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## Privilege and Responsibility

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## Privilege and Responsibility

Arthur F. McEvoy\*

### INTRODUCTION

Some twenty years ago, Stephanie Wildman began writing about *privilege*: an integrated, multi-layered, and largely invisible system of social hierarchy that sustains inequality and subordination in our culture and works in mysterious ways to confound whatever efforts people might make to ameliorate them.<sup>1</sup> Our legal culture permits us to attack *discrimination*, in some of its manifestations, when we can identify deliberate acts of individuals that cause harm to others because of their social status. The culture makes it difficult, however, for us even to talk about the networks of privilege that tacitly assign people to subordinate categories because of their race, their gender, or any other of the innumerable characteristics by which people distinguish themselves from others. Wildman's signal contribution has been to identify privilege as a social system, as well as to build concepts and vocabulary with which to make it "visible." Since Wildman established the paradigm in her 1996 book, *Privilege Revealed*, academic writers have analyzed the structure and dynamics of privilege in a great many areas. Simply recognizing privilege requires a great deal of effort, particularly when the writer shares in

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1. STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996) [hereinafter PRIVILEGE REVEALED]. See also Stephanie M. Wildman, *Privilege, Gender, and the Fourteenth Amendment: Reclaiming Equal Protection of the Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 707 (2004); Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245 (2005). For an earlier symposium on Wildman's work, see Angela P. Harris, *Symposium: Introduction*, 34 U.S.F. L. REV. 409 (2000).

it: the problem of counteracting its role in the subordination of people by category has received somewhat less attention.

Privilege, Wildman taught us, is inexorable. Privilege orders people's perception of themselves, their ideas about the world, their behavior in society. "It appears as the fabric of life," as Wildman put it: "as the way things are."<sup>2</sup> It works as invisibly and as pervasively as gravity, or a magnetic field: it requires no act, no deliberation, not even awareness on the part of the people who ratify and reproduce it in countless ways, large and small, every day of their lives. Privilege is not necessarily the same thing as subordination, but privilege is to subordination as water is to fish; it is a kind of ether that pervades society and culture, outside of which there exists no frame of reference from which to talk about it, much less to exert leverage against it.

One can avoid privilege, then, neither by wishing it away, nor by pretending that it doesn't exist, nor, indeed, by analyzing it in classrooms and academic journals. Renouncing society by, for example, joining a monastic order or taking up life on the street, would leave the interwoven gradients of one's privilege undiminished: individuals are powerless to nullify whatever privilege they enjoy because it is the culture, not the individual, that identifies and ranks whatever characteristics one has or does not have. If anything, dropouts reinforce the network of privilege to the extent that they also renounce whatever power they might have to fight oppression. One can't avoid the privilege that comes with being white or wealthy or male or attractive or, for that matter, an American citizen. One can only exercise whatever privilege one has, responsibly or not. *Responsibility*, then, is what distinguishes the political fact of subordination from the ether of privilege in which it propogates.

This Essay argues that exercising privilege responsibly is particularly difficult in the United States, whose culture rests more than any other on formal commitment to the equality and dignity of the individual. This is because our legal culture not only disavows privilege formally but also shifts responsibility for the moral

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2. WILDMAN, PRIVILEGE REVEALED, *supra* note 1, at 3.

character of people's social behavior away from individual actors and onto the abstract institutions of politics and markets. The synthesis of the two—formal disavowal of privilege in public life and the moral enchantment of politics and markets<sup>3</sup>—was the work of the original Founders: a uniquely privileged group of aristocrats who tried to broaden the franchise for what they called “virtuous” self-government, with remarkable but mixed results. There are, nonetheless, recessive traditions in American legal culture that have both recognized the existence of different kinds of privilege and the duty of citizens to exercise privilege responsibly in the name of political equality and human dignity. Together, these recessive traditions offer suggestions, at least, of what morally responsible politics might look like.

#### I. PRIVILEGE DIVORCED FROM VIRTUE

Privilege was the birthright of people like the American Founders, well-to-do men brought up in eighteenth-century North Atlantic culture. It entailed such rights as self-ownership, property, and some degree of political franchise: rights which the natural order of things made more or less unavailable to people who occupied lesser stations in life. Eighteenth-century privilege also, however, entailed the responsibility for *virtue*: the capacity to act selflessly for the good of one's household as well as for that of the community at large. George Washington and others who carried out the American Revolution were, for the most part, aristocrats who took the responsibility for civic virtue very seriously.<sup>4</sup> Their great contribution was first to theorize and then to build a political system in which ordinary people (which they generally understood to include adult white male property holders of whatever means) could govern themselves—to

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3. On “enchantment,” see PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 97–98 (1998); Susan S. Silbey & Patricia Ewick, *The Double Life of Reason and Law*, 57 U. MIAMI L. REV. 497, 504 (2003).

4. On the problem of virtue during the Revolutionary period, see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 65–70 (1969).

refute “those who wish it to be believed, that man cannot be governed but by a rod of iron,” as Jefferson put it.<sup>5</sup>

The Founders’ ultimate strategy was to economize what innate resources of virtue were available to common people so that government “would go of itself” without hereditary rulers. Confederation-era governments tried to inculcate among citizens the self-sacrifice and community-mindedness required for self-government, although the experiment was on the whole a miserable failure. The historic achievement of the 1787 Constitutional Convention was to design a frame of government in which competing selfish interests would cancel each other out and thus, on balance, permit the common interest of the whole people to direct affairs of state. In this, the Founders did remarkably well, although in the process they severed the bond between privilege and responsibility that had underwritten order and progress in the eighteenth-century Atlantic community.

Unlike those of our day, Revolution-era constitutions were as careful to lay out the responsibilities as they did the liberties of citizens. One of the most distinctive of these instruments was that of Pennsylvania, which a convention proclaimed within months of the Declaration of Independence and which endured until 1790.<sup>6</sup> It began with a sixteen-point declaration of the rights of the commonwealth’s inhabitants, the fourteenth of which affirmed

[t]hat a frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the blessings of liberty, and keep a government free: The people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right to exact a due and constant regard to them, from their legislatures and magistrates, in the making and executing such laws as are necessary for the good government of the state.<sup>7</sup>

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5. THOMAS JEFFERSON, KENTUCKY RESOLUTIONS (1798), *reprinted in* DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606–1863, at 287, 293 (Howard W. Preston ed., 1886).

