THIRTEEN EASY PIECES

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I. PROLOGUE: ARE WE ALL POSITIVISTS NOW?

Responding to Imperfection is a collection of essays on the ways of constitutional change in the United States. Correlatively, the book is a collection of views on the figurations of “higher law” in American constitutional thought and argument. “Collection,” however, does not do the volume justice, because it mounts a conversation whose sum exceeds its parts. Beyond the merits of any of the selections standing alone, an intriguing interplay among them gives this book a special energy and interest. What follow are some thoughts about that interplay. Reflections of one reader’s interests of the moment, these thoughts should not be mistaken for a full account of all that is worth attention in these essays.

Theoretical legal positivism has an official standard-bearer on Levinson’s stage: he is Frederick Schauer. Schauer suggests positivist opinion is unfashionable, but I wonder. As far as I can see, if there is anything most of your standard-issue, fin de siècle American constitutionalists would rather not profess, it is natural law, legal positivism’s supposed opposite. Rarely do we claim to be

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1. Hereinafter, I will refer to the book as IMPERFECTION.


3. See Frederick Schauer, Amending the Presuppositions of a Constitution, in IMPERFECTION 145, 148 n.8 (“pleading guilty” of having “legal positivist dispositions”) [hereinafter Schauer, Amending the Presuppositions]; Frederick Schauer, Constitutional Positivism, 25 Conn. L. Rev. 797, 798 (1993) (offering to defend positivism against condemnation, “until recently,” as “simultaneously irrelevant and pernicious”); id. at 805 (describing the prevalent “current attitude among American constitutionalists” as “compatible with . . . a natural law outlook” but “making no causal claim”).

4. Save a few hardies such as Michael Moore, Robert George, and Hadley Arkes. See, e.g., Michael S. Moore, Moral Reality Revisited, 90 Mich. L. Rev. 2424 (1992); Robert P. George, Making Men Moral: Civil Liberties and Public Morality (1993); Hadley
drawing our standards for the identification of valid law from speculative sources—rationality, morality, fundamentals of the human condition—lying fully beyond those supplied by socially created authorities-in-fact. Rarely do we draw them, in other words, strictly and unambiguously, from what theorists sometimes call transcendent, rather than immanent, sources. Justice Hugo Black's excoriation of the "natural-law due process formula" still carries a sting, and it is pretty much the case, I believe, that we are all to some degree positivists now, all immanentists, at least by outward profession.

Inductive support appears in Imperfection. The book ostensibly focuses on two questions about the American higher law's amenability to change, both of them centering on Article V of the U.S. Constitution. One question is whether Article V is "exclusive"—whether the several paths to amendment the Article marks out are the only ones by which Americans can arrive at a valid—or rightful, or legally cognizable—change in the higher law. The other question is whether Article V is boundlessly inclusive—whether, so to speak, everything goes under Article V or whether, to the contrary, there are changes that cannot validly be accomplished, in that way or any other.


7. U.S. Const. art. V provides:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

8. If we combine the two ways of proposing an amendment (concurrence of two-thirds majorities of both congressional houses and vote of a convention called on application of two-thirds of the states) with the two modes of ratification (by legislatures or conventions in three-fourths of the states), there are altogether (disregarding the range of possible variations in the "convention" alternatives) four paths to constitutional alteration provided by Article V.

9. William F. Harris II, a scholar whose work Levinson calls "essential reading" for the theory of constitutional amendment but who has no essay in the volume, believes that some relatively profound constitutional changes are achievable by certain Article V routes—the ones that come closest to approximating the procedure limned by Article VII for adoption of Article V itself—but not others. See Acknowledgements in Imperfection; William F.
One might think these questions would be tools for prying apart the naturalists and the positivists among us. Contentions that the Constitution is amendable by popular, or popularly representative, political action "outside of" the mainly government-driven channels set by Article V must mean to appeal, one might suppose, over the head of the Constitution as we find it to transcendent values of democracy, popular sovereignty, and collective political self-rule. Just as, one might think the idea, for example, of the legal invalidity of a procedurally immaculate Article V repeal of the First Amendment must mean to appeal beyond the extant regime to transcendent values of human dignity or freedom.

Thus transpositivistically is not how the players in Impresario Levinson's antiformalist contingent (as we may style them) present themselves on stage. With only one arguable exception, they come on as interpreters of the regime-in-force. They offer us readings of the factually-established American way with politics. In form, at least, their speeches are not oracles of transcendent reason or truth, but rather renderings of a historically specific — American — legal-cultural object. None of the principal players asserts or evidently believes that it is possible or desirable for renditions of such contestable objects to be wholly uninflected by the renderers' own perceptions of reason and truth. The point, though, is that when it comes to propounding validity criteria for law in the United States, it is not theories but facts — facts of extant legal-cultural practice, interpretable facts but facts nevertheless — that remain finally sovereign for all our speakers.

10. See Bruce Ackerman, Higher Lawmaking, in Imperfection 63; Akhil Reed Amar, Popular Sovereignty and Constitutional Amendment, in Imperfection 89. Because the gatekeepers for all the paths are either incumbent members of Congress or incumbent members of state legislatures, and because Congress can in all cases designate state legislatures as the ratifiers, see U.S. Const. art. V, the Article V scheme as a whole can fairly be called one for government-driven constitutional change. See Amar, supra, at 90. In Amar's view, although not in Ackerman's, this government-driven characteristic is a part of the argument for a nonexclusivist reading of Article V. See infra note 34 (Amar); infra text accompanying notes 38-40 (Ackerman).


12. Antiformalism is compatible with immanentism. See infra text accompanying notes 29-35.

13. The textual backing for this claim is as follows:

Ackerman describes his arguments in support of a nonexclusivist reading of Article V as "[c]ombining history with philosophy." Ackerman, supra note 10, at 65. Inquiring into "[t]he [m]eaning of Article V" (with special respect to the question of its exclusivity), an inquiry that Ackerman says requires "thoughtful resolution of . . . textual indeterminacies" and, he implies, cannot be conducted independently of how we "modern" Americans "should" read the Article, he invokes "the full range of interpretive disciplines — from the
II. MAPPING THE TERRAIN OF DEBATE

A. Constitutionalism

Among the countless variety of legal-ordering practices that might prevail in a country, some — but not all — are of the kind we call constitutionalist. A practice is constitutionalist, to begin with, only if it hierarchically distinguishes at least two ranks of law: a superordinate constitutional or "higher" law and a subordinate "ordinary" law.\footnote{The higher law sets conditions of validity for or-
intention of the Framers to the decisions of the modern Supreme Court." Id. at 71-72. In an essay published elsewhere, Ackerman is resolute about the immanentist character of constitutional argument. See Bruce Ackerman, Rooted Cosmopolitanism, 104 Ethics 516, 518-20, 532-33 (1994).}

Amar, Levinson's other frankly prescriptive Article V anti-exclusivist (leaving for later discussion the more descriptive-minded contributions of Levinson himself and Stephen M. Griffin) pursues his inquiry into Article V's meaning beyond the "[a]rticle... narrowly struc-
tured" to "other provisions of the Constitution... the overall structure and popular sover-
eignty spirit of the document... the history of its creation and amendment, and... the history of the creation and amendment of analogous legal documents, such as state constit-
tutions." Amar, supra note 10, at 91-92.

