

# Chapter 1

## Introduction

### **Cultural Studies, the Founding Fathers, and Judicial Review**

*Who's Your Daddy*<sup>1</sup> applies innovative interpretive strategies drawn from cultural studies to a perennial question of law and politics: what role do the founding fathers play in legitimizing contemporary judicial review? The concept of governmental legitimacy is grounded in a fear of illegitimacy. In earlier times, this fear was expressed as a concern that the king's heir was truly his legitimate issue, not a bastard (Rubin 2005). In contemporary times, any constitutional issue that is not wedded to the founding fathers risks being labeled illegitimate. Accordingly, leading theories of judicial review typically reference the founding fathers in one form or another, whether that entails embracing them as a basis of authority as in judicial restraint, enlarging the scope of their power as in judicial activism, or resigning to their persistent power as in critical race theory. Rather than offering yet another theory that attempts to legitimize either judicial activism or judicial restraint, *Who's Your Daddy* uses narrative analysis, popular culture, parody, and queer theory to better understand and to reconstitute the traditional relationship between fatherhood and judicial review.

Beginning with the title's use of a phrase that is drawn from popular culture and interrogates legitimacy, *Who's Your Daddy* explores the way that cultural studies can help us to understand "the conjunction of fatherhood and law, [as it] is portrayed in popular culture," and the way in which fatherhood serves as "one of the key terms through which law is mythologized and through which fantasies and anxieties about law are expressed" (Sarat 2000, 8, 3). Unlike traditional, top-down public law analyses that focus on elite decision-making by courts, legislatures, or executives, *Who's Your Daddy* explores the representation of law and legitimacy in various sites of popular culture. To this end, soap operas, romance novels, science fiction, reality television, and coming out narratives provide alternative ways to understand the relationship between paternal power and law from the bottom-up. Keith Bybee has nicely summarized my approach to law and popular culture, saying that it "begins with a specific understanding of American culture and uses that understanding to evaluate the dynamics of judicial decision-making. Instead of considering how law operates on the street, Burgess uses a particular account of the street to explain how law operates in court" (2006, 416).

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1 *Who's Your Daddy* is the shortened version of title; *The Founding Fathers, Pop Culture, and Constitutional Law: Who's Your Daddy?* which will be used throughout this book as a reference to the title.

Infusing traditional studies of judicial review with interpretive strategies drawn from cultural studies, *Who's Your Daddy* seeks to provide a perspective about law and social change that differs significantly in form and content from the usual fare in contemporary constitutional discourse. Narrative analysis, popular culture, parody, and queer theory provide the tools to challenge the dominance of elite constitutional interpretation, to appropriate and reformulate the terms of the mainstream debate, and to identify a populist basis upon which to fundamentally alter contemporary constitutional discourse. In this manner, constitutional discourse can begin to be transformed from a dreary parsing of scholarly and juristic argot into a vibrant discussion with points of access and understanding for all.

More specifically, *Who's Your Daddy* seeks to reconfigure contemporary constitutional discourse in three ways. First, the book seeks to democratize the debate about judicial review. While jurists and constitutional theorists of various political stripes have long called for a more democratic constitutional discourse, most have concentrated on legislative and executive interpretation as an alternative to judicial decision-making, thus retaining an elite focus (for example, Whittington 1999a). In contrast, *Who's Your Daddy* explores various forms of popular culture as more accessible bases for democratizing contemporary constitutional discourse, following the lead of scholars who have identified popular knowledge and interests as a basis for enlarging the scope of constitutional debates (for example, Brigham 1987; 1990; 1996).

Second, just as scholars such as Jody Baumgartner and Jonathan Morris (2006) have found that viewers of humorous parodies such as *The Daily Show* are not likely to view mainstream politics in the same way as they did when their only source of news was a standard evening news broadcast, each chapter of *Who's Your Daddy* offers a humorous, popularly-based send-up of the relationship of judicial review and fatherhood, which makes it unlikely that the reader will think about constitutional politics and scholarship in the same way ever again. Parodying politics has become very popular in contemporary culture outside of the academy, as evidenced by the enormous success of television shows such as *The Daily Show* and *The Colbert Report* and book-length compilations of satirical political stories from *The Onion*. Written in entertaining and accessible language, *Who's Your Daddy* aspires to offer humor as the basis for a more interesting and hip way of understanding and reconstituting politics. As Baumgartner and Morris suggest, this may lead to increased interest in public debates that otherwise seem specialized and tedious, particularly amongst college students and other younger adults (2006).