6. WOOD, *supra* note 4, at 226–37.

7. PA. CONST. of 1776, art. XIV.

Moving beyond mere exhortations to public virtue, the Pennsylvania Constitution directed that “[l]aws for the encouragement of virtue and prevention of vice and immorality, shall be made and constantly kept in force.”<sup>8</sup> Other sections provided for militia service<sup>9</sup> and rotation in office so that “more men will be trained to public business”.<sup>10</sup> Section 36 reminded citizens that “every freeman to preserve his independence, (if without a sufficient estate) ought to have some profession, calling, trade or farm, whereby he may honestly subsist” and so discouraged the pursuit of public office as a career. Indeed, whenever a public office “becomes so profitable as to occasion many to apply for it,” Section 36 directed the Legislature to reduce its compensation.<sup>11</sup> In a way foreign to us, Revolutionary-era governments took active roles in cultivating civic responsibility among members of the commonwealth.

Famously, the experiment failed, and Confederation-era politics fell into chaos.<sup>12</sup> Hamilton and Madison catalogued the problems of the revolutionary governments in *The Federalist*; chief among these was citizens’ tendency to divide themselves into factions and to hijack the machinery of the state in pursuit of particular economic interests, religious persuasions, or sectional loyalties. “As long as the connection persists between [people’s] reason and [their] self-love,” Madison wrote, “this propensity of mankind to fall into mutual animosities” would remain so powerful that civic virtue—the capacity to restrain one’s pursuit of advantage for the benefit of others—“will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.”<sup>13</sup> “Because the passions of men will not conform to the dictates of reason or justice without constraint,” as Hamilton put it,<sup>14</sup> simply exhorting citizens to virtue would not by itself keep popular government from flying apart at the seams. At the same time, while for the state itself to cultivate virtue in the citizenry was apparently a

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8. PA CONST. of 1776, § 45.

9. PA CONST. of 1776, § 5.

10. PA CONST. of 1776, §§ 8, 11, 19.

11. PA CONST. of 1776, § 36.

12. WOOD, *supra* note 4, at 393–429.

13. THE FEDERALIST NO. 10, at 78–80 (James Madison) (Clinton Rossiter ed., 1961).

14. THE FEDERALIST NO. 15, *supra* note 13, at 110 (Alexander Hamilton).

vain effort, Madison was convinced that for the state to suppress the tendency to faction would require stifling people's liberty altogether.<sup>15</sup>

The Founders' great achievement was to design a frame of government that would economize what natural virtue was available among the citizenry, while simultaneously allowing people to spend most of their energy on self-advancement and tolerating the ephemeral, factional passions that distracted them from their responsibilities to others. In *The Federalist* No. 10, Madison explained how normal politics under the new constitution would equilibrate itself: the sheer size of the national republic would make it difficult for factional interests to capture the entire government.<sup>16</sup> In No. 48, Madison insisted that division of authority among the three branches of the new government would likewise keep power divided and difficult to concentrate under the control of particular factions.<sup>17</sup> In No. 32, Hamilton showed how the division of sovereignty between state and national governments would likewise equilibrate politics under the new system.<sup>18</sup> In No. 78, finally, Hamilton justified life tenure for federal judges in similar terms, as "an excellent barrier to the encroachments and oppressions of the representative body."<sup>19</sup> The appointment process would guarantee that only people who "unite the requisite integrity with the requisite knowledge" would staff the federal bench,<sup>20</sup> while the security of tenure on good behavior would insulate them from political influence and set up yet another "safeguard against the effects of occasional ill humors in the society."<sup>21</sup> The Constitution was "a machine that would go of itself":<sup>22</sup> inspired by the now-abstracted will of "the People" and no longer dependent on the virtue of real individuals, be they hereditary aristocrats or common citizens.

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15. THE FEDERALIST NO. 10, *supra* note 13, at 78 (James Madison).

16. *Id.* at 82–84.

17. THE FEDERALIST NO. 48, *supra* note 13, at 308–11 (James Madison).

18. THE FEDERALIST NO. 32, *supra* note 13, at 197–201 (Alexander Hamilton).

19. THE FEDERALIST NO. 78, *supra* note 13, at 465 (Alexander Hamilton).

20. *Id.* at 471.

21. *Id.* at 470.

22. The phrase is that of the late nineteenth-century Romantic poet James Russell Lowell. See MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 18 (1986).

Unlike its Confederation-era counterparts, the 1787 Constitution makes no effort to school citizens in republican virtue. To the contrary, it takes a realistic view of politics, makes “proper deductions for the ordinary depravity of human nature” (as Hamilton put it),<sup>23</sup> and allows people to exercise their franchise by their own lights. Its profusion of checks and balances and its fractionated centers of authority—each of them constituted in a different way—guide power through many channels, in theory so that factions and other ephemeral perversions of the public good tend to cancel each other out and that more rational, widely shared (if sometimes recessive) ideas reinforce each other and thus, on balance, guide public affairs in wholesome directions. The Founders thus designed the Constitution to channel politics in progressive directions, in the same way that their contemporary Adam Smith thought that the Invisible Hand of market forces steered economic development.<sup>24</sup> The kinship is significant: in the nineteenth century, when Americans came to think of public life more in market than in political terms, the Constitution’s solution to the problem of republican virtue would justify similarly agnostic, laissez-faire attitudes toward economic and social relations as well.<sup>25</sup>

At the time in which our fundamental public institutions—free markets and republican governments—came into being, privilege was a visible, tangible force: conferred by birth, manifest in the social order, and underwritten by natural law. It conveyed economic and political franchise to those who enjoyed it and withheld it from those who did not. It also carried with it, theoretically, responsibilities toward one’s community and one’s dependents. The critical problem of the Revolution, as the Founders saw it, was to keep the virtue that inhered in the people as a whole from being overwhelmed by individual self-striving and factional politics. Their solution was to rely on the collective institutions of law and markets to aggregate people’s limited resources of virtue and neutralize their tendencies to

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23. THE FEDERALIST NO. 78, *supra* note 13, at 471 (Alexander Hamilton).

24. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 484–85 (Edwin Cannon ed., 1994).

25. J. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 40 (1956).



vice. In the process, however, they relieved individuals of responsibility for disciplining their striving to the public good.

## II. RESPONSIBLE POLITICS: A RECESSIVE STRAIN IN AMERICAN CULTURE

Popular sovereignty, at once reified and harnessed by the 1787 Constitution, released a historically unprecedented burst of creative energy in the nineteenth-century United States.<sup>26</sup> Courts and legislatures systematically dismantled traditional impediments to self-striving in all areas of law, from contract to crimes to coverture.<sup>27</sup> By the end of the century, Americans had transformed a string of maritime provinces into the world's largest industrial power. Political invention was nearly as widespread as the mechanical kind: Indian tribes and refugee slaves no less than millenarians and Mormons tried to build "communities of the right sort" beyond the reach of established authority, while feminists and abolitionists hectoring those in power on duties that lay beyond the mere piling up of wealth. Most successful was the synthesis of liberal democracy and capitalism that the Founders had set in motion, although it depended critically on the twin crimes of Indian genocide and African slavery as well as on the profligate waste of the continent's natural resources.<sup>28</sup>

For the most part, the nearly limitless franchise that came with American citizenship carried with it few responsibilities to other people or to the public at large. Property in slaves carried with it privileges to rape, batter, and kill; most of the killings of Indians on the frontier took place not at the hands of soldiers but of individuals and gangs, typically in retaliation for purported injuries to settlers' property or persons.<sup>29</sup> The monstrous, unbounded privilege of

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26. The term "release of energy" is that of J. Willard Hurst. *Id.* at 7.

27. *See id.* at 13–28; *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 120–39 (3d ed. 2005).

28. HURST, *supra* note 25, at 70.

29. On the rape of slaves and Indians *see* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 150–73 (1975); *see also* PAUL A. DAVID ET AL., RECKONING WITH SLAVERY: A CRITICAL STUDY IN THE QUANTITATIVE HISTORY OF AMERICAN NEGRO HISTORY 57–69, 134–61 (1976); on Indians, *see, e.g.*, SHERBURNE F. COOK, THE CONFLICT BETWEEN THE CALIFORNIA INDIAN AND WHITE CIVILIZATION 329–46 (1976) ("Sex and Family Relations"); *id.* at 259–67 ("Military Casualties" and "Social Homicide").

slaveholding so corrupted the Republic as to bring it to civil war, just as unregulated capitalism brought it low during the Great Depression of the twentieth century. In both of those cases, Americans rebuilt the Constitution by enfranchising new groups of people: emancipated slaves during Reconstruction and industrial workers during the New Deal. In neither case, however, did Americans remake the peculiar relationship between privilege and responsibility that defined American liberty, regardless of how far the franchise extended.

There runs through American history, however, a recessive strain that explicitly links privilege with responsibility in ways that have adapted the eighteenth-century idea of civic virtue to the liberal democracy of the modern era. One can see this recessive strain at work in the area of late nineteenth-century race relations, in the ideology of the New Deal, and in the work of the mid-twentieth-century Catholic Left. Other examples abound; the ones offered here are by no means systematic and appear here by way of illustration rather than logical proof. They are instructive in that they arose at times of significant upheaval in the country's social order; they arose, also, in the context of privilege regimes—of race and class—that remain critical today. Together, they offer hints at what a politics of responsibility might look like.

*A. Emancipation and Race Privilege: Abraham Lincoln, John Marshall Harlan, Mary Church Terrell*

Of all the social characteristics to which privilege attaches itself, none carries more weight than race. African slavery was the bedrock on which the U.S. economy developed; slavery and its aftermath organize American politics today no less than it did at the Founding. Indeed, Americans developed their very concept of what it meant to be a free person by way of contrast to the lives of the slaves on whose labor their progress depended. No white person in our history understood this better than Abraham Lincoln—few persons in our history have articulated so clearly the responsibility that race privilege carries with it.

Lincoln understood clearly, before he became President, that slavery was incompatible with the ideals of the American Revolution and that survival of the Revolution itself—“the last best hope of

earth”—depended on its eradication.<sup>30</sup> In his second inaugural address, at the end of his life, he spoke of the Civil War as atonement for slavery:

. . . if God wills that [the war] continue until all the wealth piled up by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said “the judgments of the Lord are true and righteous altogether.”<sup>31</sup>

Newspaper accounts of the speech expressed bewilderment as to the meaning of Lincoln's words, although they noted that black people in attendance offered praise to God throughout, responding as if to a sermon in church.<sup>32</sup> Earlier in the war, Lincoln insisted that slavery was as much the responsibility of Northerners as Southerners:

It is no less true for having been often said that the people of the South are not more responsible for the original introduction of [slave] property than are the people of the North; and when it is remembered how unhesitatingly we all use cotton and sugar and share the profits of dealing in them, it may not be quite safe to say that the South has been more responsible than the North for its continuance.<sup>33</sup>

Lincoln was certainly not the first to realize this; Quaker merchants, who were familiar with the slave trade, washed their hands of it in the early nineteenth century, while abolitionists and feminists of both races spoke eloquently of the corruption that slavery worked in

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30. Abraham Lincoln, Second Annual Message to Congress (Dec. 1, 1862), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 126, 142 (James D. Richardson ed., 1897)

31. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 276, 277 (James D. Richardson ed., 1897).

32. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 4 (1988); RONALD C. WHITE, JR., LINCOLN'S GREATEST SPEECH: THE SECOND INAUGURAL 181–83 (2002); Garry Wills, *Lincoln's Greatest Speech*, ATLANTIC MONTHLY, Sept. 1999, available at <http://www.theatlantic.com/past/issues/99sep/9909lincoln.html>.

33. Lincoln, *supra* note 30, at 137.

individuals and society, North and South.<sup>34</sup> His writings evince a profound moral education over the course of his presidency; however, a few Republican leaders in Congress evolved in similar ways during Reconstruction, as they learned by stages how deeply social change would have to go to emancipate the freed people in any meaningful way.<sup>35</sup>

Associate Justice John Marshall Harlan (the Elder) of the U.S. Supreme Court also spoke of atonement in race relations, although the sense of responsibility that he attached to white privilege had a distinctively eighteenth-century cast to it. Harlan, a Lincoln appointee from Kentucky, was the only former slaveholder on the Court at the time he wrote his lone dissents in the *Civil Rights Cases* of 1883 and in *Plessy v. Ferguson* a decade later.<sup>36</sup> The former held that owners of public accommodations, like hotels and theaters, were privileged to do business with people or not as they chose and neither subordinated people by denying them admission according to race<sup>37</sup> nor violated their civil rights in any way that the Fourteenth Amendment authorized Congress to sanction.<sup>38</sup> Dissenting, Justice Harlan insisted that innkeepers and their ilk depended for their businesses on any number of privileges granted by the public, from business incorporation to access to public transportation, and that they therefore had the responsibility to treat all members of the public alike.<sup>39</sup> It no more invaded the legitimate privileges of white businesspeople (the legal term was “social rights”) to require them to treat black customers the same as whites than it would for them to mingle with black people on the street, in a court of law, or at the post office.<sup>40</sup>

In *Plessy v. Ferguson* the Court authorized the State of Louisiana to segregate rail coaches for blacks and whites.<sup>41</sup> Consigning Homer

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34. See Thomas Haskell, *Capitalism and the Origins of the Humanitarian Sensibility, Part I*, 90 AM. HIST. REV. 339, 346 (1985).

35. FONER, *supra* note 32, at 237–39, 244–45.

36. An excellent biography of Harlan is LINDA PRZYBYSZEWSKI, *THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN* (1999).

37. *The Civil Rights Cases*, 109 U.S. 3, 21 (1883).

38. *Id.* at 18–19.

39. *Id.* at 42.

40. *Id.* at 59–60.

41. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

Plessy to a “colored” coach neither discriminated against him nor marked him with a “badge of inferiority” because, as a person of one-eighth African blood,<sup>42</sup> he was “not lawfully entitled to the reputation of being a white man.”<sup>43</sup> If legal segregation subordinated black people in any way, it was “not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”<sup>44</sup> Justice Harlan insisted, to the contrary, that everyone knew that the point of the statute was precisely to subordinate black people: echoing Lincoln, Harlan stated that “[t]he thin disguise of ‘equal’ accommodations for passengers in railroad coaches [would] not mislead any one, nor atone for the wrong this day done.”<sup>45</sup>

Yet to proclaim that “the destinies of the two races, in this country, [were] indissolubly linked together”<sup>46</sup> did not mean that the two were equal in fact: they were not.<sup>47</sup> Harlan’s model of race relations was only partly that of the post office: the Louisiana statute was also vicious because it prevented “a colored maid [from] riding in the same coach with a white woman whom she has been employed to serve, and who may need her personal attention while travelling,” or “[a] white man [from having] his colored servant with him in the same coach, even if his condition of health requires the constant, personal assistance of such servant.”<sup>48</sup> Blacks were deserving of Harlan’s respect, at home and on the street, but they were not his equals. Although Harlan’s view of the Civil War Amendments seems correct to us today, his view of race privilege betrays a kind of paternalism, an eighteenth-century *noblesse oblige*, that was utterly foreign to Lincoln.<sup>49</sup>

By contrast, although she was born in 1863 to former slaves, the journalist Mary Church Terrell displayed a thoroughly modern understanding, not only of race privilege but of law as well. Church held undergraduate and graduate degrees from Oberlin College; she

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42. *Id.* at 551.

43. *Id.* at 549.

44. *Id.* at 551.

45. *Id.* at 562.

46. *Id.* at 560.

47. *Id.* at 559.

48. *Id.* at 553.

49. PRZYBYCZEWSKI, *supra* note 36, at 21–27, 97–99, 204.

was active in women's suffrage, civil rights, and Progressive Republican causes. She helped found the National Association for the Advancement of Colored People in 1909.<sup>50</sup> She took up the issue of lynching in the 1890s when a white mob murdered a friend of hers, a Memphis grocer. Lynching—mob killings by hanging or burning at the stake, occasionally of whites and other races, but overwhelmingly against blacks, primarily though not exclusively in former slave states—became prevalent after Reconstruction, peaked in the 1890s, and died out gradually after the 1930s. Lynching was a privilege that Southern whites of all classes exercised periodically, with the tacit cooperation of local police, to vent their economic frustration and to reassert their social supremacy. In the face of international condemnation of the practice, American authorities took little or no action against it until after World War II: Terrell and Frederick Douglass urged President Harrison to make a public statement after the murder of her grocer friend, for example, but got no response.<sup>51</sup>

In a 1904 article in the *North American Review*, Terrell analyzed lynching sociologically and proved that victims of lynching were usually not even accused, much less convicted, of “the usual crime” (that of raping white women).<sup>52</sup> Instead, she showed that African-Americans more typically drew violence down upon themselves by being successful in business or otherwise rising above the social station allotted to them. The idea that black people were lynched for actual crimes was a lie thrown up for Northern consumption by “southern defenders of the men of prominence.” Terrell argued that the real causes of lynching were, first, “the spirit of vengeance and intolerance” that arose in the South after emancipation and second, the culture of lawlessness that grew out of the ignorance and poverty endemic to the South. Fixing it, she wrote, would require educating the Southern masses, “lifting them to a higher moral plane,” and renewing “popular belief in the principles of liberty and equality

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50. A sketch of Terrell's life may be found in Debra Newman Ham, *Foreword* to MARY CHURCH TERRELL, *A COLORED WOMAN IN A WHITE WORLD* 7 (2005).