A like pattern appears with Levinson's substantive-limits advocates. Walter Murphy re-
fers the question of legal limits on "constitutional change" to "the existing system's funda-
mental normative principles," including those he takes to be fairly derivable from the system's evident commitment to constitutionalism itself. See Murphy, supra note 11, at 172-
73, 179-80. In a previous major statement on this topic, Murphy wrote of "reintroducing" limits on constitutional change from the Constitution itself. See Walter F. Murphy, An Or-
dering of Constitutional Values, 53 S. Cal. L. Rev. 703, 745 (1980). He would recognize "prohibitions imposed by natural law, justice, and rights," but only insofar as the "text" actu-
ally in force incorporates them by reference. (Murphy notes the possibility, in the absence of such "textual grounding," of resort to the natural lawyer's claim that what is unjust is ipso facto not law; he does not, however, endorse it. See Murphy, supra note 11, at 180-81. Mark Brandon concludes that Murphy could justifiably claim that his theory of amendment limits is "both immanent and transcendent." See Brandon, supra note 5, at 221. But see id. at 221 n.27 (suspecting that "Murphy's theory of natural rights is [theoretically] prior to the Consti-
tution"). However, the theory's official dress appears to me to be that of immanence.

Brandon also discusses works of William F. Harris II and Sotirios Barber. See id. at 223-
28. He classifies Harris as an immanentist, presumably because Harris draws his theory of limits on constitutional change from an interpretation of American constitutional practice as meant in fact to approximate popular sovereignty. See id. at 226. (Presumably, then, Bran-
don would likewise classify his own theory, which is similarly, although not identically, grounded. See id. at 228-29.) Brandon calls Barber's theory "explicitly transcendental," id. at 223, and in fact Barber is the one player on Levinson's stage who comes closest to crossing the rhetorical line from immanence to transcendence. I don't think he has quite crossed it, however. In Barber's view, constitutional meaning is, in part, a function of "tradition," and tradition is "a normative theory of what has always been and therefore still is best in us as a people." Barber, supra note 11, at 85, quoted in Brandon, supra note 5, at 224 n.38. Correl-
atively, a change in the Constitution is acceptable so long as "[t]he ways of the Constitution" continue to "constitute our best current conception of the good society — our best under-
standing for now." Barber, supra note 11, at 57, 85, quoted in Brandon, supra note 5, at 224. The tell-tale words are "us," "our," and "now." To my ear, they signify unwillingness to cut the argument entirely loose from the ground of normative-cultural fact.

14. For a further characteristic of constitutionalist orders, see infra text accompanying
notes 55-56. For consideration of the values served by this "dualism," see infra text accompa-
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ordinary law; it functions as what H.L.A. Hart calls a rule of recognition.\textsuperscript{15}

If that begins, roughly, to describe what constitutionalism is, then a constitution is, correlatively, a particular, identifiable assemblage of higher-law prescriptions — be they written, unwritten, or some combination thereof — subsisting in the practice of a given country at a given time.\textsuperscript{16} This constitutional assemblage will certainly contain organizational and procedural prerequisites for valid ordinary lawmaking. Within it one may also find limits on the allowable contents of ordinary law. We need not debate whether such “substantive” limits are an essential feature of any constitutionalist system worthy of the name, or, in other words, whether “constitutionalism” is partly synonymous with “limited government.”\textsuperscript{17} It is enough for our purposes that such limits have come to be viewed as a part of the essence of American constitutionalism. A constitution, then, contains procedural, and perhaps substantive, preconditions for valid ordinary lawmaking. Is anything more required of it for completeness?

B. Amendment Rules

To most of us, it will intuitively seem that a constitution, to be complete, must prescribe the validity conditions not just for ordinary lawmaking, but also for any further higher lawmaking within the subsisting system of governance for which the constitution itself ostensibly supplies the higher law. Why we should think this is a matter bearing investigation. The answer begins, but does not end, in what we usually understand by the idea of a country’s being in a legally ordered state. We associate legal ordering with a preponderant sharing by inhabitants of some practical understanding of who, selected by what means or marks and acting by what forms and in what combinations, is imbued with authority to declare


\textsuperscript{16} See Samuel Freeman, Original Meaning, Democratic Interpretation, and the Constitution, 21 Phil. & Pub. Aff. 3, 6 (1992) (“In its institutional sense, the political constitution of any regime is that system of publicly recognized and commonly accepted rules for making and applying those social rules that are laws.”).

\textsuperscript{17} Stephen M. Griffin, Constitutionalism in the United States: From Theory to Politics, in Imperfection 37, 39 & n.10, approvingly quotes Charles Howard McIlwain, Constitutionalism Ancient and Modern 24 (1940), to the effect that essential to constitutionalism is the idea of “legal limitation on government,” understood as an antithesis of “arbitrary” or “despotic” rule. To agree is not yet to answer the question whether constitutionalism necessarily entails substantive limits on ordinary lawmaking, because structural and procedural provisions might be thought the aptest way to constrain government action away from arbitrariness and despotism. See Griffin, supra, at 40 & n.14; infra notes 138-39 and accompanying text.
"good" law. In the theoretical lingo of legal positivism, whatever indicative content lies within this shared-in-fact understanding is the country's "ultimate rule of recognition" ("URR"), and positivists will seem to most of us, most days, undoubtedly correct in their insistence that legal ordering in a country presupposes the existence of a URR.

If so, however, then the positivists are equally persuasive that a country's URR is not itself a law, but rather is a practice, "a matter of social fact ... for empirical investigation rather than legal analysis." But then why should we think that it is to a country's constitution — a law or body of law — that the population must look for last-ditch answers to legal-validity questions, so that a constitution is to be judged defective if it lacks a specification of the validity conditions for higher lawmaking? Evidently, we think this precisely because our minds, not surprisingly, are on a country whose URR is of the constitutionalist kind, and one mark of that kind of URR — one mark of the kind of legal-cultural practice that it is — is to refer all questions about legal authority and validity to a set of rules that themselves have the status and regulative force of law in inhabitants' eyes, having been conventionalized as such in a certain body of high law called a constitution. This, too, is a part of what constitutionalism is in our lives.

18. Legal-positivist accounts make the presence of such a shared understanding an identifying mark of legal ordering. See, e.g., Schauer, Amending the Presuppositions, supra note 3, at 148-52 (referring to works of Hans Kelsen and H.L.A. Hart). Natural-law accounts also seem to presuppose it insofar as they contend that whoever has effective authority to declare what counts as good or valid law ought or must sometimes, in fashioning such declarations, refer to transempirical moral considerations. See, e.g., JEFFREY G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 36-40 (1990).

19. See, e.g., Schauer, Amending the Presuppositions, supra note 3, at 150.

20. Id. at 150 (footnote omitted).

21. "Conventionalized" does not necessarily mean reduced to a canonical text to be read more or less literally or formalistically. See Freeman, supra note 16, at 7.

