popular constitutionalists describe are ones in which the rights claims are at the general level of principle. Direct popular constitutionalists appear willing to concede constitutional applications to the exclusive domain of courts. For example, when accounting for the judicial embrace of the constitutional principle of equal rights for women, direct popular constitutionalists do not differentiate between the Court’s two very different judicial applications of the principle.

In the case of *Frontiero v. Richardson*, a plurality of the Court embraced the principle of equal rights for women and applied the principle through the development of a heightened scrutiny standard to be applied to all laws that discriminate against women.<sup>84</sup> According to this constitutional application, the principle of equal rights for women operates as an anti-subordination principle that requires special judicial protection for historically subordinated and politically marginalized women against state actor discrimination.<sup>85</sup> The plurality, however, could not secure the necessary fifth vote, leaving questions regarding the application of the principle of equal rights for women open for another three years.

When the Court revisited the constitutional principle in *Craig v. Boren*, it applied intermediate scrutiny to a gender classification that discriminated against men.<sup>86</sup> The Court did not find that men were a subordinated class entitled to special judicial protection. Instead, it determined that gender classifications are almost presumptively impermissible because they are often based on overbroad generalizations and stereotypes about the way men and women are.<sup>87</sup> According to *Craig*, the gender equality principle operates as an anti-classification principle that protects men and women from gender classifications based on generalizations and stereotypes.<sup>88</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> 411 U.S. 677, 688 (1973).

<sup>85</sup> See Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1025-26 (1986) (treating *Frontiero* as a case recognizing the anti-subordination principle).

<sup>86</sup> 429 U.S. 190, 197 (1976).

<sup>87</sup> *Id.* at 198.

<sup>88</sup> See Colker, *supra* note 85, at 1026 (interpreting *Craig* as promoting an anti-differentiation approach to equal protection).

The Court's choice of an anti-classification standard has important implications for the gender equality principle. First, and most obviously, the anti-classification standard extended heightened scrutiny to laws that discriminated against men, a category of laws to which the second feminist movement did not pay much attention. Second, and more importantly, the Court's subsequent application of the anti-classification standard to challenges of gender-discriminatory laws revealed a divergence between the Court's approach to equal rights for women and the goals of many of the leaders of the second feminist movement.

A primary goal of the second feminist movement was breaking down barriers to women in the workplace and advancing the economic autonomy of women.<sup>89</sup> Yet when the Court used the anti-classification standard to apply the principle of equal rights for women, it resolved cases in a manner directly contrary to the movement's goals. For example, when addressing the constitutionality of a state disability law that denied benefits to pregnant women, the Court applying the anti-classification standard focused on the question of whether the law classified on the basis of sex.<sup>90</sup> The Court reasoned that it did not since the law discriminated on the basis of pregnancy status, not sex.<sup>91</sup> If the Court had embraced the *Frontiero* anti-subordination standard in adjudicating claims of gender discrimination, the resolution of the controversy would likely have been more consistent with the feminist movement's goals. Since pregnancy discrimination is a tool to subordinate women—the only class of individuals who can get pregnant—the disability law would have been treated as presumptively unconstitutional because it discriminatorily undermined the economic status of women.

Similarly, in a case addressing the constitutionality of a state hiring preference for veterans that shut most women out of most state jobs because veterans were overwhelmingly male, the Court, applying the anti-classification standard, upheld the state action.<sup>92</sup> The Court determined that despite the disparate impact of the law on a historically subordinated class of women, the law did not classify people on the basis of gender because it was not motivated by gender discrimination.<sup>93</sup>

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<sup>89</sup> See, e.g., *Statement of Purpose*, NAT'L ORG. FOR WOMEN (1996), <https://now.org/wp-content/uploads/2014/02/Statement-of-Purpose.pdf> [<https://perma.cc/AT5G-FFF8>] (emphasizing the employment disadvantages that women face and promoting an equality of economic opportunity for women).

<sup>90</sup> *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 127-28 (1976).

<sup>91</sup> *Id.* at 139-40.

<sup>92</sup> *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 280-81 (1979).

<sup>93</sup> *Id.* at 279 (imposing on the female challenger to the disparately impactful state law a requirement that she prove that the state adopted the law "because of, not merely 'in spite of,' its adverse effects upon an identifiable group").

These two examples show the important function of constitutional applications in shaping constitutional principles. The second feminist movement's principle of equal rights for women inspired by the historical economic subordination and political marginalization of women was transformed, through constitutional application, into a more neutral gender non-classification norm.

### B. *Mediated Popular Constitutionalism*

The constitutional principles developed through mediated popular constitutionalism are usually elaborated at a more detailed level than those transmitted through social movements. Constitutional principles advanced through the lawmaking process of mediated popular constitutionalism can be embedded within comprehensive and intricate statutes, rather than through the vague, open-ended language of constitutional amendments, broad rights claims, or salient rallying slogans. But even with this additional detail, the constitutional meaning determinations advanced in statutes often lack specific enough prescriptions to resolve disputes. This lack of specificity arises from two primary sources. First is the inability of lawmaking institutions to secure agreement on more specific applications of constitutional principles in statutes. Legislatures often leave things undecided with the irresolution evidenced in the vagueness of a statute.<sup>94</sup> Second is the inability of Congress to anticipate future contexts in which the statute will apply. An application of a constitutional principle for which Congress can secure majority support in the present might not be relevant to a context that Congress is unable to foresee.<sup>95</sup> In these situations of unforeseen contexts, the question of how the statute should apply must be resolved in the particular dispute without the guidance from the enacting Congress.

The common link among civil rights statutes enforcing the Equal Protection Clause, such as Title VII of the Civil Rights Act of 1964 and Section 2 of the Voting Rights Act of 1965, is that they embrace the antidiscrimination principle.<sup>96</sup> But the statutes did not specify how the

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<sup>94</sup> See Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 CALIF. L. REV. 541, 550 (1994) (arguing that legislators use vagueness as an essential tool to build the necessary support for a statute and avoid opposition from more concentrated interests).

<sup>95</sup> See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1480 (1987) (arguing that unanticipated gaps and ambiguities arise in all statutes as society changes "and generates new variations of the problem which gave rise to the statute").

<sup>96</sup> See Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301(a) (2012) ("No voting qualification of prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision [to deny or abridge] the right of any citizen of the United States to vote on account of race or color . . ."); Title VII of the Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a)(1) (2012) (defining unlawful employment actions as the failure or refusal "to hire or to discharge any individual,

principle applies. Did the statutes prohibit actions that have a disparate impact, or only those actions that are motivated by a discriminatory intent? Mediated popular constitutionalists do not contest the Court's exercise of domain over the choice of constitutional application even though that choice inevitably shapes the constitutional principle.<sup>97</sup> Similar to the gender equality context, the choice between a disparate-impact and a discriminatory-intent standard is a choice between different visions of anti-discrimination that has real world consequences for what equality ultimately means.