Third, *Who's Your Daddy* promises to open up a constitutional debate that leading political scientists and legal scholars have characterized as being lodged at an impasse for the last 25 years (for example, Gillman 2001; Brest 1981). I argue that this is in large part owing to the failure of contemporary constitutional discourse to provide adequate attention to dissenting voices that challenge, rather than seek, legitimacy. Exploring the link between fathers and law provides a basis for better understanding the impasses that exist and opens up the space to consider already existing alternative sources drawn from popular culture. In its current state, contemporary constitutional discourse is similar to music that lacks dissonance—lovely, perhaps, but lacking the tension that is necessary for release and movement.

By integrating populist challenges to legitimacy into the constitutional debate, *Who's Your Daddy* seeks to transform the familiar discussion about the legitimacy of judicial review into a parody that reconstitutes the relationship between fatherhood and law. Because parody typically serves to complicate and confound a familiar narrative, the longstanding nature of the debate about judicial review provides a remarkably rich basis for such an interpretive move.

## Structure of the Book

*Who's Your Daddy* speaks to various scholarly communities interested in judicial legitimacy, law and narrative analysis, law and popular culture, parody as a transformative strategy, and queer theory. Structured to address these concerns, Chapters 2, 3, and 4 each introduce a major theory of judicial legitimacy in contemporary constitutional discourse, subject it to narrative analysis, and compare it with a parallel narrative in popular culture, eventuating in a parody of the original constitutional narrative. These parodies open up space for the alternative narratives of judicial identity and power offered in Chapters 5 and 6.

Chapter 2 explores Keith Whittington's embrace of the founders. It analyzes his theory of judicial restraint as a romantic narrative and compares it to a romance novel to produce a parody of originalist judicial review. Chapter 3 examines Ronald Dworkin's enlargement of the founders' authority. Cast as a comedic narrative and compared to a comic soap opera, the chapter creates a parody of nonoriginalist judicial review. Chapter 4 investigates Derrick Bell's rejection of the founders' authority, interprets his critical race theory as a tragic narrative, and compares his use of science fiction to the parody of mainstream journalism that one finds in the tabloids.

As the book progresses, the constitutional theories explored are more openly narrative in form, and the parodies produced become more ironic. For example, Whittington offers something of a nod to narrative analysis by conceiving popular sovereignty as a metaphor for the constitutional order and by seeking to provide an alternative constitutional narrative that moves the contemporary debate beyond its current impasse. The mild parody of judicial restraint that is produced by way of comparing Whittington's theory to a romance novel is much more reserved than that of Chapter 3. In response to Dworkin's call for a full exploration of law, literature, and popular culture in the form of soap operas, Chapter 3 parodies the role of the founding fathers in relation to judicial activism through the soap opera trope of resurrecting a long-since deceased patriarch. In Chapter 4 Bell's fantastical tabloid-like tales of time travel and alien abduction, rooted in popular culture and self-consciously pitched in a narrative form, are more outrageous even still.

These parodies steadily destabilize the original constitutional narratives to which they refer, and the paternal authority on which they are based, creating the space for two parodies of contemporary constitutional practice, both of which are grounded in queer irony. Chapter 5 presents a parody that rejects the founders' authority, reimagining *Bush v. Gore* as a coming out narrative. Chapter 6 reappropriates the founders' authority to a queer end, rendering *Lawrence v. Texas* as a makeover of *Bowers v. Hardwick*, à la the reality television show *Queer Eye for the Straight Guy*.

Below, I discuss in greater detail the scholarly literatures that provide the basis for this work and identify several scholarly communities that would constitute the likely audience for *Who's Your Daddy*.