22. It is true that constitutionalism's having this significance for us makes our constitutionalist URR self-referring or recursive, and so gives rise to paradox at the outer bounds of constitutionalist reflection. See infra note 27 for an illustration. For speculation on why constitutionalism nevertheless entails referring questions about legal authority to a higher law, see infra text accompanying notes 128-31.

Frederick Schauer's contribution to Levinson's volume argues that changes in the meanings of constitutional prescriptions can be wrought by changes in the factual, political-cultural background of "assumed presuppositions," as well as by official acts of legislation and legal interpretation. Schauer, Amending the Presuppositions, supra note 3, at 160-61. There is no conflict between that view and my claim here that it is partially definitive of a constitutionalist political-cultural background that inhabitants treat the validity conditions for higher lawmaking as themselves a matter to be found out by legal investigation. See Laurence Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 HARV. L. REV. 1221, 1291 n.227 ("My view of Article V as providing the only methods of amendment that meet the Constitution's own requirements is consistent with Professor Schauer's point.").
Let us speak, then, of amendment rules, and let us agree on a broad understanding of both of that locution's component terms. "Amendment" means alteration of the higher law, of whatever extent or degree. "Rule" means any interpretable prescription, any prescription extractable from a given and finite corpus juris, such as Americans take the Constitution to be. The class of amendment rules has limiting cases. At one extreme lies the case of total, irrevocable, and absolute entrenchment of extant constitutional content against any change, ever. At the other extreme is the rule that would allow ordinary legislative assemblies to adopt constitutional amendments by the same procedures they use for ordinary lawmaking.

Most real-world constitutionalism, in this respect typified by American practice and understanding, operates between the extremes — using amendment rules that are distinct from, and more demanding than, the validity rules for ordinary lawmaking but that do not absolutely and eternally entrench the whole constitution. We would not feel we had proper self-government if everything that mattered in our higher law were irrevocably and permanently placed beyond the people's sovereign reach. Nor would we feel we had real higher law if our amendment rule did not in some palpable degree entrench the rest of the Constitution. Finally, an amendment rule does not really entrench the rest of a constitution, in any specific degree, unless it, itself, is at least relatively entrenched by its own terms.

23. Thus "amendment" may encompass, on one extreme, the sort of relatively trivial or housekeeping matter that Bruce Ackerman would class as a "superstatute," see BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 91 (1991), and, on the other extreme, the sort of radical break — repealing the First Amendment, for example — that some writers would distinguish as "revision" or "transformation," see, e.g., Murphy, supra note 11, at 176-77, and others would call "breakdown," see James E. Fleming, We the Exceptional American People, 11 CONST. COMM. 355, 371 n.71, 371-72 (citing works of Samuel Freeman and John Rawls).

24. The U.S. Constitution may contain a partial, not total, but nevertheless absolute and permanent entrenchment, namely, that of the right of each state to insist on its equal suffrage in the Senate. See U.S. CONST. art. V. ("May," because it is conceivable, if just barely, that the entrenchment clause in Article V is itself subject to amendment. See Murphy, supra note 11, at 176 n.41.)

25. Under such a rule, the constitutionalist character of the system, its maintenance of a differentiation between higher and ordinary lawmaking, could reside only in the expectation that ordinary lawmakers conscientiously assume the responsibilities of higher lawmakers — and that their constituencies hold them accountable accordingly — when they put on their higher lawmaking hats.

26. An amendment rule approaching the just-like-ordinary lawmaking extreme is recommended, for the time being, for some components of the constitutions of the countries of eastern Europe by Stephen Holmes and Cass R. Sunstein. See supra note 2.

27. Perhaps the idea of a constitution requires absolute entrenchment of an amendment rule, which in turn at least relatively entrenches everything else. Do you think our own Article V allows for an amendment of itself (using its own prescribed procedures), that would make any further amendments, without limitation, accomplishable by ordinary act of Congress? Have we a constitution, then, for only as long as we refrain from amending Article V
practice cannot make do without a constitutionally contained rule for amending the Constitution, which is by the same token a rule for preserving the Constitution against undue change.28

C. Formalism

An amendment rule, we now easily see, may prescribe in either or both of two dimensions, one procedural and the other substantive. Article V visibly prescribes in both dimensions. It sets out specific procedures for amending the Constitution, and it also contains at least one specific prohibition on amendment content—that is, deprivation of any state’s equality of suffrage in the Senate without that state’s consent.29 The central action of Levinson’s book consists of debates about the exclusivity or exhaustiveness, in both dimensions, of Article V’s facial prescriptions. As already noted, all the debaters seek answers from within, not beyond, the interpretable Constitution30 to which the American constitutionalist URR refers all inquirers into these matters. It is common ground among them that the answers lie in interpretations of the

in that manner? Levinson’s authors do not directly address these questions. Recent writing that deals with them includes Harris, supra note 9, at 176-87; Peter Suber, The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change (1990).

28. Levinson gets his show on the road by reminding us that the Framers had a similar view. See Sanford Levinson, Introduction: Imperfection and Amendability, in Imperfection 3-4. (For good measure we can add that, at least when a constitution purports to have issued from some temporal authority, as ours purports to have issued from “We the People of the United States,” it logically must—as ours does in Article VII—prescribe terms and conditions for its own coming-into-effect in the first place.)

U.S. Const. art. VII provides:

The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

29. See U.S. Const. art. V. As Walter Murphy says, “[T]he prohibition against amending the clause forbidding the regulation of the importation of slaves self-destructed in 1808.” See Murphy, supra note 11, at 175 n.40. The same is true of the prohibition against amending population proportionality of direct taxation. See U.S. Const. art. I, § 9.

For completeness, we should note the argument that the First Amendment, especially as incorporated in the Fourteenth, carries its own textually explicit shield against deletion from the Constitution. This shield, of course, is supposed to be the amendment’s opening words—“Congress shall make no law” (respecting, prohibiting, or abridging certain matters)—which the Fourteenth is said to expand to “No state shall make any law.” See U.S. Const. amend. I, XIV, § 1; Murphy, supra note 11, at 175-76 n.40. This is not on its face a compelling argument. According to Article V, at least, Congress “proposes” and state bodies “ratify” amendments; they do not “make” them. Moreover, the generation that ascribed the legislation of the Constitution to an act of the people as a whole cannot easily be understood either to have equated a constitutional amendment with the kind of law that Congress ever makes or to have encompassed Congress proposing or a state body ratifying an amendment in “Congress shall make no law.” This is no less true despite the recent surfacing of a theory that treats the serial steps in amendment-making as each the enactment of a law. See Michael Stokes Paulsen, A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment, 103 Yale L.J. 677, 721-23 (1993). For these and other interpretative objections, see John R. Vile, The Case Against Implicit Limits on the Constitutional Amending Process, in Imperfection 191, 196-97, 204-05.

30. See Harris, supra note 9.
Constitution including, of course, Article V. That does not settle very much, however, because one has still to choose between relatively formal and nonformal interpretative approaches. By a formal reading, I mean one that follows the line of least resistance whenever there is one, cleaving to what the great preponderance of lawyers would undoubtedly see as the plain and reasonable meaning of the law, in all cases in which there is such a thing. By a nonformal reading, I mean one that, perhaps because it gives the law a prima facie unexpected reading, depends for persuasiveness on a transtextual theory about the deeper aims and premises of American government, one that is contestable enough to require support from somewhat arduous philosophical or historiographical arguments.