### C. *Administrative Constitutionalism*

Rich historical accounts of administrative constitutionalism by Sophia Lee, Karen Tani, Jeremy Kessler, and Joy Milligan among others illuminate administrative agencies' role in applying constitutional principles.<sup>98</sup> In the article that gave the practice of administrative constitutionalism its name, Lee focuses on instances in which the Federal Communications Commission (FCC) and the Federal Power Commission (FPC) creatively expanded and narrowed the state action doctrine in their equal employment rulemaking.<sup>99</sup> The constitutional principle of state action that arose from the Supreme Court's interpretation of the Fourteenth Amendment's language, "[n]o State shall," limited the amendment's reach to state actions.<sup>100</sup> Left unresolved in the judicial elaboration of the constitutional principle was the question: what is state action? Over time, the Court developed in case law many, sometimes contradictory, applications of the state action principle.<sup>101</sup> But what has been mostly overlooked in constitutional accounts, and what was revealed in Lee's account, is the role of administrative agencies in developing parallel

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or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin").

<sup>97</sup> For instance, in a case decided soon after the adoption of the Civil Rights Act, the Court adopted a standard that would be used to apply the constitutional principle. *See* *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (adopting a disparate-impact standard for Title VII on the basis of a finding that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation" (emphasis in original); *see also* *City of Mobile v. Bolden*, 446 U.S. 55, 70 (1980) (interpreting Section 2 of the Voting Rights Act and finding that challengers to an election law must prove that the law is motivated by a discriminatory purpose). *But see* 42 U.S.C. § 1973 (2012) (overturning *Bolden* and establishing a discriminatory-results test for claims brought under Section 2 of the Voting Rights Act).

<sup>98</sup> *See generally supra* note 73.

<sup>99</sup> Lee, *supra* note 73, at 810-80 (describing how the FPC and FCC engaged in creative, selective, and resistant interpretations of the state action doctrine).

<sup>100</sup> U.S. CONST. amend. XIV, § 1; *see also* *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited [by the Fourteenth Amendment].").

<sup>101</sup> *See* Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 BYU L. REV. 575, 581-604 (2016) (describing the doctrinal confusion surrounding the state action doctrine).

applications of the state action principle that were sometimes at odds with those developed in judicial doctrine.<sup>102</sup>

Similarly, Karen Tani in her account of administrative equal protection demonstrates how the Department of Health, Education, and Welfare (HEW) was at the forefront in their application of the constitutional principle of non-discrimination to recipients of public assistance.<sup>103</sup> In its evaluation of state welfare laws in the middle part of the twentieth century, HEW expansively applied the constitutional nondiscrimination principle through rigorous rational review of state welfare provisions—a constitutional application that diverged from that of the courts.<sup>104</sup>

Finally, Joy Milligan’s examination of the Office of Education uncovers an agency engaged in a more constrained application of the constitutional principle of racial desegregation than advanced in the Court’s constitutional jurisprudence.<sup>105</sup> In the wake of the Court’s elaboration of the racial desegregation principle in *Brown v. Board of Education*, the Office of Education determined that the principle did not require the denial of federal funds to segregated schools in the face of political pressure from civil rights groups, the White House, and other agencies.<sup>106</sup>

Each of these examples of administrative constitutional applications and the many others described by scholars should be considered integral components of constitutionalism. Since popular constitutionalists do not disaggregate between constitutional principles and constitutional applications, this administrative agency role in constitutional meaning determinations has been overlooked.

The popular constitutionalists’ apparent willingness to concede constitutional applications to the exclusive domain of courts undermines the popular constitutionalist project in an important way. To the extent that judicial choice of constitutional application is not responsive to public input, the popular influence on constitutional principles is diluted by the ability of an unelected and unaccountable court to shape the principles to accord with its values through applications. In the next section, I describe the role of an institution long ignored by popular constitutionalists—administrative agencies—and advance the case that their role in constitutionalism should be treated as a critical component of popular constitutional theory.

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<sup>102</sup> See Lee, *supra* note 73, at 810-80.

<sup>103</sup> See Tani, *supra* note 73, at 844-89.

<sup>104</sup> *Id.* at 889 (describing the Court’s eventual rejection of HEW’s rigorous review of state welfare operations after it had been applied for nearly a half century).

<sup>105</sup> Milligan, *supra* note 73, at 876-914.

<sup>106</sup> *Id.* at 901 (“Throughout both administrations, education officials held firmly to the position that the Constitution did not empower or require them to prevent federal funds from supporting segregation.”).

## III. ADMINISTRATIVE POPULAR CONSTITUTIONALISM: THEORY

A critique of administrative constitutionalism as a form of popular constitutionalism arises from doubts about the popular pedigree of administrative agency actions. Administrative agencies do not fit within direct popular constitutionalist accounts because agencies are not typically seen as focal points for social movement activity. Agencies also do not fit within mediated popular constitutionalist accounts because the officials that run them are not elected directly by the people.

While administrative constitutionalism might not have the same type of connections to the public as direct and mediated forms of popular constitutionalism, there is a range of administrative approaches to applying constitutional principles that has varying relationships to the public. Administrative applications are advanced through informal guidance letters and directives for which career bureaucrats are often principally responsible, guidelines that usually incorporate the input of agency heads directly accountable to the President, and rules that are the product of agency heads, career bureaucrats, and public input through a notice-and-comment process.<sup>107</sup>

Administrative applications of constitutional principles through rules that are the product of public notice-and-comment have perhaps the strongest claims to popular constitutionalism. In the notice-and-comment process, the agency is required under the Administrative Procedure Act to give the public notice of a proposed rule and an opportunity to submit comments to the agency about the proposed rule.<sup>108</sup> Public comments range from unsophisticated expressions of support, concern, or opposition to the proposed rule to more extended examination and recommendations for alternatives to the proposed rule.<sup>109</sup> Proposed rules adopted as regulations can be challenged and held procedurally invalid if the agency fails to consider all of the public comments and provide explanations for why it rejected alternatives to the proposed rule.<sup>110</sup> Administrators must therefore engage in

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<sup>107</sup> Administrative Procedure Act, 5 U.S.C. §§ 553-54 (2012); *see also* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1319-27 (1992) (providing a taxonomy of administrative decisionmaking devices).

<sup>108</sup> 5 U.S.C. § 553 (2012).

<sup>109</sup> *See* Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414 (2005) (finding from an analysis of public comments “dramatic differences . . . in the extent of specialized knowledge and technical sophistication reflected in comments from organized interests versus those from individual members of the public”).

<sup>110</sup> The courts enforce the mandate of a deliberative notice-and-comment rulemaking process through “hard look review” of the process. *See* *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring under the arbitrary and capricious standard that the “agency . . . examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”); *see also* Cass R.



a deliberative process in which they consider and evaluate comments and proposed alternatives, make any necessary adjustments to the rule, and when they do revise the rule, resubmit it for additional public comment.

The notice-and-comment process can involve more direct public input into constitutional applications than can participation in social movements, which are focused more on principles in dialogue with courts that are then given carte blanche discretion to develop constitutional applications on their own. In addition, the notice-and-comment process involves at least as much public input into constitutional applications as the constitutional meaning determinations arising from mediated popular constitutionalism, since representatives tend to have little knowledge about the specific preferences of their constituents on most issues, even issues of constitutional import.<sup>111</sup> Instead, elected representatives tend to make decisions on the basis of preferences that they anticipate their constituents might have, a much less concrete or direct form of public input than notice-and-comment rulemaking.<sup>112</sup>

While popular constitutionalists have overlooked this important source of popular input into constitutional decisionmaking, the notice-and-comment process has its limits. Social science and legal scholars have demonstrated that, in most contexts, elites dominate the notice-and-comment rulemaking process, with interest groups and other elites submitting the overwhelming majority of comments.<sup>113</sup> However, it is important to note that the context in which elite domination has been shown to be a little less prevalent—the notice-and-

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Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 287 (1986) (describing the goal of hard look review as “guard[ing] against the dangers of self-interested representation and of factional tyranny of the regulatory process”).