51. MARY CHURCH TERRELL, *A COLORED WOMAN IN A WHITE WORLD* 454 (2005).

52. Mary Church Terrell, *Lynching from a Negro Point of View*, 178 N. AM. REV. 853, 855 (1904). See also FRIEDMAN, *supra* note 27, at 384–85; LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* 117–20 (2002).

upon which this government was founded.”<sup>53</sup> Where the U.S. Supreme Court refused to address white supremacy in any but the most formal, antiseptic terms, Terrell subjected lynching, not only as an informal exercise of race privilege but in its relations with the law, to a sophisticated, sociological analysis that was many years ahead of its time. While lynching would remain a privileged activity for another half-century, Terrell showed that eliminating it would require taking responsibility, not only for the victims of lynching but for its perpetrators as well.

*B. The New Deal and Class Privilege: Labor, Civil Rights, and the Catholic Left*

American law was as blind to class privilege in the late nineteenth and early twentieth centuries as it was to white supremacy. Emancipation had made blacks and whites formally equal, as Justice Bradley put it, so that neither would “be the special favorite of the laws.”<sup>54</sup> If black people felt that segregation marked them as inferior, the *Plessy* court reasoned, it was “solely because the colored race chooses to put that construction upon it.”<sup>55</sup> Just so, free contract empowered workers and employers equally in any way the law could find meaningful.<sup>56</sup> Statutes that set minimum wages or limited hours of work, the courts insisted, unconstitutionally invaded the liberty of both. They put the worker “under a legislative tutelage . . . not only degrading to his manhood, but subversive of his rights as a citizen.”<sup>57</sup> Minimum wages forced from the employer “a compulsory exaction . . . for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility [and imposes upon him] a burden which, if it belongs to anybody, belongs to society as a whole.”<sup>58</sup> The privileges of wealth were as immutable as what the *Plessy* court called “racial instincts”:<sup>59</sup> “wherever the right of private

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53. Terrell, *supra* note 52, at 867–68.

54. *Civil Rights Cases*, 109 U.S. at 25.

55. *Plessy*, 163 U.S. at 551.

56. *See, e.g.*, *Adair v. United States*, 208 U.S. 161, 174–75 (1908).

57. *Godcharles v. Wigeman*, 6 A. 354, 356 (Pa. 1886).

58. *Adkins v. Children’s Hospital*, 261 U.S. 525, 557–58 (1923).

59. *Plessy*, 163 U.S. at 551.

property exists,” wrote Justice Pitney in 1915, “there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances.”<sup>60</sup> So corrupting was the post-Civil War structure of wealth inequality and class privilege that it brought the Republic to collapse in the economic catastrophe of 1929–31, as race privilege had done in the Secession Crisis of 1860–61.

As the Republican leadership had done in the Civil War, the New Deal’s historic achievement was to preserve the ideals of the Revolution in a radically changed environment. As Franklin Roosevelt put it in his first inaugural address, the Depression had made Americans “realize as we have never realized before our interdependence on each other”:<sup>61</sup> the “rulers of exchange,” who knew “only the rules of a generation of self-seekers,” had “fled from their high seats in the temple of our civilization.”<sup>62</sup> “We may now restore that temple to the ancient truths,” he continued, the chief of which was that citizenship entailed responsibility as well as privilege: “the measure of that restoration lies in the extent to which we apply social values more noble than mere monetary profit.”<sup>63</sup> As during Reconstruction, the New Deal’s chief strategy was to broaden the franchise, this time to include industrial workers: by guaranteeing the right to organize and bargain collectively,<sup>64</sup> providing a government forum for the resolution of labor disputes,<sup>65</sup> and legislating standards for wages, hours, and working conditions.<sup>66</sup> In so doing, the New Deal stabilized the economy, made business answerable to public welfare as never before, and set the foundation for political stability in the second half of the century by relieving labor from the outlawry to which “liberty of contract” had condemned it.

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60. *Coppage v. Kansas*, 236 U.S. 1, 17 (1915).

61. Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933), in 2 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 1, 14 (Samuel I. Rosenman ed., 1938).

62. *Id.*

63. *Id.*

64. National Industrial Recovery Act, Pub. L. 73-67, § 7(a), 48 Stat. 195, 198–99 (1933).

65. National Labor Relations Act, Pub. L. 74-198, 48 Stat. 449 (1935).

66. National Industrial Recovery Act, Pub. L. 73-67, § 7(b), 48 Stat. 195, 199 (1933); Fair Labor Standards Act, Pub. L. 75-718, 52 Stat. 1060 (1938).



In one sense, the New Deal did little more than to adapt the Founders' agnostic approach to civic responsibility to twentieth-century conditions. Labor got rights to organize, but Congress rested its guarantee of collective bargaining on its authority to suppress industrial conflict rather than to promote industrial democracy; the result was that labor relations thereafter mostly concerned wages and benefits and left employers' authority over the workplace undiminished.<sup>67</sup> Nor did the New Deal do much to improve the situation of African-Americans, dependent as it was for political support on the Southern wing of the Democratic Party. The New Deal went a long way, as Roosevelt put it in 1937, toward putting "practical controls over blind economic forces and blindly selfish men".<sup>68</sup> It gave labor a voice in economic regulation if not industrial governance, it established a social welfare system that alleviated human suffering, and it began, in Roosevelt's words, "to bring private autocratic powers into their proper subordination to the public's government."<sup>69</sup> But, like the Civil War Amendments, it left the basic constitution of private power undisturbed.<sup>70</sup>

Still, the change that the New Deal wrought in the legal culture ultimately made it possible for Wildman and those who followed her to talk about privilege in the way that we do. The Supreme Court created modern equal protection law when it announced, in a footnote of *United States v. Carolene Products Co.*, an economic regulation case, that "prejudice against discrete and insular minorities" was so corrosive to the integrity of the legislative process that statutes motivated by such prejudice might in the future be subject to constitutional scrutiny as such.<sup>71</sup> Roosevelt himself articulated a positive vision of human rights in his "Second Bill of Rights" speech,

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67. See generally CHRISTOPHER TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985).