Formal readings treat Article V's express prescriptions as exclusive in both the procedural and substantive dimensions. On the procedural side, a formal reading says that there is no other way to amend; on the substantive side, a formal reading says that there are no other prohibitions on amendment content. It takes nonformal exertion to support contentions that the Constitution means to open itself to amendment by political events not visibly conforming to the Article V protocols, just as it does to construe

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31. I thus use the notion of interpretative formality in a somewhat different sense from that in Mark V. Tushnet, Anti-Formalism in Recent Constitutional Theory, 83 Mich. L. Rev. 1502 (1985).

32. See, e.g., David R. Dow, The Plain Meaning of Article V, in Imperfection 117.

33. See, e.g., Vile, supra note 29.

34. Among Levinson's authors, Akhil Amar provides the test case. Amar contends that the Constitution, rightly construed, provides for amendment by a "mechanism akin to a national referendum, even though that mechanism is not explicitly specified in Article V." Amar, supra note 10, at 89. His argument is ostensibly formally attired. It is intently focused on "the narrow text of Article V ... other parts of the original Constitution, various glossing provisions of the federal Bill of Rights, and various Article V analogues in state constitutions." Id. at 91.

Squint as hard as you like at the words of Article V, the argument runs, and you won't find any saying that this is "the only way to amend the Constitution." Id. at 90. Carefully notice the textual reverberations among other parts of the instrument — the references to "the people" in the Preamble, the Ninth and Tenth Amendments and the Assembly Clause of the First — and you'll see the higher lawgiving populace reserving to voting majorities of itself the right to revise their legislative product at will. See id. at 103-08. You will also see Article V falling nicely into place as an exclusive procedural prescription applicable to government-driven, as distinguished from populace-driven, initiatives for change. See id. at 90-91.

Neat. But not, standing without more, remotely persuasive to the great bulk of present-day American lawyers. See, e.g., Tribe, supra note 22, at 1290 (calling Amar's textual argument "creative," "unconvincing," and "bizarre"). Amar might object that this easily predictable resistance is itself a result of a long-sustained habit of misreading, but that fact, if it is one, does not change the fact that nonformal argumentation is now required to begin to counter this resistance. What is required is a transtextual theorization of an American constitutional understanding that is committed to majoritarian popular sovereignty as its all-subsuming first principle, a theorization sure to be contested on the merits, see, e.g., Dow, supra note 32, and one that can hope to establish itself only by appeal to facts of history — themselves contestable — that are external to the constitutional instrument: the Declaration's equation of governmental legitimacy with the consent of the governed, see Amar, supra note
or infer unmentioned, internal constitutional prohibitions against egregiously antiliberal or antidemocratic revisions such as a repeal of the First Amendment.35

D. A Levinsonian Grid

We now have before us — what else? — the makings of a four-fold table. We can permute two classes of readings of Article V, exclusive or nonexclusive, with two dimensions of amendment-rule prescription, procedural and substantive, to construct four possible positions. Regarding Article V’s procedural exclusivity one can, like David Dow36 and John Vile,37 affirm it; or one can, like Bruce Ackerman38 and Akhil Amar,39 deny it. Regarding textually inexplicit limitations on amendment content one can, like Bruce Ackerman40 and John Vile,41 deny them; or one can, like Walter Murphy42 and Akhil Amar,43 affirm them. Among the five authors just mentioned, we find one consistent exclusivist, John Vile; one consistent nonexclusivist, Akhil Amar; and one straddler between procedural nonexclusivism and substantive exclusivism, Bruce Ackerman. We have no clear exemplar of the converse straddle, between procedural exclusivism (clear) and substantive nonexclusi-

10, at 89-92, and the arguments of lawyers (including James Madison) caught in the need to explain how state ratifications of the Constitution would not violate the amendment rules of the state constitutions, see id. at 97. For disagreement with Amar’s historical readings, see Ackerman, supra note 10, at 69 n.3; Bruce Ackerman & Neal Katyal, Our Unconventional Founding — (forthcoming).

On the ultimately nonformal character of Amar’s argument, see Dow, supra note 32, at 138 n.91 (“The Constitution, by virtue of embodying republican principles, thereby embodies a certain right — the right of the people to alter their government whenever a majority so demands. This, ultimately, is the essence of Amar’s claim”). I do not mean — and neither, I believe, does Dow — that the argument’s nonformality is a fatal defect in itself. Dow rejects the argument, but only after contesting its normative-theoretic and historiographical supports.

35. Here, it is hard to think of even a weakly plausible counterexample. Walter Murphy makes reference to the fact that Article V speaks only of amendment, not revision or transformation, and to the possibility of “prohibitions embedded in the structure of the text.” He does not suggest that the first factor can carry the burden of the argument, and he points out that the second “bleeds into” what has to be the real, load-bearing part of any argument for substantive limits, namely, “normative theories on which a constitutional democracy is based.” See Murphy, supra note 11, at 176-78.

36. See Dow, supra note 32.


38. See Ackerman, supra note 10.


40. See infra notes 98-106 and accompanying text.

41. See Vile, supra note 29.

42. See Murphy, supra note 11.

43. See supra notes 10, 29. One might also mention here Sotirios Barber and William Harris. See supra note 13.
Walter Murphy, so far as I am aware, has not spoken to the question of procedural exclusivity, so he cannot be classified as either consistent or a straddler.

Above, at the end of section C, we noticed a correlation between exclusivist conclusions and formalist interpretative methods. In light of this observation, two questions come to mind about the fourfold table we have just constructed. First, to what extent, if any, is it the case that those who occupy the "consistent" positions — exclusivist or nonexclusivist — are there by reason of formalist or antiformalist methodological inclination or commitment? Second, do the straddle positions disclose, on the straddlers' parts, an objectionable inconsistency?

In the next two parts of this essay, I try to gauge the significance of the formalist-nonformalist opposition as it appears on Levinson's pages. Part III looks closely at a controversy between Bruce Ackerman and David Dow over the procedural exclusivity of Article V. It concludes that the distance between the two on the formalism axis, which Dow, in particular, treats as significant in its own right, may be best understood as reflecting a difference on matters of value distinct from issues of interpretative method. Part IV returns to the fourfold grid and generalizes the suggestion that an apparent break or difference in interpretative method is perhaps best understood as reflecting a transmethodological concern — without, however, concluding that the straddlers are being objectionably inconsistent or opportunistic. That question we take up in Part V.

III. DOW AND ACKERMAN

We consider here a fight that David Dow's essay picks with Bruce Ackerman's. I put the matter that way because it seems to me that Dow finds disagreement between the two in a place where Ackerman might very well not.

44. David Dow has expressly rejected substantive nonexclusivism. See David R. Dow, Constitutional Midrash: The Rabbis' Solution to Professor Bickel's Problem, 29 Hous. L. Rev. 543 (1992) [hereinafter Dow, Constitutional Midrash].