<sup>111</sup> See Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 353 (2016) (describing surveys and studies showing that citizens lack clear preferences on most policy issues).

<sup>112</sup> *Id.* at 353-54 (elaborating on the anticipated preference theory, which suggests that legislators act on the basis of preferences that they anticipate their constituents have on the basis of how they might respond to policy decisions).

<sup>113</sup> See, e.g., William F. West, *Formal Procedures, Informal Process, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 70-71 (2004) (finding in an analysis of forty-two rules that “the vast majority of comments come from or are orchestrated by organized groups”); Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006) (finding after an examination of forty rules promulgated by the U.S. Department of Labor’s Occupational Safety and Health Administration and Employment Standards Administration and the U.S. Department of Transportation’s Federal Railroad Administration and Federal Highway Administration that business interests submitted over 57% of the total comments, governmental interests submitted 19% of the total comments, and public interest groups provided only 6% of the total comments).

comment process for rules involving social welfare and civil rights—is the context in which many constitutional meaning determinations are made.<sup>114</sup>

Such empirical evidence, however, might not be sufficient to ameliorate concerns about elite domination of the notice-and-comment process. And even if sufficient, there is still the concern that many administrative applications of constitutional principles are not made through the notice-and-comment process, but rather through other decisionmaking processes that lack similar channels for direct public input.

It is thus important to recognize that agency actions applying constitutional principles often engage the public in other ways—by triggering the involvement of the public, elected officials, institutions, and candidates in a debate about constitutional meaning. In a foundational article, Matthew McCubbins and Thomas Schwartz famously modeled a rational approach to congressional oversight over agency actions that is relevant here.<sup>115</sup> According to their model, congressional supervision of agency actions occurs through “fire alarm” rather than “police patrol” oversight.<sup>116</sup> In police patrol oversight, “Congress examines a sample of executive agency activities, with the aim of detecting and remedying any violations of legislative goals and, by its surveillance, discouraging such violations.”<sup>117</sup> For Congressmembers motivated by reelection, such police patrol oversight is an irrational waste of time and resources. They will “inevitably spend time examining a great many executive-branch actions that do not violate legislative goals or harm any potential supporters [and] detecting and remedying arguable violations that nonetheless harm no potential supporters.”<sup>118</sup> In addition, since Congressmembers “examine only a small sample of executive-branch actions[,] they are likely to miss violations that harm their potential supporters.”<sup>119</sup>

Such police patrol oversight is more costly to Congress than the alternative fire alarm oversight. In employing fire alarm oversight, “Congress establishes a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative decisions . . . to charge executive agencies with violating congressional goals,

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<sup>114</sup> See Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RESEARCH & THEORY 245, 252-54 (1998) (contrasting the complete non-participation of individuals and citizen groups in the comment process for Environmental Protection Agency and National Highway Transportation Safety Agency rulemaking with the broader involvement of citizen advocacy groups and individual citizen participation in Department of Housing and Urban Development rulemaking).

<sup>115</sup> Mathew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

<sup>116</sup> *Id.* at 165-69.

<sup>117</sup> *Id.* at 166.

<sup>118</sup> *Id.* at 168.

<sup>119</sup> *Id.*

and to seek remedies from agencies, courts, and Congress itself.”<sup>120</sup> This form of oversight allows Congress to focus on the agency actions that draw attention from the public. Congressmembers will be motivated to supervise, oversee, and check these agency actions, particularly when they impact their supporters and by extension the congressmembers’ reelection prospects.

While McCubbins’s and Schwartz’s model focuses on Congress and the use of procedures to trigger oversight, administrative applications of constitutional principles are likely to trigger fire alarm oversight, since agency actions tend to be salient to the public and elicit support from those benefitted and opposition from those harmed by the constitutional applications. Administrative constitutional applications that trigger fire alarms are also likely to trigger reactions from courts, particularly the Supreme Court, when the application diverges from that established by doctrine. This judicial reaction can open the channels for a dialogic relationship between the administrative agency through its action, the public through its response, and the Court through its review.

Administrative law scholarship has explored in depth the notice-and-comment process and political control (congressional and executive oversight, supervision, and direction) pathways of public input into administrative decisionmaking. In the next Part, I focus on the third pathway of public input, administrative constitutional applications as a catalyst for public input and dialogue between courts and agencies. I examine this mechanism of popular constitutionalism through an Obama-era example: the Department of Housing and Urban Development’s rule applying a desegregation mandate in the Fair Housing Act.

#### IV. ADMINISTRATIVE POPULAR CONSTITUTIONALISM IN PRACTICE

In December 2006, the Anti-Discrimination Center of New York (ADC) brought a *qui tam* action on behalf of the United States Department of Housing and Urban Development (HUD) for damages under the False Claims Act against Westchester County, New York.<sup>121</sup> The ADC claimed that from 2000–2009, Westchester County had “knowingly presented . . . to the United States false claims to obtain federal funding for housing and community development.”<sup>122</sup> The ADC’s False Claims Act targeted Westchester County’s receipt of federal funding under the Community Development Block Grant (CDBG), which required as a condition for receipt of such funding, that

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<sup>120</sup> *Id.* at 166.

<sup>121</sup> See *Complaint-in-Intervention of the United States of America, United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cty.*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007) (No. 06 2860), 2006 WL 6348390.

<sup>122</sup> *Id.* at 2.

Westchester “certify that it met a variety of fair housing obligations, including the obligation to affirmatively further fair housing (‘AFFH’).”<sup>123</sup>

The “affirmatively further fair housing” obligation originally appeared in the Fair Housing Act of 1968.<sup>124</sup> The Act, which was passed in the wake of the assassination of Martin Luther King and the riots that followed in African American ghettos and slums throughout the country, had the twin goals of banning housing discrimination and addressing residential segregation.<sup>125</sup> President Lyndon Johnson and members of Congress saw the combination of housing discrimination and residential segregation as critical contributing factors to the extensive poverty, lack of education, and underemployment that plagued African American communities.<sup>126</sup> The law directly combated housing discrimination through prohibitions on the rental and sale of housing and sought to address segregation through a requirement that the Secretary of HUD administer the program in a manner that affirmatively furthers fair housing.<sup>127</sup>

This AFFH mandate embedded within the 1968 Fair Housing Act represented an application of the constitutional desegregation principle established in *Brown v. Board of Education*.<sup>128</sup> Yet even though Congress built into the statute an enforcement regime that gave the administering agency (HUD) more power than other agencies responsible for enforcing other civil

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<sup>123</sup> *Id.* at 3; *see also* Housing and Community Development Act of 1974, 42 U.S.C. § 5304(b)(2) (2012) (requiring recipients of community development block grant funds under the Act to “affirmatively further fair housing”); National Affordable Housing Act, 42 U.S.C. § 12705(b)(15) (2012) (requiring recipients of community block grant funds to certify “that the jurisdiction will affirmatively further fair housing”).

<sup>124</sup> 42 U.S.C. § 3608(e)(5) (2012).

<sup>125</sup> *See, e.g.*, David D. Troutt, *Inclusion Imagined: Fair Housing as Metropolitan Equity*, 65 BUFF. L. REV. 5, 15 (2017) (describing the context surrounding the adoption of the Fair Housing Act and the desegregation and antidiscrimination goals of the Act).