68. Franklin D. Roosevelt, Second Inaugural Address (Jan. 20, 1937), in 1937 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 1, 1 (Samuel I. Rosenman ed., 1941).

69. *Id.*

70. See Barton J. Bernstein, *The New Deal: The Conservative Achievements of Liberal Reform*, in *TOWARDS A NEW PAST: DISSENTING ESSAYS IN AMERICAN HISTORY* 263, 264 (Barton J. Bernstein ed., 1968); see also Cass R. Sunstein, *Lochner's Legacy*, 1987 *COLUM. L. REV.* 873 (1987).

71. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

based on the “realization of the fact that true individual freedom cannot exist without economic security and independence.”<sup>72</sup> Although neither the Second Bill of Rights nor the *Carolene Products* footnote drew much attention at the time, they nonetheless outlined the constitutional history of the next half-century.<sup>73</sup> The Democratic Party included planks in favor of civil rights and against lynching for the first time at its 1948 convention.<sup>74</sup> President Johnson, who began his career as a New Dealer, engineered passage of the Civil Rights Act of 1964: the statute contained a public accommodations provision like the one overturned in the 1883 *Civil Rights Cases*, as well as sanctions for workplace discrimination on the basis of race or sex.<sup>75</sup> Women won rights to reproductive autonomy, an advance the Supreme Court tied directly to the constitutional changes that began with the New Deal.<sup>76</sup> One of the salient points of Wildman’s work is that statutes like the Civil Rights Act do little by themselves to undermine the system of privilege that generates discrimination;<sup>77</sup> Reva Siegel and Angela Harris have shown how resilient gender- and race-privilege, respectively, have proven in the face of legal reform.<sup>78</sup> The exfoliation of anti-discrimination law under the New Deal regime has, however, made it possible to talk coherently about privilege at all.

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72. Franklin D. Roosevelt, Message to Congress on the State of the Union (Jan. 11, 1944), in 1944–45 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 32, 41 (Samuel I. Rosenman ed., 1950).

73. On contemporary reception of the Second Bill of Rights, see DAVID KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945, at 784 (2001); JAMES MACGREGOR BURNS, ROOSEVELT: THE SOLDIER OF FREEDOM, 1940–1945, at 424–26 (1970). See generally CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004).

74. ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 439–44 (2002); DAVID McCULLOUGH, TRUMAN 638–40 (1992); CARL SOLBERG, HUBERT HUMPHREY: A BIOGRAPHY 13–19 (2003).

75. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964). See ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: THE PASSAGE OF POWER 558–64 (2012); see also JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974, at 543–47 (1996).

76. *Planned Parenthood v. Casey*, 505 U.S. 833, 862–65 (1992).

77. WILDMAN, PRIVILEGE REVEALED, *supra* note 1, at 140–41.

78. See Reva Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923 (2000).

There emerged during the New Deal, as well, a peculiarly American version of left-wing Catholicism that articulated a modern politics of responsibility and foreshadowed the radical vision that Latin American Catholics developed later in the century. The main progenitor was Dorothy Day, who founded the Catholic Worker movement with the French social activist Peter Maurin. Born in 1897, Day grew up in Chicago and worked on socialist newspapers there and in New York, where she and Maurin founded the *Catholic Worker* newspaper in 1933. Day was a pacifist who advocated direct engagement with the poor and empowering workers and the unemployed to act on their own behalf; she opposed the New Deal at first (because it was run by government) but supported the Southern Tenant Farmers' Union and other organizations directly and intervened on behalf of organized workers wherever she could.<sup>79</sup> She counseled resistance to the draft during World War II and the Korean and Vietnam wars.<sup>80</sup> She supported the Church hierarchy and its teachings, however, and generally remained in the hierarchy's good graces for her entire life.<sup>81</sup> Key to the Catholic Worker ministry was that it renounced privilege: in their "houses of hospitality," following Saint Francis of Assisi, Catholic Workers lived poor, among the poor, "sharing rooms and food and clothes with them," without preaching to them.<sup>82</sup>

Day's influence spread around the world and continues to this day.<sup>83</sup> She inspired Michael Harrington, whose writing on poverty in postwar America informed the Johnson Administration's War on Poverty: Head Start, Legal Services, and other "community action" aspects of Johnson's Great Society program showed clearly the

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79. JIM FOREST, *ALL IS GRACE: A BIOGRAPHY OF DOROTHY DAY* 134–43 (2011).

80. DOROTHY DAY, *THE LONG LONELINESS: THE AUTOBIOGRAPHY OF THE LEGENDARY CATHOLIC SOCIAL ACTIVIST* 263–73 (1952); Tom Cornell, *The Roots of Dorothy Day's Pacifism: Solidarity, Compassion, and a Stubborn Hold on Truth*, *HOUS. CATH. WORKER*, Oct. 1, 1997, available at <http://cjd.org/1997/10/01/the-roots-of-dorothy-days-pacifismsolidarity-compassion-and-a-stubborn-hold-on-truth/>.

81. See Dwight Macdonald, *The Foolish Things of the World*, *NEW YORKER*, Oct. 11, 1952, at 37; see also Paul Elie, *The Patron Saint of Paradox*, *N.Y. TIMES*, Nov. 8, 1998, § 6, at 44.