45. Murphy takes such broad views both of what "the Constitution" consists of and what "interpretation" involves that the question of express amendment procedures may well strike him as much less important than Ackerman, for example, considers it to be. See, e.g., Walter F. Murphy, Constitutions, Constitutionalism, and Democracy, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3, 7-20 (Douglas Greenberg et al. eds., 1993).

46. Levinson placed Dow's essay after Ackerman's in the series, so insofar as there really is mutually recognized disagreement between the two authors, it may simply have fallen to Dow's lot rather than Ackerman's to voice the disagreement. It should perhaps be noted, though, that Dow's essay — adapted for Levinson's book from an article originally published in 1990, see David R. Dow, When Words Mean What We Believe They Say: The Case of Article V, 76 Iowa L. Rev. 1 (1990); Dow, supra note 32, at 117 n.* — does not make any direct reference to the paper Ackerman prepared for this collection. Cf. Dow, supra note 44,
Dow yokes Ackerman together with Akhil Amar. Both authors, he says, commit the same, two-fold mistake: First they posit a counter majoritarian difficulty, then they try to “dissolve” the difficulty “by transforming . . . the [constitutional] amendment process into a majoritarian exercise.” In Dow’s account, in other words, both authors get off on the wrong foot by mistakenly supposing that judicial review needs reconciling with majority rule, and that mistake draws them into the graver error of crediting to majoritarian provenance the higher law that reviewing courts bring to bear on ordinary acts of government. Against such works of reconciliation, Dow objects that there really is nothing out there that wants resolving at all. The “so-called ‘difficulty,’” he writes, is a product of failure to grasp the most basic of all facts about American constitutionalism, which is that at the very bottom of it—as a part of what Frederick Schauer and others might well call our ultimate rule of recognition—lie a pair of precepts whose simultaneous truth for us, or normative force for us, may be problematic but is nevertheless “what we believe.” We believe in—we are in our constitutional culture and practice as a matter of fact wholeheartedly committed to—“majority rule,” and no less wholeheartedly are we committed to the belief that “not everything ought to be subject to it.”

Efforts to collapse this dualist structure into its majoritarian pole are, then, simply misconceived. Like “the ostensible difficulty itself,” such efforts “rest[] on a misunderstanding of the ontology of a higher law system.” They overlook the fact that such a system “intends, on occasion, to frustrate majority will.”

For us as Americans practicing the Constitution, Dow writes, “[f]ollowing the majority because it is the majority is sometimes obligatory; resisting the majority even though it is the majority is sometimes required.” This problematic conjunction of normative

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47. Dow, supra note 32, at 129-30.
48. Id. at 118-19.
49. Id. at 118.
50. See supra note 19 and accompanying text; Dow, Constitutional Midrash, supra note 44, at 548 (asserting that the simultaneous norms of “majoritarianism” and “rights” are constitutive of American “legal culture”).
51. Dow, supra note 32, at 119.
52. Id. at 130.
53. Id. at 119 (emphasis in original). We should note, for future reference, a somewhat different formulation of the duality of precepts, which Dow draws from rabbinical sources, but by which he apparently means also to describe the characteristic form of American constitutionalist understanding. From the biblical injunction that we “not follow a multitude to do evil,” Dow reports, [the] rabbis inferred that, except when the majority is doing evil, it is commanded to follow the majority. At the same time . . . the most general overarching principle of Jewish law is not to follow the majority, but to do what is just and good. . . .
givens "constitute[s] the essence of our political being."

Correlatively, in Dow's argument, this conjunction structures the "ontology of a higher law system," meaning a system in which the legislative wills of present majorities are subordinate to higher law. That, of course, is an ontology that would be subverted or deconstructed by envisioning the source or legislator of the higher law as, itself, a simple-majoritarian popular sovereign or We-the-People. Precisely such a subversion is what Dow says both Ackerman and Amar would effect by their misguided quests for resolution, or "reconciliation," of the dualist, structuring tension that lies at the heart, or in the soul, of American constitutionalism.

Dow's affirmative claim, his claim about what we believe, is refined and careful. He has our beliefs hewing faithfully to the idea of popular sovereignty, the idea that the People legislating are the only legitimate, ultimate source of higher law. He apparently allows that collective self-rule, starting from scratch, may faute de mieux have to get itself going by a primeval majority setting the protocol for the next stage. He insists that, according to our beliefs, such a majority has both good reason to "agree today that it will take more than a mere majority tomorrow" to legislate in certain ways and legitimate power thus to bind its posterity to supermajoritarian constraints. In sum, Dow confines his complaint against the would-be reconcilers to their attempts to equate popular sovereignty now with simple majoritarianism and, accord-

and-good desideratum can act as an exception to a particular rule . . . enunciated by a majority. The principle of majority rule does not override the overarching commandment to do what is "just and good."

Id. at 121 (citations omitted).

This formulation of our duality of beliefs differs from the one in the main text in this respect: The latter leaves open the possibility that a higher law laid down by a supermajority (for example, by the supermajoritarian procedures prescribed by Article V) is legally valid and civilly obligatory, regardless of any moral evaluation we might independently make of it. The rabbinical formulation may well seem to foreclose this possibility. How, after all, can a multitude of any size or proportion — a supermajority any more than a majority — be allowed to lead us into evil or to override the ultimate injunction to abide by the just and the good?

54. Id. at 119.

55. Id. at 130. This subordination of majority will to higher law must be envisioned, I think, as constant and without exception, not as occasional or exceptionable. If, as Dow says, resisting the majority is only "sometimes" required, that must be because the higher law doesn't fill the normative space. (It can't be that there is applicable higher law but that majority rule overrides it.) It would be entirely consistent with this view of "our beliefs" to say that, according to these beliefs, not everything ought to be subject to higher law (higher law ought not to fill the normative space; it ought rather to leave majority rule its due), just as not everything ought to be subject to majority rule.

56. See Dow, supra note 32, at 119-22. But see supra note 53.

Dow's picture of what we American constitutionalists believe, his picture of our dualistic constitutionalist ontology, is accurate.\textsuperscript{59} What is puzzling, though, is Dow's stated ground for complaint against the writings of Ackerman. The gravamen of the central charge that Dow brings against Ackerman is disregard of the higher-law ontology. In Ackerman's vocabulary, the charge would be written as: "Monistic Democracy![\textsuperscript{60}]" But Ackerman is, by his own avowal at any rate, decidedly no monist; neither is he a simple-electoral-majoritarian when it comes to higher lawmaking.\textsuperscript{61}

Let us consider at greater length what Ackerman might say in response to Dow. Here is a picture of what I take Dow to mean by the ontology of a higher law system:

\begin{center}
\textbf{Ultimate Rule of Recognition}
\end{center}

\begin{center}
\textbf{L A W}
\end{center}

\begin{center}
democracy\rightarrow\text{law}
\end{center}

The box called "LAW" is the Constitution, higher law, chartering the processes of ordinary democratic government and limiting the allowable legislative output of those processes. Inside the box we see ordinary-level democracy, thus chartered, legislating ordinary law, thus limited. This whole set-up is depicted here as an imaginative product, an emanation from a what-we-believe — cultural facts