<sup>126</sup> *See* Lyndon B. Johnson, Message from the President of the United States Proposing Enactment of Legislation to Make Authority Against Civil Rights Violence Clear and Sure, H.R. Doc. No. 432 (2d. Sess. 1966) [hereinafter Message from the President] (“It is self-evident that the problems were are struggling with form a complicated chain of discrimination and lost opportunities.”); *see also* Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s Affirmatively Further Mandate*, 100 KY. L.J. 125, 128-30 (2011) (describing congressmembers’ views of the purpose and intended operation of the Fair Housing Act).

<sup>127</sup> *See* 42 U.S.C. § 3604 (2012) (establishing the prohibitions on discrimination in the sale or rental of housing); *id.* § 3608(e)(5) (2012) (“The Secretary of Housing and Urban Development shall . . . administer the program and activities relating to housing and urban development in a manner affirmatively to further the policies of [fair housing].”).

<sup>128</sup> 347 U.S. 483, 493-95 (1954) (determining that segregation in public schools is a denial of equal educational opportunity, which is protected under the Fourteenth Amendment’s Equal Protection Clause).

rights laws,<sup>129</sup> the constitutional commitment to housing desegregation remained unrealized when the ADC brought its *qui tam* action against Westchester County.<sup>130</sup> Moreover, housing segregation, as a matter of constitutional or statutory concern, was almost entirely absent from the public's consciousness.<sup>131</sup>

In the nearly three years after the ADC brought the action against Westchester County, the issue of housing segregation remained mostly hidden from public view. The principal source of information to the public, the media, paid very little attention to the case. In February 2007, the *New York Times* reported that Westchester County had been sued over a lack of affordable housing.<sup>132</sup> The article quoted a Princeton University demographer, Douglas Massey, who described how little the federal government had done in the prior 12–15 years to redress housing segregation.<sup>133</sup> A week later, the *New York Times* published an editorial that urged greater attention to the ongoing problems of class and ethnic segregation in the New York suburbs “where the progress in building new units has been meager and largely confined to communities with already disproportionately healthy populations of people who are black and Hispanic, poor and immigrant.”<sup>134</sup> During the litigation between the ADC and Westchester County, these were the only two reminders of housing segregation's persistence and government's failure to satisfy the constitutional imperative laid out in *Brown v. Board of Education*. For the public, housing segregation remained a non-issue.

The catalyst for public engagement with housing segregation came when HUD intervened in the case against Westchester County.<sup>135</sup> HUD acting under President George W. Bush refused to intervene in the ADC's *qui tam*

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<sup>129</sup> See Schwemm, *supra* note 126, at 144–45 (describing how Congress strengthened the Department of Housing and Urban Developments enforcement regime in its amendment to the Fair Housing Act in 1988).

<sup>130</sup> See Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1198 (2011) (describing the persistence of housing segregation after the 1988 amendments to the Fair Housing Act).

<sup>131</sup> A ProQuest search of current and historical newspapers found only 25 articles between 1980 and 2009 that mentioned “affirmatively further fair housing” or “affirmatively furthering fair housing” the principal tool for fighting housing segregation.

<sup>132</sup> See Ford Fessenden, *County Sued Over Lack of Affordable Homes*, N.Y. TIMES (Feb. 4, 2007), <https://www.nytimes.com/2007/02/04/nyregion/nyregionspecial2/04wemain.html> [https://perma.cc/N7BW-SLLC].

<sup>133</sup> *Id.*

<sup>134</sup> See Editorial, *Housing Carrots and Sticks*, N.Y. TIMES (Feb. 11, 2007), <https://www.nytimes.com/2007/02/11/opinion/nyregionopinions/WEHousing.html> [https://perma.cc/ASX7-WUL4].

<sup>135</sup> *Id.*

action.<sup>136</sup> But after the District Court for the Southern District of New York denied Westchester County's motion to dismiss and then its motion for summary judgment,<sup>137</sup> HUD acting under President Barack Obama intervened at the request of the county that sought to avoid \$180 million in liability.<sup>138</sup> The Department's intervention resulted in a settlement mandating greater residential integration by requiring the County to build 750 affordable housing units in mostly white neighborhoods.<sup>139</sup> When HUD determined that Westchester County was falling short of its settlement obligations, HUD took another aggressive step and withheld federal housing funds under the Community Development Block Grant.<sup>140</sup>

HUD's actions to enforce what had previously been considered a toothless regulation under the AFFH were unprecedented. According to Westchester County Executive Andrew Spano, the County's settlement with HUD represented "a 'sea change in American policy,' . . . because it guarantee[d] access to fair and affordable housing 'all over,' as opposed to guaranteeing access in certain areas."<sup>141</sup> Fair housing advocates agreed, viewing the settlement as a critical and long overdue step to enforcing a law designed to eliminate housing segregation.<sup>142</sup>

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<sup>136</sup> See Defendant's Memorandum of Law in Support of its Motion to Dismiss the Complaint at 1, *United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cty.* (S.D.N.Y. April 17, 2007) (No. 06 2860), 2007 WL 1622360, at \*1 (noting the government's decision to decline to intervene in the Anti-Discrimination Center's suit against Westchester County).

<sup>137</sup> See *United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cty.*, 668 F. Supp. 2d 548, 567-68 (S.D.N.Y. 2009) (denying Westchester County's motion for summary judgment); *United States ex rel. Anti-Discrimination Ctr. of Metro New York v. Westchester Cty.*, 495 F. Supp. 2d 375, 390 (S.D.N.Y. 2007) (denying Westchester County's motion to dismiss for failure to state a claim).

<sup>138</sup> See Memorandum of Law of the United States of America in Support of its Application to Intervene in this Action, *United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cty.* (S.D.N.Y. Aug. 10, 2009) (No. 06 2860), 2009 WL 2899691; see also Nick Timiraos, *Wealthy Suburbs Accept Low-Income Homes*, WALL ST. J. (Aug. 11, 2009), <https://www.wsj.com/articles/SB124993778549420475> [<https://perma.cc/RYY4-VV3X>] ("The settlement with the U.S. Department of Justice and the Department of Housing and Urban Development ended a \$180 million federal lawsuit brought by the Anti-Discrimination Center of Metro New York . . . over Westchester's responsibility to enforce fair-housing laws.")

<sup>139</sup> See *United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cty.*, No. 06 2860, 2011 WL 7563042, at \*5 (S.D.N.Y. Nov. 14, 2011).

<sup>140</sup> See Shelly Banjo, *Westchester in HUD Squeeze: Agency Calls Local Officials' Housing Plans Inadequate*, WALL ST. J. (July 16, 2011), <https://www.wsj.com/articles/SB10001424052702304203304576448403801182500> [<https://perma.cc/87GV-6SVY>] (describing HUD's rejection of Westchester County's affordable housing plan and withholding of "\$7.3 million in yearly federal housing funds allocated to the county").

<sup>141</sup> See Timiraos, *supra* note 138.