## Scholarly Audiences

### *Judicial Review and Legitimacy*

Judicial legitimacy has long been a central focus of constitutional discourse in the United States, both inside and outside of the academy.<sup>2</sup> Scholars engaged in these debates often assume that judicial review is at base undemocratic, and thus a potentially illegitimate use of judicial power. As the oft-cited John Hart Ely puts it: “The central function is at the same time the central problem of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people’s elected representatives that they cannot govern as they’d like” (1980, 4).

The problem of judicial legitimacy is evident not only in academic constitutional theory but also in iconic constitutional cases such as *Brown v. Board of Education* and *Roe v. Wade*, as well as in more recent cases that are highly contested such as *Bush v. Gore* and *Lawrence v. Texas*. While scholars and jurists have long sought to resolve this dilemma, offering various arguments to legitimize either active or restrained uses of judicial review,<sup>3</sup> none of these arguments have been widely accepted as the standard upon which to ground judicial review. Thus, the problem of judicial legitimacy and the call for increased democratic input continue to persist in contemporary constitutional discourse.

Debates about judicial legitimacy typically refer back to the founding fathers in one form or another. In the contemporary debate about judicial review, advocates of originalism and judicial restraint such as Whittington (1999a and b) embrace the founders’ authority; supporters of non-interpretivism and judicial activism such as Dworkin (1977; 1985; 1986; 1996; 2006) seek to enlarge the founders’ constitutional conceptions; and critical race theorists such as Bell (1987; 1992; 1996) reject the founders’ basic choices while remaining resigned to their influence on the shape of the debate.

The impasse over judicial legitimacy has led some influential constitutional theorists to claim that the debate is irresolvable on its own terms. More than a generation ago Paul Brest predicted that this impasse would not be resolved “until despair or hope impels us to explore alternatives to the world we currently inhabit”

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2 Judicial legitimacy has been a focus of debate at least since Federalist 78 and Brutus 15. It can be found in more contemporary discussions in Bork (1990; 1996), Dworkin (1977; 1985; 1986; 2000; 2006), Ely (1973; 1980), Kozlowski (2003), Rosenberg (1991), Sunstein (1984; 1994; 1999; 2005), Wechsler (1959), Whittington (1999a; 1999b) and a host of other conservative and liberal scholars. For a detailed discussion of these debates see Burgess (1992), Gillman (2001), Keck (2004) and Perretti (1999).

3 These include nonoriginalism and originalism, noninterpretivism and interpretivism, maximalism and minimalism, and a host of others.

(1981, 1109). In his well known article “Nomos and Narrative,” Robert Cover called for scholars to devise new stories based on new practices in order to bring new worlds into being (1983). Following these leads, recent scholarship suggests that careful attention to narrative analysis and popular culture in conjunction with the use of humor and parody may serve to move contemporary constitutional discourse beyond its current impasse, opening up space for new forms of democratic dissent and transformation.

### *Narrative Analysis*

As Cover has said: “No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning” (1983, 4). Critical race theorists such as Bell (1987; 1992; 1996) and Patricia Williams (1992; 1995) also argue that law is conveyed through narrative, and that form is intimately related to content. They offer narratives that are based in the lived experiences of people of color, in an effort to foreground the persistence of racism in American law. In doing so, they highlight the way that altering mainstream narrative forms may disrupt and thus transform the content of contemporary legal discourse.

In a similar vein, sociolegal scholars such as Patricia Ewick and Susan Silbey maintain that it is possible to articulate subversive stories even though “the structure, the content, and the performance of stories as they are defined and regulated within social settings often articulate and reproduce existing ideologies and hegemonic relations of power and inequality.” They argue that such stories can break silence and “bear witness to what is unimagined and unexpressed” (1995, 212). Relatedly, Jessica Silbey claims that understanding the form in which each narrative presents itself is crucial to understanding its substance, or meaning. She argues: “The study of representation—be it discursive legal practices, modern art, or documentary filmmaking—is the study of form...The story being told has little substance independent from its form, and to understand the story—and to judge it—means first to understand its formal qualities” (2002, 162).