82. Michael Harrington, *Existential Saint*, *N.Y. TIMES*, June 13, 1982, § 7, at 3.

83. Alden Whitman, *Dorothy Day, Outspoken Catholic Activist, Dies at 83*, *N.Y. TIMES*, Nov. 30, 1980, § 1, at 45.

influence of Catholic Worker ministry.<sup>84</sup> The Catholic Worker movement also influenced the Peruvian priest Gustavo Gutierrez, whose 1971 book, *A Theology of Liberation*, proclaimed the poor “privileged members of the reign of God,” who had “the right . . . to think out their own faith.”<sup>85</sup> Like Day, Gutierrez preached “a theology which does not stop with reflecting on the world, but rather tries to be part of the process through which the world is transformed.”<sup>86</sup> For the Brazilian Leonardo Boff, Liberation Theology requires that “we must first understand and then take an active part in the real and historical process of liberating the oppressed.”<sup>87</sup> Like the autonomous Catholic Worker communities and farms that grew out of the hostels of the 1930s, thousands of Christian Base Communities throughout Latin America gather believers for prayer and Bible study combined with political action.

Here and there, then, in nineteenth-century antislavery, in the New Deal, and in the Catholic Left, there have emerged outlines of a politics that confronts privilege rather than immunizing it from scrutiny, that urges us to take responsibility for those over whom society privileges us, in whatever way. In 1862, President Lincoln warned the members of Congress, “fellow-citizens, *we* can not escape history.” “*We here* hold the power and bear the responsibility. In *giving* freedom to the *slave* we *assure* freedom to the *free*—honorable alike in what we give and what we preserve.”<sup>88</sup> Mary Church Terrell insisted that race privilege corrupted not only the South but the entire nation: “[u]ntil there is a renaissance of popular belief in the principles of liberty and equality upon which this government was founded, lynching . . . and similar atrocities will

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84. See generally MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* (1962); Economic Opportunity Act, 78 Stat. 508 (1964); PATTERSON, *supra* note 75, at 533–42; CARO, *supra* note 75, at 538 (Harrington book catalyzed Johnson Administration antipoverty effort). On the Great Society, see FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY*, *supra* note 52, at 194–95.

85. GUSTAVO GUTIERREZ, *A THEOLOGY OF LIBERATION: HISTORY, POLITICS AND SALVATION*, at xviii, xxi, xxxiii (Sister Caridad Inda & John Eagleson eds. & trans., Orbis Books 1988).

86. *Id.* at 12.

87. LEONARDO BOFF & CLODOVIS BOFF, *INTRODUCING LIBERATION THEOLOGY* 9 (Paul Burns trans., 1988).

88. Lincoln, *supra* note 30, at 142 (italics in original).

continue to dishearten and degrade the negro, and stain the fair name of the United States.”<sup>89</sup> During the Great Depression, President Roosevelt described a “change in the moral climate of America,” in which “[w]e are determined to make every American citizen the subject of this country’s interest and concern; and we will never regard any faithful, law-abiding group within our borders as superfluous.”<sup>90</sup> For all three, responsibility for others was the common antidote for the socially, politically, and morally corrosive effects of privilege divorced from virtue.

### III. EXERCISING PRIVILEGE RESPONSIBLY

If we can find a handful of examples in our history of people who have understood clearly how privilege works, who have contradicted it successfully, or who have put their own privilege to good work in society, what can we abstract from them to sketch the outlines of a responsible politics? Wildman and her colleagues have written mostly about making privilege visible in different areas, as well as creating a vocabulary for analyzing it in a useful way. Beyond one’s personal life and relationships (particularly with students and colleagues, as most of the writers are law professors), this literature offers few guides to contradicting privilege in our behavior as citizens.<sup>91</sup> The examples discussed here may offer suggestions for individual and collective action, if not toward the end of obliterating privilege then at least to exercising it in responsible ways: a guide to exercising what in the eighteenth century people called *virtue* but in a modern context. These hints work at the level of the individual, at the societal level, and over time.

At the level of the individual, all of the movements discussed here worked because they gave their participants a basis for acting against the interests with which society privileged them: they offered a compelling logic for exercising empathy, solidarity, virtue emancipated from privilege. Michele Landis Dauber showed how New Deal strategists overcame political resistance to poor relief by

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89. Terrell, *supra* note 52, at 868.

90. Roosevelt, *supra* note 68, at 5.

91. See WILDMAN, PRIVILEGE REVEALED, *supra* note 1, at 179–80.

portraying its beneficiaries as victims of something like natural disaster and thus more worthy of government assistance than people whose hardship was merely economic in nature.<sup>92</sup> Roberto Unger, himself much influenced by the Latin American Catholic Left, wrote that a reconstructed politics “would affirm the principle that everyone should share, in some way and at some time, responsibility for taking care of other people outside his own family.”<sup>93</sup> The lawyers, schoolteachers, and other white Northerners who at tremendous personal risk joined the effort to rebuild Southern society after the Civil War offer some of the best examples of this. The slaves freed themselves, of course, with the help of the Federal Army,<sup>94</sup> but Reconstruction (as far as it went) also required the assistance of privileged Northerners who were willing to sacrifice themselves to the cause. Lyndon Johnson—as venal and as calculating a politician as the Jim Crow South ever produced—forced the Civil Rights Act of 1964 through Congress because he was the one with the resources to do so and because his upbringing and his training in the New Deal made it clear to him that it was the right thing to do.<sup>95</sup> When an advisor cautioned him not “spend his time and power on lost causes, no matter how worthy those causes might be,” Johnson’s answer was “Well, what the hell’s the presidency for?”<sup>96</sup> Race privilege would have allowed Johnson to let the problem go at no cost to himself. Instead, like the Reconstruction Carpetbaggers, Johnson put his privilege to constructive use in the service of others because it was his responsibility to do so, then and there.

At the social level, many of the examples of responsible politics outlined here entailed a strategy of working simultaneously within and against established institutions, in effect leveraging privilege against itself. Dorothy Day was adept at this strategy of “building a new society within the shell of the old”: she avoided conflict with the

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92. Michele Landis Dauber, *Fate, Responsibility, and ‘Natural’ Disaster Relief: Narrating the American Welfare State*, 33 L. & SOC. REV. 257 (1999). See also Thomas W. Lacqueur, *Bodies, Details, and the Humanitarian Narrative*, in THE NEW CULTURAL HISTORY 176 (Aleta Biersack & Lynn Avery Hunt eds., 1989).