<sup>142</sup> See, e.g., Craig Gurian, Letter to the Editor, *The Court is Right About Westchester County Housing*, WALL ST. J. (Aug. 18, 2009), <https://www.wsj.com/articles/SB10001424052970204683204574356340436871178> [<https://perma.cc/T97C-MNDC>] ("[T]he settlement both creates real consumer choice and,

The unprecedented intervention brought national public attention to housing segregation for the first time in decades.<sup>143</sup> In the immediate days after the settlement, the media targeted the persistent problems of housing segregation and the accompanying harms that arose from it. The Wall Street Journal interviewed HUD Deputy Secretary Ron Sims, who pointed to the lawsuit as evidence of the “significant amount of racial segregation’ in Westchester” and described studies showing that “zip codes could increasingly serve as a predictor of life expectancy and illness.”<sup>144</sup> Sims concluded with an appeal “to remove zip codes as a factor in the quality of life in America.”<sup>145</sup> The New York Times quoted Craig Gurian, executive director of the Anti-Discrimination Center, who followed in the path of President Lyndon Johnson by drawing the link between housing segregation and other forms of racial disadvantage. “Residential segregation,” Gurian explained, “underlies virtually every racial disparity in America, from education to jobs to the delivery of health care.”<sup>146</sup>

In the years following HUD’s intervention, the public through the media engaged in dialogue about the history of housing segregation. Newspaper articles reminded people of the degree of racial residential segregation and how we got here. Articles described federal and state governments’ social engineering of segregation through their enforcement of racial restrictive covenants, neighborhood redlining practices, and the siting and segregation

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41 years after the passage of the Fair Housing Act, takes an important step toward ending the legacy of ‘two societies, one black, one white, separate and unequal.’”).

<sup>143</sup> In contrast to the 25 newspaper articles found in a ProQuest search of current and historical newspapers between 1980 and 2009 that mentioned the principal tool for fighting housing segregation, “affirmatively further fair housing” or “affirmatively furthering fair housing,” using those same search terms yielded 132 articles between 2009 and the present.

<sup>144</sup> Timiraos, *supra* note 135.

<sup>145</sup> *Id.* In a follow up Wall Street Journal blog after the Westchester County settlement with HUD, journalist Nick Timiraos asked his readers the following questions: “[H]ow diverse are your communities? Do you think your communities could face similar scrutiny?” Nick Timiraos, *Westchester Settlement: “Removing ZIP Code as Quality of Life Factor”*, WALL ST. J. (Aug. 11, 2009), <https://blogs.wsj.com/developments/2009/08/11/westchester-settlement-removing-zip-code-as-quality-of-life-factor/> [<https://perma.cc/2M3N-ABY4>]. In an answer to the questions, a blog poster expressed opposition to the HUD Deputy Secretary’s idea of removing zip codes as a factor in the quality of life in America. The blog poster argued that “[t]aken to its logical conclusion, this idea would eliminate any income or housing quality distinction between different parts of town.” That means, according to the blog post, “[i]t would eliminate the distinctions in culture that brought those who live in a more expensive part of town to where they’re at . . . [and it] would eliminate the incentive to work towards upward social mobility.” Don Warrington, *Removing Zip Code as a Quality of Life Factor*, POSITIVE INFINITY (Nov. 6, 2009), <https://www.vulcanhammer.org/2009/11/06/removing-zip-code-as-a-quality-of-life-factor/> [<https://perma.cc/U8GR-2FLC>].

<sup>146</sup> Sam Roberts, *Westchester Adds Housing to Desegregation Pact*, N.Y. TIMES (Aug. 10, 2009), <https://www.nytimes.com/2009/08/11/nyregion/11settle.html> [<https://perma.cc/3BTK-J82B>].

of public housing, among other discriminatory practices.<sup>147</sup> Media accounts recalled for the public the history and purpose of the Fair Housing Act. Articles recounted how the findings from the National Advisory Commission on Civil Disorders, also known as the Kerner Commission, inspired the Fair Housing Act.<sup>148</sup> The Kerner Commission attributed the riots and unrest in major cities during the 1960s to residential segregation “sustained and made worse by federal policies that concentrated poor black citizens in ghettos” with little or no educational or employment opportunities.<sup>149</sup> The report warned in a famous passage that newspapers picked up again after HUD’s intervention into the Westchester County litigation that “[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.”<sup>150</sup> Media outlets recognized the rooting out of residential segregation as a purpose of the Fair Housing Act.<sup>151</sup> They informed the public about the Act’s failure due in part to executive under-enforcement of the Fair Housing Act mandates.<sup>152</sup> The combined effect of multiple Presidents’ lack of political will

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<sup>147</sup> See, e.g., Daniel Denvir, *Separation Anxiety*, PHILA. WEEKLY, March 16, 2011, at 10-12 (showing that black, Latino, and Asian people continue to be segregated from white people as they move into the suburbs); Jane Smith, *What Exactly is “Fair Housing?”*, RECORDER, April 4, 2014, at A.6.

<sup>148</sup> See, e.g., Editorial Board, *Housing Apartheid*, *American Style*, N.Y. TIMES (May 16, 2015), <https://www.nytimes.com/2015/05/17/opinion/sunday/housing-apartheid-american-style.html> [<https://perma.cc/9SH7-LX6P>] (describing the findings of the Kerner Commission); see also Troutt, *supra* note 125, at 22 (“[T]he Kerner Commission Report was especially influential in crafting the Fair Housing Act . . .”).

<sup>149</sup> See Editorial Board, *Housing Apartheid*, *American Style*, *supra* note 148. The Kerner Commission pointedly determined that “white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.” NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON DISORDERS 1 (1968).

<sup>150</sup> NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, *supra* note 149; see also Editorial, *The Battle for Westchester*, N.Y. TIMES (May 12, 2012), <https://www.nytimes.com/2012/05/13/opinion/sunday/the-battle-for-westchester.html> [<https://perma.cc/DGJ4-232A>] (describing how America has become more diverse in the years since the passage of the Fair Housing Act and that while “many of the barriers that kept communities separate and unequal have eroded . . . the fight against unlawful discrimination has not ended”).

<sup>151</sup> See, e.g., Charlene Crowell, *Will Federal Lawmakers Turn the Clock Back on Fair Housing?*, NEW ORLEANS TRIB. (Mar. 8, 2017), <http://www.theneworleanstribune.com/main/will-federal-lawmakers-turn-back-the-clock-on-fair-housing/> [<https://perma.cc/4WKA-YXUA>] (describing as one of the purposes of the Act “forg[ing] inclusive and diverse communities as a means to reverse America’s housing history of segregation and Jim Crow”).

<sup>152</sup> See Editorial Board, *Housing Apartheid*, *American Style*, *supra* note 148 (describing how HUD’s failure to enforce the Fair Housing Act left segregated metropolitan areas with large black populations); Emily Badger, *Obama Administration to Unveil Major New Rules Targeting Segregation Across U.S.*, WASH. POST (July 8, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/07/08/obama-administration-to-unveil-major-new-rules-targeting-segregation-across-u-s/?noredirect=on&utm\\_term=.2cd0607fb663](https://www.washingtonpost.com/news/wonk/wp/2015/07/08/obama-administration-to-unveil-major-new-rules-targeting-segregation-across-u-s/?noredirect=on&utm_term=.2cd0607fb663) [<https://perma.cc/TY3A-93XH>] (“[A] mandate [to actively dismantle segregation and foster integration] for decades has been largely forgotten, neglected, and unenforced.”).



and opposition to the anti-discrimination and desegregation goals of the Act, newspapers noted, contributed to this weak enforcement of the Act.<sup>153</sup>

Descriptions of the history of housing segregation and the Fair Housing Act led to thick, empirically driven media accounts of the persistence of such segregation. Mainstream media outlets covered studies of housing segregation once left to the annals of academic journals.<sup>154</sup> Reports about the index of dissimilarity, a measure of residential segregation, identified the degree of segregation throughout the country and shifts in segregation patterns, from the “white flight” to the suburbs of the past to the gentrification of city neighborhoods in the present.<sup>155</sup> Newspapers reported on studies about the relationship between segregation and other forms of racial disadvantage, such as education and employment disparities and differences in exposure to crime.<sup>156</sup>

The most important connection drawn from the perspective of constitutionalism was that between the segregation of housing and schools and the concomitant differences in educational opportunity and outcomes. What was old and broadly known in the 1960s became new and more widely shared after HUD intervened in 2009. In 1966, President Lyndon Johnson submitted a message to Congress proposing the enactment of a precursor to what became the Fair Housing Act that described the “complicated chain of

<sup>153</sup> See, e.g., Badger, *supra* note 152.