Accordingly, *Who’s Your Daddy* identifies three major narrative forms prevalent in contemporary constitutional discourse, as a means of analyzing the role that the founding fathers play in legitimizing various practices of judicial review and their outcomes. Whittington’s originalist desire to unite the founding fathers with contemporary constitutional debate is cast as a nostalgic romantic narrative; Dworkin’s aim to overcome the illiberal politics of the past by enlarging the founders’ vision is set as a comedy aiming at a happy ending; and Bell’s critical yet resigned rejection of the founding fathers’ racism is discussed as a tragic narrative in which no significant change can occur because the die has been cast against African-Americans from the very start of the story. Each narrative has its own set of requirements that drive the plot forward, as well as significant limitations that obstruct transformation of the constitutional debate.

*Popular Culture*

Popular culture is a potentially rich source of populist understandings that may address narrative limitations. Leading cultural studies scholars such as John Fiske have argued that popular culture offers various representations that can be read both to maintain as well as to challenge dominant power, often in a humorous manner.

Popular culture is the culture of the subordinated and disempowered and thus always bears within it signs of power relations, traces of the forces of domination and subordination that are central to our social system and therefore to our social experiences. Equally, it shows signs of resisting or evading these forces: popular culture contradicts itself. (1989b, 4–5)

Thus, Fiske looks to popular culture not simply as a reflection of elite power but also as a potential source of dissent and popular interests.

Scholarly work at the intersection of popular culture and the law is burgeoning, as evidenced by the publication of such work in the new peer-reviewed journal *Law, Culture, and the Humanities*. In addition, Richard Sherwin's path-breaking work *When Law Goes Pop* has argued that "any attempt to understand adequately the way law works in contemporary society requires that popular culture be taken into account" (2000, 17). While Sherwin's work focuses largely on the way that popular culture may negatively impact law's meaning, stability, and legitimacy, he remains open to a more affirmative form of postmodernity that would offer a compelling dramatic narrative and challenge the dominant legal order.<sup>4</sup>

Following these leads, *Who's Your Daddy* explores the potentially salutary effects of integrating law and popular culture, arguing that although contemporary constitutional discourse appears to be focused solely on legitimizing judicial review, even it, with the assistance of popular culture, can be seen as containing the seeds of populist dissent, which may well be constructive or transformative with respect to constitutional meaning.

Accordingly, *Who's Your Daddy* pairs each narrative form of elite constitutional discourse with a parallel genre of popular culture, providing a populist understanding of law, legitimacy, and transformation, each of which challenges its elite partner. Thus, Whittington's romantic originalist theory of judicial restraint is paired with a romance novel; Dworkin's comedic judicial activism is paired with a comedic soap opera; and Bell's tragic critical race theory is paired with tragic science fiction stories of time travel and alien abduction. Integrating democratic interpretations of law and legitimacy with elite interpretations in this manner sets the stage for parodies that promise to disrupt the stability of the legitimacy debate and create space for the production of new constitutional narratives grounded in popular forms.

*Parody*

Popular culture regularly integrates humor into its narratives. At the forefront of this work in critical cultural studies, Mikhail Bakhtin suggests that libratory forms of humor promise to disrupt *status quo* narratives that appear univocal, thus providing

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4 For a wide variety of views on this issue see Sherwin (2006).

grounds for populist political transformation. For Bakhtin, the laughter occasioned by parody may create a space for “a shift of authorities and truths, a shift of world orders” (1984a, 127). Even if such openings sometimes emerge only temporarily, they nevertheless represent opportunities for dissent and potential transformation.<sup>5</sup>

Bakhtin suggests that parody, a strategy based in humor, can help reveal the paradoxes and problems that underlie the official workings of power. Parody is typically practiced by outsiders subject to the dominant order, as they have more of a vested interest in ridiculing and displacing it than those who continue to benefit from it. Always referential, parody provides a humorous commentary upon another narrative, serving to confound it. It employs double meanings, pretending, with a subtle wink and a nudge, to embrace purposefully implausible and laughable conclusions. The original narrative is typically paralleled in a ludicrous, distorting fashion, to the end of ridiculing, and, potentially, reforming it (Preminger 1965, 600). Operating as a form of dissent, parody typically sends up a serious person, work, or situation by mimicking it in an exaggerated, humorous, and often eccentric or theatrical manner, frequently borrowing costumes, phrases, mannerisms, or voicing from an original in order to alter its content to make it look ridiculous (Cuddon 1998, 64).