\textsuperscript{58} For Dow's critical reading of Ackerman as locating "constitutional politics" in elections, see, for example, Dow, \textit{ supra} note 32, at 125, 125 n.36.
\textsuperscript{60} See \textit{Ackerman, supra} note 23, at 7-10.
\textsuperscript{61} Ackerman's view is "authoritarian" in a sense I have previously identified, see Michelman, \textit{ supra} note 59, at 1520-21: that is, the view requires that any "transformative" change in judicially cognizable constitutional meanings be licensed by an identifiable intervening event of higher lawmaking by the People. Authoritarianism in this sense is certainly not facially incompatible with democratic dualism, because it does not equate higher lawmaking by the People with ordinary or simple-majoritarian politics. Is there, however, some argument waiting to be made that this sort of authoritarianism would be normatively defensible (if at all) only on premises that also imply monistic democracy? If so, the argument is not broached by any contribution to Levinson's volume. (Possible beginnings of such an argument appear in Miriam Galston & William A. Galston, \textit{Reason, Consent, and the U.S. Constitution: Bruce Ackerman's We the People}, 104 \textit{ETHICS} 446, 465 (1994) (reviewing \textit{ACKERMAN, supra} note 23, and suggesting that rejection of rights foundationalism leaves no basis for attributing special value to deliberative as opposed to ordinary politics); Frederick Schauer, \textit{Deliberating About Deliberation}, 90 \textit{MICH. L. REV.} 1187, 1189-90 (1992) (same).
informing a “practice”62 (or, perhaps, a form of life) — that the artist has named, in good modern legal-positivist style, an ultimate rule of recognition.

Now, it would seem that what marks this drawing as a picture of, specifically, a higher law ontology is its differentiation of “LAW” from “law,” a differentiation without which there could be no depiction of LAW standing in a limiting relation to both “democracy” and the “law” that democracy makes. But then this next drawing, too, depicts a higher law ontology:

![Diagram](Ultimate Rule of Recognition)

This picture preserves the hierarchical differentiation of higher LAW from ordinary law, so it, too, portrays a higher-law system. The system and its ontology don’t stop being higher-law just because they add in a higher-level DEMOCRACY (the constitutional politics of Us the People to be distinguished from lower-case democracy, the ordinary politics of representative government), and attribute the higher status of the higher law to its being a product of DEMOCRACY. Whatever objection anyone may have to this picture, it can’t be that it “misunderstands the ontology of a higher law system.”

The drawings correspond to the first two of the three rival pictures of American constitutionalist ontology that Ackerman sets forth under the respective names of Rights Foundationalism, Dualist Democracy, and Monistic Democracy.63 Dualist Democrats stand arm in arm with Rights Foundationalists, together defending the ramparts of higher law ontology against the onslaughts of Monistic Democracy. Ackerman, of course, has declared loudly for Dualist Democracy.64 No doubt there is a major bone of contention between the two higher law camps — as Ackerman puts it, “the dualist’s Constitution is democratic first, rights-protecting sec-

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62. See Schauer, Amending the Presuppositions, supra note 3, at 150 (following the lead of A.W.B. Simpson).
63. See Ackerman, supra note 23, at 6-15.
64. See, e.g., Ackerman, supra note 10, at 65-66.
ond" whereas the Rights Foundationalist "reverses this priority"—but higher-lawism is not that bone. So what is Dow's beef with Ackerman?

Dow says it has something to do with Ackerman's equating the sovereign People with simple voting majorities, and with his equating higher lawmaking with voter behavior in ordinary elections. Perhaps it is true that anyone who makes those equations forfeits dualist credentials. The trouble, the puzzle, is that Ackerman—at least on the face of his writings—does not make such equations; he rejects them. True, he claims that constitutional amendment can occur "structurally," outside Article V as formalistically construed. But not only has he not said, he has vigorously denied, that any simple voting majority, or indeed any fraction of votes in any given election, can accomplish a structural amendment.

Let us take a closer look. Ackerman has put on the table a concrete proposal for an improved institutional arrangement for higher lawmaking. It calls for a concatenation of approvals from the President, supermajorities of both houses of Congress, and supermajorities of voters in two elections separated by a quadrennium. That looks like an expression of supermajoritarian thinking. (For that matter, even a rule that required no more than a concurrence of simple electoral majorities in two quadrennially separated elections would be a supermajoritarian rule, not a simple-majoritarian one.) The processes Ackerman has described of implicit or structural amendment consistently involve repeated elections, and, moreover, never elections alone but rather always elections serially compounded with other events involving all three branches in our separated-and-divided-powers system of government. These Ackermanian amendment schemata certainly seem to be of supermajoritarian design. Finally, Ackerman denies that any of the acting bodies, taken apart from the serial compounding of their actions, is the People. His argument has been that the Peo-

65. ACKERMAN, supra note 23, at 13.
66. See Dow, supra note 32, at 125 & n.36.
67. See, e.g., Ackerman, supra note 23, at 277-78.
68. See id. at 54-55.
69. When simple majorities of two overlapping but nonidentical constituencies are required in order to pass a resolution, a nay-saying minority can prevail over a yea-saying majority of the combined constituencies, even assuming that voters common to both constituencies vote the same way both times. For example: Constituency A consists of voters One through Eleven. Constituency B consists of voters One through Eight, Twelve, Thirteen, and Fourteen. One through Four vote "yes" both times. Five through Eight vote "no" both times. In A, Nine through Eleven vote yes. In B, Twelve and Thirteen vote no and Fourteen votes yes. The resolution fails in B, 6-5, and so it fails the repeated-elections test, even though it carried in A, 7-4. All told, 12 votes were cast in favor, 10 against. Counting voters rather than votes, 8 were in favor, 6 opposed. On any view, a minority ruled.
70. See, e.g., Ackerman, supra note 10, at 78-84.
ple, or rather the voice of the People, is what the serial compound of events may on occasion be allowed to represent.\(^7\) So again one asks: What is Dow's beef?

The most straightforward answer, if we can make it stick, is: The beef is just what the title of Dow's essay — "The Plain Meaning of Article V" — suggests and a good deal of his text addresses, namely, the conflict between Ackerman's nonformalist interpretative denial and Dow's formalist affirmation of the exclusivity of Article V. Given that what is mainly puzzling us is Dow's charge against Ackerman of "misunderstanding the ontology of a higher law system," the problem then is to understand how Dow thinks Ackerman's interpretative rejection of Article V exclusivity evinces such a misunderstanding.\(^7\) Ackerman denies that it does, and his denial has to be reckoned with. As Ackerman presents the case, rejection of Article V exclusivity is certainly not rejection of the Article's status as higher law. It is, rather, interpretation of the Article as nonexclusive.\(^7\) That interpretative account leaves exclusivity-rejection in perfect conceptual harmony with higher-lawism and dualism.

Yet there is much that is cogent to be said, too, on Dow's side of the debate. As Dow forcefully contends,\(^7\) the inevitably somewhat vaguely defined "structural" amendment processes endorsed by Ackerman can never be known with certainty to have been qualitatively "higher" than ordinary majoritarian politics, nor can the text of the resultant higher law ever be securely demarcated from interpretations of this (quasi) text.\(^7\) These consequences, along with the very tolerance for strongly nonformal interpretation that is required in order to credit Ackerman's historically based argument for the nonexclusive reading of Article V, may very well be thought to weaken in practice what higher law ontology requires in theory — that is, a clear and firm separation, and insulation, of higher law from both ordinary politics and ultraplastic interpretation.\(^7\)

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\(^7\) See, e.g., Ackerman, supra note 23, at 236, 260-62.