<sup>154</sup> See, e.g., Editorial Board, *America’s Federally Financed Ghettos*, N.Y. TIMES (Apr. 7, 2018), <https://www.nytimes.com/2018/04/07/opinion/sunday/americas-federally-financed-ghettos.html> [https://perma.cc/JF5L-8267] (re-introducing the findings from sociologists Douglas Massey and Nancy Denton’s seminal work, “American Apartheid: Segregation and the Making of the Underclass”); Editorial Board, *The Architecture of Segregation*, N.Y. TIMES (Sept. 5, 2015), <https://www.nytimes.com/2015/09/06/opinion/sunday/the-architecture-of-segregation.html> [https://perma.cc/9PM7-3W6W] (describing and citing findings from public policy professor and housing segregation expert Paul Jargowsky); Mark Trumbull, *Obama Puts “Fair Housing” on Agenda: Why Segregation Still Matters*, CHRISTIAN SCI. MONITOR (July 8, 2015), <https://www.csmonitor.com/USA/2015/0708/Obama-puts-fair-housing-on-agenda-Why-segregation-still-matters> [https://perma.cc/937T-MXEK] (describing findings from economists Raj Chetty and Nathaniel Hendren identifying the benefits for children of reducing segregation and concentrated poverty).

<sup>155</sup> See, e.g., Richard H. Sander, *Why are African Americans Better Off in San Diego than St. Louis? Fair Housing*, L.A. TIMES (Apr. 15, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-sander-fair-housing-act-20180415-story.html> [https://perma.cc/VH7V-XC5Q] (describing the index of dissimilarity and identifying the degree of segregation in major metropolitans).

<sup>156</sup> See, e.g., Emily Badger, *Housing Segregation is Holding Back the Promise of Brown v. Board of Education*, WASH. POST (May 15, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/05/15/housing-segregation-is-holding-back-the-promise-of-brown-v-board-of-education/?noredirect=on> [https://perma.cc/X8MP-AXPD] (identifying the relationship between housing segregation and educational disadvantage); Emily Badger & John Eligon, *Trump Administration Postpones an Obama Fair-Housing Rule*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/upshot/trump-delays-hud-fair-housing-obama-rule.html> [https://perma.cc/JM96-WRK2] (quoting legal expert on segregation Myron Orfield as concluding that “[a]ll of the disparities in the U.S.—in education, in income, wealth, employment, health—between the races are all fundamentally linked to residential segregation”).

discrimination and lost opportunities.”<sup>157</sup> As President Johnson explained, “[e]mployment is often dependent on education, education on neighborhood schools and housing, housing on income, and income on employment. . . . All the links—poverty, lack of education, underemployment, and now discrimination in housing—must be attacked together.”<sup>158</sup> For forty years after Johnson’s speech, the public mostly ignored the role of housing discrimination in the chain of discrimination and lost opportunity, until the issue returned to the forefront of the public debate after HUD’s intervention. Mirroring the views of President Johnson, ADC Executive Director Craig Gurian explained that “[r]esidential segregation underlies virtually every racial disparity in America, from education to jobs to the delivery of health care.”<sup>159</sup> In a letter to the editor, a former HUD Administrator praised the New York Times for placing “housing segregation and racism at the heart of our urban problem” and then reaffirmed that “[i]t’s about everything that goes with [housing segregation and discrimination]: joblessness, crime, drugs, underperforming schools, crumbling infrastructure, inadequate public services—the list goes on.”<sup>160</sup>

As with all public dialogues at the center of popular constitutional debates, there were opponents who took a differing view of housing segregation and HUD’s response to it, a perspective that also played out in the media. While supporters of HUD’s intervention linked persistent housing segregation to past discriminatory state actions, those opposed to federal involvement argued that segregation was a product of choice and income. An anonymous editorial in the Wall Street Journal written days after HUD’s intervention into the action against Westchester County challenged the assumption that the low presence of racial and ethnic minorities in certain Westchester towns was the result of discrimination. The author noted that “there’s no pattern of fair housing complaints or other evidence showing that black families with incomes similar to whites in more upscale neighborhoods were barred from those jurisdictions.”<sup>161</sup> The integration of black and Latinos into suburban Westchester towns was increasing, the editorial argued, “as the household incomes of those groups rise.”<sup>162</sup> Another Wall Street Journal article titled “HUD’s Racial Agenda” quoted statements from conservative

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<sup>157</sup> Message from the President, *supra* note 126.

<sup>158</sup> *Id.*

<sup>159</sup> Roberts, *supra* note 146.

<sup>160</sup> Alan Goldfarb, Letter to the Editor, *Moving to End Housing Segregation*, N.Y. TIMES (May 20, 2015), <https://www.nytimes.com/2015/05/20/opinion/moving-to-end-housing-segregation.html> [<https://perma.cc/7DGH-444T>].

<sup>161</sup> Anonymous, *Color-Coding the Suburbs*, WALL ST. J. (Aug. 14, 2009), <https://www.wsj.com/articles/SB10001424052970203863204574346862154177606> [<https://perma.cc/CSH5-PUQX>].

<sup>162</sup> *Id.*

members of the United States Commission of Civil Rights, who asserted that “legal segregation has been dead for over forty years” and that “geographic clustering of racial and ethnic groups is not in and of itself an invidious phenomenon.”<sup>163</sup> The article then editorialized that “if Asian or black or white communities voluntarily choose to live together, that’s perfectly legal.”<sup>164</sup> A later Wall Street Journal article cited unnamed “research” showing that “for decades large majorities of blacks have no desire to live in all-white or even mostly white neighborhoods and strongly prefer to live where at least half of the other residents are black” as an argument against “the federal government . . . forcing wealthy Westchester municipalities to import low-income minorities.”<sup>165</sup>

The opponents of HUD’s actions accused the agency of engaging in social engineering. A New York Times editorial in 2012 quoted a Republican candidate for a United States Senate seat in New York, who accused President Obama and HUD of “trying to ‘socially engineer’ rich communities into accepting poorer people.”<sup>166</sup> A Washington Post editorial titled “Obama Wants to Reengineer Your Neighborhood” accused HUD of using the Affirmatively Furthering Fair Housing mandate to “force communities to diversify.”<sup>167</sup> Such forced integration, another critic argued, would create or heighten racial tensions.<sup>168</sup>

A final criticism pitted HUD’s federal anti-segregation efforts against the principle of local control. Robert Astorino, the Westchester County executive responsible for implementing the HUD settlement, tried to rally opponents through the use of federalism-infused arguments. A media outlet quoted Astorino as claiming that “Washington bureaucrats, who you will never see or meet, want the power to determine who will live where and how each

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<sup>163</sup> See Mary Kissel, *HUD’s Racial Agenda*, WALL ST. J. (Sept. 18, 2013), <https://www.wsj.com/articles/huds-racial-agenda-1379516023> [<https://perma.cc/DS57-28KP>] (quoting Commissioners Abigail Thernstrom, Peter Kirsanow, and Todd Gaziano).