Parody asks the audience to laugh at the fact that reality is not merely suspended but constructed, perhaps most especially when it is being represented as natural or given. Yet, reality’s constructedness does not mean that it is malleable at will. Parodists are keenly aware of the powerful forces that keep the original dominant, despite whatever criticism, humorous or otherwise, may be leveled against it. In this sense, parody entails a fairly sophisticated understanding of power, as it bespeaks both a strong desire for change as well as an understanding that the ability to effectuate such change at will is typically quite limited, no matter how passionate or charismatic the parodist may be. This does not leave the parodist simply resigned to dominance. Instead, the parodist is committed to working within rather than resolving such contradictions.

Accordingly, parody seeks to transform the audience’s consciousness, so that it can no longer view the object of parody in the same way ever again. Thus, the success of parody depends, at least in part, on the audience(s) to whom it is pitched. Because this is so, parody is usually pitched in an accessible and entertaining manner—at least to the audience(s) whose understanding and transformation is (consciously) sought by the parodist. A work may lend itself to parody in a manner seemingly unintended by the original author. Of course, humor and parody may not be received favorably by the original author. In addition, parody itself may reach unintended audiences, who may interpret the parody in a manner not consciously intended by the parodist.

Ohio State Senator Bob Hagan’s (D-Youngstown) announcement of his intent to introduce a bill that would prevent Republicans from adopting children offers a good example of the use of parody in contemporary politics. In February 2006, Hagan sent a memo out to his Senate colleagues asking for cosponsorship in order

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5 In the literature of democratic theory, Iris Young has also argued that humor is central to establishing dissent and the integration of previously excluded voices into dominant narratives (1996, 124, 130).

to “ignore this growing threat to our communities.” Explicitly referencing the original that he sought to mock, he stated that his legislation was “modeled after a bill recently introduced in the Ohio House by Rep. Ron Hood (R-Ashville via Carrollton) that would prohibit homosexual, bisexual and transgender people from adopting children.” Following the now familiar claims of opponents of gay rights that homosexuals are more affluent than heterosexuals, more emotionally unstable, and more interested in recruiting unwitting outsiders to their lifestyle, Hagan stated: “Credible research exists that strongly suggests that adopted children raised in Republican households, though significantly wealthier than their Democrat-raised counterparts, are more at risk for developing emotional problems, social stigmas, inflated egos, an alarming lack of tolerance for others they deem different from themselves and an air of overconfidence to mask their insecurities” (Nichols 2006). He added several poignant quotations from those afflicted by this scourge, such as a 25-year-old Republican adoptee who “chose to remain nameless” and characterized his adoption as a “nightmare I haven’t yet awoken from.” Calling the original anti-gay adoption bill homophobic, blatantly discriminatory, and extremely divisive, Hagan said, “We need to see what we are doing.” In other words, he hoped to alter his audience’s consciousness so that they would never again view an anti-gay bill simply at face value. Perhaps not surprisingly, no one volunteered to cosponsor Hagan’s bill. Interestingly, however, the Speaker of the Ohio House, conservative Jon Husted (R-Kettering), blocked the anti-gay adoption bill by coming out as an adopted child himself and noting the enormous need for more people from all walks of life to adopt the large numbers of parentless children across the state of Ohio.

The unruly potential of parody and humor are well-illustrated by jazz musician Joel Forrester’s comments about the use of humor by his band, The Microscopic Septet.<sup>6</sup> Music critics had become quite upset with the band because they couldn’t figure out who the humor was aimed at. Were they making fun of jazz? The audience? Themselves? Forrester’s answer was: all three. Although modern artists had done much to develop jazz into its present form, the band felt that jazz had become much too serious an enterprise, a mere shadow of its former self in the raucous and ribald era of the 1920s and 1930s. In response to this development, jazz audiences had adopted an increasingly expert, serious, and distant style of music appreciation. As a result, the Septet worried that its own performance style had become highly proficient, yet joyless. Their solution was to laugh at the entire enterprise—jazz, the audience, and themselves included—destabilizing the stolid form of performance and reception that had developed over time, in order to make way for something new to emerge. In a similar manner, *Who’s Your Daddy* seeks to use humor to reinsert a populist tone into contemporary constitutional discourse. The tongue-in-cheek parodies of various stolid forms of scholarly constitutional work destabilize a well-worn debate, loosening it up to make it more accessible and entertaining for all involved.