\(^7\) See Dow, supra note 32, at 130 (discussing Amar and Ackerman).

\(^7\) See Ackerman, supra note 10, at 71-74.

\(^7\) See Dow, supra note 32, at 122, 127, 131-36.

\(^7\) For example, Ackerman contends that a certain series of political events in the mid-1930s eventuated in a "New Deal" amendment to the Constitution. Ackerman, supra note 10, at 79-82. But because these events never focused on a finite prescriptive text, the meaning in application of this putative amendment, at the time of its supposed occurrence, remained to be interpolated by "synthetic" interpretative exertions of the Supreme Court. Levinson's spoof: "'Congress may pass any regulation it believes conducive to the national health, safety, or welfare so long as the conduct regulated has any link whatsoever with "interstate commerce,"'" Levinson, supra note 28, at 7-8, must be understood as initiating a commentator's redaction of the Court's interpretations (as of the time he wrote it) of a textless amendment, not a formulation of the shadow-text the Court has been interpreting.

\(^7\) Dow has not been alone in advertising these weaknesses in Ackerman's position. For a recent statement, see Tribe, supra note 22, at 1247, 1279-80, 1302.
These, however, must be classed as prudential objections to Ackerman’s proposals. They have not, yet, risen to the kind of conceptual or visionary level required to sustain a charge of failure on Ackerman’s part to grasp or respect the higher law ontology. Ackerman, after all, stoutly professes the dualist ontology against monist opposition. What is more, he admits the prudential objections to nonformal amendment, although he finds them outweighed, at least pending an improved Article V, by an opposite prudential concern, one that itself has dualist roots, namely, the risk of “false negatives” — cases of blockage of what is in fact a present higher-democratic will — arising from strict Article V formalism.77 Ackerman, in sum, can very plausibly claim that he and Dow are at one on the concept of a higher law system, and disagree only on its practical effectuation.

Would such a claim, however, be unassailable? Dow might attack it in the following way. Ackerman’s conceptions of the People and their higher lawmaking, Dow might well say, are majoritarian at heart, not supermajoritarian. As Ackerman himself explains his own view of what we believe, the proper test for any purported higher lawmaking is approbation of the People, understood as a true or “mobilized” majority of the populace: a majority of the populace, but counted by giving special weight to the fraction of them that in its address to the pending question is focused, informed, deliberate, public-spirited, and, finally, deeply persuaded.78 In this Ackermanian account, supermajoritarian procedures have no virtue as counter-majoritarian or minoritarian.79 To the contrary: the minoritarian bias of supermajoritarian processes is a vice, in Ackerman’s view, because it can result in “false-negative” obstruction of a present mobilized-majoritarian higher lawmaking will.80 If, despite this vice, Ackerman has us relying on supermajoritarian processes for higher lawmaking, that is because such processes are nevertheless, on balance, the best indicators we can devise for the presence of a simple majority of the properly requisite kind, a mobilized simple majority.

So the possibility is now before us that Dow’s beef with Ackerman is this: Ackerman portrays the true, deep spirit of American constitutionalism as promajoritarian. He does differentiate between higher and ordinary lawmaking processes, but the differentiation is strictly between processes that do and processes that do not

77. See AckerMAN, supra note 23, at 278-80; Ackerman, supra note 10, at 84-86.
79. Compare Dow, supra note 32, at 121 (“Implicit in this legal structure is protection of minority interests. That is, it may be 'just and good' to protect the minority even when the majority would not be so inclined.”).
80. See, e.g., Ackerman, supra note 23, at 280.
merit attribution of their product to true, or mobilized, *majorities*. When and only when such attributions are deemed merited, then, by Ackerman’s lights, the product is higher law, and it is, in such a case, higher law regardless of its consonance with minority rights or “justice and the good.” Insofar as Dow holds that this is contrary to what we believe — insofar as Dow holds that what we believe is that there are some normative contents that no simple majority, no matter how “mobilized” or qualitatively excellent, can validate as higher law — Dow does have a real beef with Ackerman. This, you may be thinking, would hardly be a surprising conclusion, given that the Dow we have just described is a Dow who reads as rights-foundationally inflected — as making the Constitution rights-protecting first and democratic only second — the American ultimate rule of recognition.

If you are thinking that, wait a minute. I do not know whether the “rights foundationalist” description I have just offered of Dow’s belief about what we believe would please Dow or displease him, but I think I do know how he could evade it if he wanted. He could say that, in his account of what we believe, there is no reference, ever, to any substantive limit on what *supermajorities* can validly legislate as higher law; the only validity requirements for higher lawmaking are for *supermajorities* as opposed to *simple* majorities. In return, we might ask Dow, as we did above, how we or anyone could possibly believe that there are considerations of minority rights, or of “the just and the good,” that a supermajority can over-ride even though a mere majority cannot.

Dow’s best rejoinder, I think, would run along lines suggested by Lawrence Sager, in a recent paper that Levinson might well consider for inclusion in his next edition. According to Sager’s argument, we believe our Constitution to be justice-seeking; we believe, furthermore, that it is not always clear exactly where justice lies, that disagreements about this can be deep, and that these deep disagreements cannot always be consensually resolved in real time in this world; we believe, too, that a person’s right to participate in the processes that determine such questions, in the course of determining the higher laws of her country, is itself a component of justice; and we believe, finally and in light of all the foregoing, that an aptly designed supermajoritarian process of higher lawmaking is the best justice-seeking device available to us.

81. Compare Dow, supra note 32, at 121.
82. See id.
83. See Sager, supra note 57.
84. Sager develops the reasons for this last belief along Rawlsian lines: The obduracy of the Constitution to amendment requires of members of the ratifying generation that they choose for the Constitution principles and provisions not just for themselves but for their children and their children’s children; while the geographic di-
This is a plausible set of beliefs, apparently capable of explaining how we might understand Dow as a supermajoritarian dualist constitutionalist, and yet as one who is neither, in Ackerman’s terms, a Rights Foundationalist (Dow would on this account be a supermajoritarian proceduralist) nor a Dualist Democrat (Dow would not be making the Constitution put democracy before rights-protection). Interestingly, then — although neither any contributor nor the impresario himself takes note of this fact — the Levinson papers reveal that Ackerman’s tripartite division of the territory, into Rights Foundationalist-Dualist Democrat-Democratic Monist, is not exhaustive.

Notice, now, that a Sagerite self-explanation by Dow, were he to adopt it, would come at a price, and the price would be exposure to an *ad hominem* retort from those who stand charged by him with mistakenly trying to reconcile or dissolve a tension — between majority rule and higher law — that we do better to work at sustaining. For Dow’s position, thus explained, would be the symmetrical converse of Ackerman’s. Just as Ackerman repairs to supermajoritarian process as a proxy for true majority rule, Dow would be repairing to supermajoritarian process as an approximation for the true law of justice and the good. If so, then just as it can fairly be said of Ackerman that he collapses the majority-rule-higher-law tension into its majority-rule pole, it could equally fairly be said of Dow that he collapses the tension into its higher-law pole.