<sup>164</sup> *Id.*

<sup>165</sup> Jason L. Riley, *Obama Wants to Pick the Clintons’ Neighbors*, WALL ST. J. (June 16, 2015), <https://www.wsj.com/articles/obama-wants-to-pick-the-clintons-neighbors-1434494645> [<https://perma.cc/38N8-N7G6>].

<sup>166</sup> Editorial, *The Battle for Westchester*, N.Y. TIMES (May 12, 2012), <https://www.nytimes.com/2012/05/13/opinion/sunday/the-battle-for-westchester.html> [<https://perma.cc/DGJ4-232A>] (quoting New York Republican Senate candidate Bob Turner).

<sup>167</sup> Marc A. Thiessen, *Obama Wants to Reengineer Your Neighborhood*, WASH. POST (June 15, 2015), [https://www.washingtonpost.com/opinions/obama-wants-to-reengineer-your-neighborhood/2015/06/15/f7c0c558-1366-11e5-9518-f9e0a8959f32\\_story.html?utm\\_term=.67ade5614aeb](https://www.washingtonpost.com/opinions/obama-wants-to-reengineer-your-neighborhood/2015/06/15/f7c0c558-1366-11e5-9518-f9e0a8959f32_story.html?utm_term=.67ade5614aeb) [<https://perma.cc/55AY-DAKS>].

<sup>168</sup> See Anonymous, *supra* note 161.

neighborhood will look.”<sup>169</sup> For Astorino, “[w]hat’s at stake is the fundamental right of our cities, towns, and villages to plan and zone for themselves.”<sup>170</sup> In a Wall Street Journal op-ed, Astorino tried to stoke longstanding fears about centralized housing by suggesting to the reader that HUD was seeking “unchecked power to put an apartment building in your neighborhood.”<sup>171</sup> Then, combining arguments about federal control and social engineering, Astorino went on to assert that HUD “wants the power to dismantle local zoning so communities have what it considers the right mix of economic, racial and ethnic diversity.”<sup>172</sup> Letters to the editor and other editorials in the Wall Street Journal agreed with Astorino’s characterization of HUD’s efforts to address housing segregation as an assault on local control.<sup>173</sup>

In the midst of this public dialogue about the history and persistence of housing segregation and the public debate about its sources and effects, HUD proposed and adopted a rule to enforce the Fair Housing Act’s Affirmatively Furthering Fair housing mandate.<sup>174</sup> The Supreme Court also reaffirmed the desegregation purposes of the Act.<sup>175</sup> The relationship between the public dialogue and debate, the HUD rule, and the Supreme Court’s decision is impossible to prove definitively. But the correlation between the public

<sup>169</sup> Peter Applebome, *Showdown for Westchester and U.S. Over Desegregation Agreement*, N.Y. TIMES (Apr. 23, 2013), <https://www.nytimes.com/2013/04/24/nyregion/us-gives-westchester-deadline-to-comply-with-housing-pact.html> [<https://perma.cc/6J8U-TQQW>].

<sup>170</sup> *Id.*

<sup>171</sup> Robert P. Astorino, *Washington’s “Fair Housing” Assault on Local Zoning*, WALL ST. J. (Sept. 5, 2013), <https://www.wsj.com/articles/washingtons-fair-housing-assault-on-local-zoning-1378422087> [<https://perma.cc/58WH-8FY9>].

<sup>172</sup> *Id.*

<sup>173</sup> See, e.g., Letters to the Editor, *HUD Zoning: Coming Soon to a Neighborhood Near You*, WALL ST. J. (Sept. 15, 2013), <https://www.wsj.com/articles/hud-zoning-coming-soon-to-a-neighborhood-near-you-1379262411> [<https://perma.cc/WAA9-G5QB>] (expressing opposition to HUD’s attempt to “promote racial harmony by inserting many more low-income housing units that don’t comply with local zoning laws in affluent suburbs”); Riley, *supra* note 165 (“What is at stake [with HUD’s action] is the loss of locally controlled residential zoning, and more such federal relocation edits are almost certainly on the way.”); Thiessen, *supra* note 167 (“Putting decisions about how local communities are run in the hands of federal bureaucracy is an assault on freedom.”).

<sup>174</sup> HUD proposed the Affirmatively Further Fair Housing rule in 2013 and it received over 1,000 comments. See *Affirmatively Furthering Fair Housing*, Final Rule, 80 Fed. Reg. 42,272, 42,276 (2015). HUD published the final rule in 2015. Among other things, the rule replaced the weakly enforced and vague requirement that participants undertake an analysis of impediments to fair housing. See GOVERNMENT ACCOUNTABILITY OFFICE, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS 9 (2010) (describing the problems with the analysis of impediments to fair housing). In its stead, the rule established “a more effective and standardized Assessment of Fair Housing through which program participants identify and evaluate fair housing issues, and factors contributing to fair housing issues.” *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. at 42,273.

<sup>175</sup> See *Texas Dep’t of Housing & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2515–25 (2015) (upholding the Fair Housing Act’s disparate-impact standard on the basis of the history and persistence of segregation that the Act was intended to eradicate).

dialogue and debate, the adoption of the first HUD rule to enforce the AFFH, and the conservative Supreme Court's surprising decision to embrace HUD's disparate-impact standard of liability for housing discrimination to support the goal of desegregation is noteworthy.

Although the HUD rule imposed extremely modest requirements on recipients of federal housing funding, it served as a catalyst for further public debate. Supporters saw the rule as a first step toward more robust enforcement of the AFFH desegregation mandate.<sup>176</sup> Opponents viewed it as more social engineering and a further assault on local control.<sup>177</sup> For the first time in decades, HUD's rule drew attention to housing segregation in a presidential contest. A day after HUD issued its rule, Republican presidential candidate Ben Carson described HUD-enforced housing desegregation as a form of social engineering.<sup>178</sup> A few months later, the Republican Party joined in the backlash against the rule. The GOP in its 2016 platform accused the Obama administration of "trying to seize control of the zoning process through its Affirmatively Furthering Fair Housing regulation" and "threaten[ing] to undermine zoning laws in order to socially engineer every community in the country."<sup>179</sup> The Democratic Party platform responded with a promise to "defend[] and strengthen[] the Fair Housing Act."<sup>180</sup>

Donald Trump's subsequent election as president opened the door to a rollback of HUD's desegregation efforts during the Obama administration. The rollback started with the appointment of Ben Carson to serve as secretary of HUD,<sup>181</sup> and culminated with the suspension of the HUD rule enforcing

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<sup>176</sup> See, e.g., Editorial Board, *The End of Federally Financed Ghettos*, N.Y. TIMES (July 11, 2015), <https://www.nytimes.com/2015/07/12/opinion/the-end-of-federally-financed-ghettos.html> [https://perma.cc/QC8W-JLLM] (describing the new HUD rule and suggesting that it represented a step toward ending federally financed segregation); Trumbull, *supra* note 154 (acknowledging that the HUD rule "doesn't sound revolutionary" but suggesting that the data and tools that it will equip cities with to address segregation will change expectations surrounding the role of the Fair Housing Act in eradicating segregation).