Because parody is referential, it invokes familiar narratives that typically assume a shared, stable reality. It seeks to dislodge such assumptions by revealing the shaky grounds upon which firmly entrenched discourses rest. By doing so, parody can open up longstanding debates, particularly those that seem dead-ended, questioning

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6 Interviewed by Terry Gross, *Fresh Air*, 28 November 2006.

rather than resolving, confounding rather than settling the very terms and shape of the discussion. By breaking down structures and creating disorder, the laughter occasioned by parody may create a space for what Bakhtin has called “a shift of authorities and truths, a shift of world orders” (1984a, 304). Even if such openings sometimes emerge only temporarily, they nevertheless represent opportunities for dissent and potential transformation, in terms of both form and content or performance and substance.

Due to the referential nature of parody, the form of the original narrative must be carefully identified along with its constituent parts. If the parody is to be based in democratic interests, it must be drawn from a populist source. Hence, the narrative analysis and use of popular culture in *Who’s Your Daddy* provide excellent taking-off points from which to parody three major stories in contemporary constitutional discourse (romance, comedy, and tragedy) that alternatively embrace, enlarge, and reject the authority of the founding fathers. When the originals are compared to parallel forms drawn from romance novels, soap operas, and tabloids, parodies are produced that send-up both the form and content of contemporary constitutional discourse. Destabilizing the stolid narrative forms available in the contemporary debate, these chapters pave the way for the introduction of two more broadly pitched parodies of constitutional discourse, both of which are based in queer irony.

### *Queer Theory*

Feminist cultural studies scholar Tania Modleski reminds us that if we are always working in an adversarial role, we are always on the defensive, “always, as it were, complaining about the family, but never leaving home” (1982, 103–104). But if the myth of origin is removed, that is, if we leave home, then we might stand a better chance of addressing constitutional politics in our own right, rather than continuing to respond to paternal views in one (narrative) form or another. Removing, or at least decentering, the myth of origin through parody can open up space in which new constitutional narratives and judicial identities can emerge, as Cover, Brest, and others had hoped. The point is neither to idealize nor to malign the founding fathers, but rather to decentralize them, to move on by exploring alternative constitutional narratives that produce different forms of constitutional discourse and judicial identity.

Chapters 5 and 6 offer two such possibilities: both are grounded in queer theory, which foregrounds irony and destabilizes identity, rejecting a stable myth of origin. Rather than centralizing ancestry, queer identity appears to start each generation anew. The question, “who’s your daddy?” is much more likely to elicit a narrative about one’s own interests, rather than stories like those examined in Chapters 2, 3, and 4, which tend to obscure contemporary power by focusing on paternal decisions made long ago. Chapter 5 provides an ironic account of what constitutional discourse might look like absent the centrality of such a myth to reference in order to legitimate (or resist) constitutional decision-making, while Chapter 6 decentralizes the myth and reconstitutes it along with several other key features of the contemporary debate.

In Chapter 5 *Bush v. Gore* is read as a coming out narrative in which the Supreme Court abandons its longstanding attachment to a myth of origin, along

with its presumptively legal identity, in favor of a deviant political identity. The chapter is framed in a manner that parallels the standard coming out narrative in which heterosexuality is abandoned in favor of homosexuality. Chapter 6 offers a parodic reading of the narrative forms of contemporary constitutional discourse, inspired by the popular reality television show, *Queer Eye for the Straight Guy*. This chapter evaluates, makes-over, and sends-up romantic, comedic, and tragic narrative accounts of constitutional change as played out in the context of the change in the Supreme Court's treatment of sodomy laws, from *Bowers v. Hardwick* to *Lawrence v. Texas*. The result, consistent with other parodic readings, is a new way to read and evaluate contemporary constitutional discourse, which transforms the audience's consciousness so that it can no longer view the object of parody, contemporary constitutional discourse, in the same way again.