93. ROBERTO MANGABEIRA UNGER, THE LEFT ALTERNATIVE, at ix–x (2005).

94. See ADAM GOODHEART, 1861: THE CIVIL WAR AWAKENING 293–348 (2012).

95. CARO, *supra* note 74, at xv, 487.

96. *Id.* at xv.

established Church and publicly supported its teachings on such issues as forgiveness, if not the Church's more general campaign to enforce a particular way of life. She said that she would shut down the *Catholic Worker* if the bishops ordered her to do so, although they never did.<sup>97</sup> The lawyers who staffed the Great Society's Legal Services Corporation, likewise, worked within the government bureaucracy but spent their time making it possible for people without access to justice to sue, among other defendants, the government. Ronald Reagan fought Legal Services implacably, both as Governor of California and as President, because he could not tolerate the idea of the government generating lawsuits against itself.<sup>98</sup> Luke Cole, who started as a Legal Services lawyer but later co-founded the Center on Race, Poverty, and the Environment in northern California, used environmental issues primarily to organize poor neighborhoods and to train them in the political skills they needed to defend themselves.<sup>99</sup> The prospect of sainthood for Dorothy Day, according to one writer, "is no simple tug-of-war between the Catholic left and Roman right. It involves a range of conceptions of what it means to be Catholic, and the one that prevails very likely will be the prevailing form of Catholicism in the next century."<sup>100</sup> Day doubtless understood this while she was alive and maintained her ambiguous relationship with the Church hierarchy, protecting her privilege while using it against the authorities, in the service of the larger struggle.

Over time, finally, these recessive traditions in American legal culture suggest a strategy of effecting change recursively, in small steps, by which people learn as they go while building their capacity to act responsibly, all the while transforming themselves, their politics, and their communities. In a 1974 article about environmental

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97. Elie, *supra* note 81.

98. Wallace Turner, *Proposal by Reagan Opens Old Wound*, N.Y. TIMES, Mar. 15, 1981, § 1, at 25; Stuart Taylor, *Legal Aid for the Poor Did Work, and That's the Rub*, N.Y. TIMES, Mar. 15, 1981, § 4, at 3.

99. Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 649–52 (1992); see also LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* (2000).

100. Elie, *supra* note 81.

law, the constitutional-law scholar Lawrence Tribe described a politics—he called it a “way of acting”—that environmentalism suggested to him: people’s ideas about the world, their practices, even their ideas about how progress works, interact with each other and change over time with experience. Tribe described this evolution as a spiral “along which the society moves by successive stages, according to laws of motion which themselves undergo gradual transformation as society’s position on the spiral, and hence its character, changes.”<sup>101</sup> Reconstruction after the Civil War worked this way: Congressional Republicans started out thinking that simply prohibiting legal slavery would make the former slaves “free” in all meaningful senses of the word. They learned over time, however, as race privilege reasserted itself in the South, that emancipation would also require federal guarantees of civil, then political, and finally “social” rights.<sup>102</sup> This is also, probably, what Unger had in mind when he wrote that even the laws of nature are subject to history, co-evolving along with the phenomena that they explain.<sup>103</sup> Since the end of World War II, Americans have seen one form of privilege after another lose its natural, immutable character and appear suddenly as the political construct that it is. That Wildman was able to develop a general theory of privilege at the end of the century was the result of earlier Americans’ struggles to overcome particular manifestations of the phenomenon over time.

#### CONCLUSION

The problem of privilege—the network of power that regulates people’s behavior toward one another, their senses of themselves, their perception of the world—is particularly acute in the United States. Not only does American legal culture formally disavow

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101. Lawrence Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1338–39 (1974).

102. See FONER, *supra* note 32, at 239–51, 256–59, 446–49. The Supreme Court told this story as well, in *The Civil Rights Cases*, 109 U.S. at 22.

103. ROBERTO MANGABEIRA UNGER, *THE RELIGION OF THE FUTURE* 53 (forthcoming), available at [www.law.harvard.edu/faculty/unger/english/pdfs/theologycontinuous.pdf](http://www.law.harvard.edu/faculty/unger/english/pdfs/theologycontinuous.pdf); Adam Frank, *Is the Search for Immutable Laws of Nature a Wild-Goose Chase?*, DISCOVER MAG., Apr. 2010, available at <http://discovermagazine.com/2010/apr/10-is-search-for-immutable-laws-of-nature-wild-goose-chase#.UPcIZ4jnCY>.



privilege as a relic of eighteenth-century aristocracy, which makes it difficult to talk about how it works in our lives today. Our law also masks the persistent, pervasive influence of privilege in social life by shifting responsibility for the social consequences of our activities onto politics and markets, on which we rely in the place of eighteenth-century virtue to temper our striving for wealth, power, and prestige.<sup>104</sup> Politics and markets, our main arenas for interacting with each other, offer the magic of checks and balances and invisible hands to excuse us from exercising our privilege responsibly. This was the ingenious solution the Founders developed once it became clear that popular governments could not, after all, be trusted to follow their traditional leaders (whose virtue was hereditary) or to temper factional striving for the benefit of the community.

The culture has, however, from time to time thrown up occasional examples of individuals and groups who did manage to exercise virtue in public life and, in doing so, kept the country's original ideals alive while adapting them to changed circumstances. Notable examples include the anti-slavery and civil rights movements and the twentieth-century campaign to advance the rights of industrial workers. These movements, and others like them, may offer hints as to how politics might acknowledge privilege while making it responsible, to individuals, to the society at large, and to history. In the end, being an American is similar in some ways to being a Catholic: one is heir to a noble tradition that is nonetheless captive to institutions that are prone to corruption and in which privilege lives mostly to serve itself. Americans and Catholics also have in common great legacies of personal and civic responsibility with which to reclaim their virtue as individuals and communities.

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104. See JAMES WILLARD HURST, *LAW AND MARKETS IN UNITED STATES HISTORY: DIFFERENT MODES OF BARGAINING AMONG INTERESTS* (1982).