<sup>177</sup> See Emily Badger, *How Ben Carson Could Undo a Desegregation Effort*, N.Y. TIMES (Nov. 23, 2016), <https://www.nytimes.com/2016/11/23/upshot/how-ben-carson-at-housing-could-undo-a-desegregation-effort.html> [https://perma.cc/A23R-2KM9] ("[Ben] Carson and other critics call efforts to dismantle poor, segregated communities as 'social engineering' . . .").

<sup>178</sup> See Editorial Board, *Ben Carson's Warped View of Housing*, N.Y. TIMES (Dec. 19, 2016), <https://www.nytimes.com/2016/12/19/opinion/ben-carsons-warped-view-of-housing.html> [https://perma.cc/BW3V-Y6GS].

<sup>179</sup> REPUBLICAN PLATFORM 2016, at 4 (2016), [https://prod-cdn-static.gop.com/media/documents/DRAFT\\_12\\_FINAL\[1\]-ben\\_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf) [https://perma.cc/5BKF-BNP5].

<sup>180</sup> 2016 DEMOCRATIC PARTY PLATFORM 5 (2016), [https://democrats.org/wp-content/uploads/2018/10/2016\\_DNC\\_Platform.pdf](https://democrats.org/wp-content/uploads/2018/10/2016_DNC_Platform.pdf) [https://perma.cc/CE8J-QCUE].

<sup>181</sup> See Jeffrey Sparshott, *U.S. Senate Confirms Ben Carson as Housing and Urban Development Secretary*, WALL ST. J. (Mar. 2, 2017), <https://www.wsj.com/articles/u-s-senate-confirms-ben-carson-as-housing-and-urban-development-secretary-1488469893> [https://perma.cc/8L7D-ABJJ].

AFFH and the shift away from integration as a goal for housing policy.<sup>182</sup> In some respects, the rollback has left us back where we began when HUD intervened in the Westchester County litigation. Prior to the intervention, HUD had done little to enforce the Fair Housing Act's desegregation mandate, and in the current context the Trump administration seems interested in reducing the federal role in advancing housing integration.<sup>183</sup> But in one critical respect, the public discourse pre-Westchester County looks very different from that of today. Prior to HUD's intervention into Westchester County, there was very little public attention and virtually no public dialogue about housing desegregation, an issue of enormous constitutional import that has not been adequately addressed. The HUD intervention into Westchester County inspired a popular constitutional debate, with advancement in constitutional rights claims and backlash against them that are typical of most popular constitutional rights movements. This popular debate has not yet concluded, but without an administrative agency as the catalyst, it likely would have never begun.

#### CONCLUSION

As a descriptive project, the current accounts of popular constitutionalism are incomplete. Popular constitutional theorists provide a persuasive account for constitutionalism in the first century and a half of the American republic, when frequent popular movements, congressional and presidential interventions into constitutional disputes, and state advancement of, and resistance to, constitutional values all effectively competed with courts as focal points for constitutional interpretive disputes.<sup>184</sup> But for most of the

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<sup>182</sup> See Emily Badger & John Eligon, *supra* note 156 (reporting on the Trump administration's suspension of HUD's Affirmatively Furthering Fair Housing rule until 2020); Glenn Thrush, *Under Ben Carson, HUD Scales Back Fair Housing Enforcement*, N.Y. TIMES (Mar. 28, 2018), <https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html> [<https://perma.cc/S5LS-JAR9>] (reporting on the Trump Administration's efforts "to scale back federal efforts to enforce fair housing laws, freezing enforcement actions against local governments and businesses . . . while sidelining officials who have aggressively pursued civil rights cases").

<sup>183</sup> See Laura Kusisto, *HUD Moves to Shake Up Fair-Housing Enforcement*, WALL ST. J. (Aug. 13, 2018), <https://www.wsj.com/articles/hud-moves-to-shake-up-fair-housing-enforcement-1534161601> [<https://perma.cc/2ZVQ-XQSV>] ("The Trump administration wants to shift the way it enforces an aspect of fair housing around the U.S., pivoting away from efforts to integrate lower-income housing into wealthier neighborhoods in favor of promoting more housing development overall.").

<sup>184</sup> See generally Kramer, *THE PEOPLE THEMSELVES*, *supra* note 6 (focusing mostly on eighteenth- and nineteenth-century examples of popular constitutionalism). The Chicago-Kent Law Review hosted a symposium on Kramer's work in which the descriptive accounts of popular constitutionalism focused mostly on eighteenth- and nineteenth-century examples of popular constitutionalism. See generally Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883 (2006); Mark A. Graber, *Popular Constitutionalism, Judicial Supremacy, and the Complete Lincoln-Douglas Debate*, 81 CHI.-KENT L. REV.

past century, constitutional change has far outpaced the efforts of these popular actors and institutions. A popular constitutionalism for the modern era requires a recognition of both the role of agencies as constitutional actors, as loci for popular input in constitutional meaning determinations, and as catalysts for popular debate about the Constitution. In fact, in a context in which social movement activity is infrequent, Congress is dysfunctional, and the President for the most part stays out of constitutional disputes, administrative agencies are arguably the lead popular constitutional actors that compete with the constitutional supremacy of the courts.

It is the hope that this Article will serve as a starting point for understanding administrative agencies' roles as popular constitutional actors. The role of HUD as a catalyst for a popular constitutional debate on the government's mandate to combat the constitutional harm of segregation is just one of many examples from the recent era. Attorney General Eric Holder's attack on Voter ID laws, which served as a catalyst for popular debate about the constitutional right to vote, and the Environmental Protection Agency's Clean Power Plan that triggered a popular debate about separation of powers and executive authority, are both other very recent examples of such actions by administrative agencies that are ripe for further examination.<sup>185</sup> Once we account for the role of administrative agencies in popular constitutionalism, we can also more completely re-engage the normative debate about who should exercise control over the meaning of the Constitution.

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983 (2006); Daniel W. Hamilton, *Popular Constitutionalism in the Civil War: A Trial Run*, 81 CHI.-KENT L. REV. 953 (2006); Richard J. Ross, *Pre-Revolutionary Popular Constitutionalism and Larry Kramer's The People Themselves*, 81 CHI.-KENT L. REV. 905 (2006).

<sup>185</sup> See, e.g., Jason L. Riley, *Cue the Voter ID Scaremongering*, WALL ST. J. (Dec. 21, 2011), <https://www.wsj.com/articles/SB10001424052970204464404577112631828248266> [<https://perma.cc/5EL8-K75A>] (presenting one of the first newspaper accounts of the Department of Justice's review of Voter ID laws under the Voting Rights Act and Attorney General Eric Holder's role as the lead actor spearheading the review); Benjamin Zycher, *Obama and the EPA: It's About Rewarding Friends and Punishing Enemies*, L.A. TIMES (June 9, 2014), <https://www.latimes.com/opinion/op-ed/la-oe-zycher-epa-global-warming-20140610-story.html> [<https://perma.cc/G5RY-9ZY2>] (providing an account of the EPA's Clean Power Plan and the popular debate about separation of powers that it sparked).

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