I do not think, however, that this charge of tension destruction is aptly directed at either of the parties. I think we would be mistaken to direct it at Dow, just as, by the same token, I think he was mistaken to direct it at Ackerman. Both these authors are loyal dualists, upholding the tension of the higher law ontology against diversity demanded by Article V is a reasonable proxy for a broad diversity of circumstances among those who must join in endorsing changes in the text of the Constitution. The result is a structural tendency in popular constitutional decisionmaking towards the choice of general principles attractive and acceptable to persons in a variety of actual human circumstance, imagining their application over time to generations unborn in circumstances unknown.


85. That is, it would remain true for him that “supermajoritarianism, just like majority rule, implies that decisions are legitimated by their source, not their content.” Holmes & Sunstein, *supra* note 2, at 278.

86. Dow may or not believe that there is an objectively “true” law of justice out there, awaiting discovery. His text is silent on that question. But what it seems he must at a minimum believe, in order for his essay to have any motivation or point, is that Americans have reason to organize their collective political life as if such a thing existed. And that is enough to sustain the symmetry I allege between his position and Ackerman’s. For it is at least equally doubtful that Ackerman believes there really is any such thing as the People, to be spoken for by a “mobilized majority” of the franchised populace of the country. On both sides of the symmetry, then, it may be regulative ideas rather than recondite-but-in-principle-discoverable objects that are being approximated.
ideological pressures. It is just that the pressures they experience come from opposite ideological directions. It seems that behind the attraction of Ackerman and Dow, respectively, to super-majoritarian institutional devices there stand opposite ideological pulls — toward majoritarian democracy and the sovereignty of the people in Ackerman's case, toward justice and the sovereignty of the right in Dow's. This difference might, then, explain our two authors' differing levels of tolerance for dilutions of formality in higher lawmaking and higher-legal interpretation — their different weightings of the counterbalancing risks of false negatives and of weakened higher law ontology.

It is that methodological disagreement — that distance between their stances on the formalism axis — which is, in fact, the ostensible bone of contention between them. But it reflects, I am suggesting, something else: an interminable, unresolvable, duality of first principles in American political thought.

IV. FORM AND SUBSTANCE

Recall that, when speaking above of debates over the meaning of Article V, we used "procedural exclusivity" to name the view that Article V lays out the only procedural routes to valid amendments, while using "substantive exclusivity" to name the view that Article V contains the only prohibition against tampering with representation in the Senate — against the content of amendments.87 Near the end of Part II, we mapped out four positions in the exclusivity debates.88 I now want to assign labels to each of the four.

Those who support exclusivity in both dimensions, as a formal interpretation apparently would require, might conceivably be called either "consistent formalists" or "consistent exclusivists." Our exemplar for this position is John Vile, and I shall suggest that "consistent exclusivist" is the apter name for him. Those who, using nonformal arguments as they must, support nonexclusivity in both dimensions — Akhil Amar is our exemplar — are best called "consistent nonexclusivists." Those, like Bruce Ackerman, who straddle between procedural nonexclusivism and substantive exclusivism, are "democratic dualists." Finally, a straddler between procedural exclusivism and substantive nonexclusivism (such as Walter Murphy conceivably may be89) are "rights-based dualists." The choices of nomenclature call for explanation.

87. See supra text accompanying notes 29-35.
88. See id.
89. David Dow has expressly rejected substantive nonexclusivism. See supra note 44.
Start with the third position. The Ackermanian straddler strongly refuses formal interpretation on the procedural side. He cannot, then, convincingly defend his substantive-side exclusivism by appeal to independent values of interpretative formality. So how then, if you hold this straddle position, do you explain it, except on substantive-visionary, dualist-democratic grounds? It is right for Americans, you will have to say — either right absolutely or a correct interpretation of what Americans are bound to by past and present practice — that a mobilized majority of the People should be free to declare their higherlawmaking will whatever that may be, and that their higher-legislative declarations should outrank anything that ordinary politicians may try to legislate to the contrary. Against that all-subsuming popular-democratic value or commitment, you will have to say, no barriers stand whether procedural or substantive. Because that seems inescapably the defense of the position, "democratic dualist" seems the apt name for it.

Now consider the fourth position, the converse straddle. It, too, is indefensible on the basis of independent values of formality. Reasoning in parallel with our analysis of the third position, we easily find that what lies behind it can only be the idea — again, allegedly either absolutely right or a correct interpretation of the American way — of a prepolitical, predemocratic, higher law of justice and rights against which no political preference may be allowed to transgress. (Of course, these could be, or include, rights to live under a regime of collective self-government to which one has appropriate access.) "Rights-based dualism" is, therefore, an apt name for it.

The first position, it may seem, can sidestep the ideological issues in which the third and fourth are inevitably embroiled, by pressing on the distinct values of formality in legal interpretation, of letting "the rule of law" be "a law of rules." Whoever we think the higher lawgiver is, the first position's defenders may say, whatever we think is the ultimate sign of the higher law's validation, we should strive to construe all law, including this law, as straightforwardly and plainly as possible. Things simply work better that way: calculability is enabled, liberty is enhanced, accountability is clarified, everyday democracy is respected, and legal-rule appliers
are appropriately emboldened.² They may be dualist democrats who complain to you that the price of your choice for formalism, and hence for exclusivity in both dimensions, is suppression of democracy. Maybe a rights-based dualist will complain to you that the price is endangerment of rights. To either complaint you can answer: “Yes, but formality has its values, too, and in this matter I rank those the highest of all.” Your antagonists may think you misguided, they may call you single-minded or extremist, but your consistency seems beyond reproach. That would make you a "consistent formalist."

Perhaps the name fits Justice Scalia.³ But it does not seem apt for our exemplary both-sides exclusivist, Professor Vile. His view seems to be more substantive-visionary. It seems to depend in considerable part on a judgment that Article V, read straightforwardly, has settled matters — including working relations among the branches of government — pretty well on both the procedural and substantive dimensions.⁴ "Consistent exclusivist," then, would seem the fairer name for him.

An occupant of position two — Amar, for our purposes — is undoubtedly a consistent nonformalist so far as we can see. He must hold to nonformalist principles, at least in some degree, at least for this case: Law will be dysfunctional, people will not be free, lawmakers (Framers) frozen in anticipation of interpretative bean-counting will not be able to legislate as responsively and intelligently as they wish, unless interpreters take it upon themselves to treat the law as guided by ends and suffused with values that are not expressly enacted but are rather to be drawn from the context of enactment. But because it is in the nature of nonformalist interpretation to be somewhat open-ended and indeterminate, one can hardly suppose that an occupant of position two — a nonexclusivist on both the procedural and substantive dimensions — is there just because of nonformalist commitments. In fact, that seems prima facie unlikely. It seems he must be there, in part, because he holds to a notion or theory of rights and good government — again, either transcendentally or immanently derived — to the effect that contemporary, considerate majorities simply must be allowed to have their way. In that case, which I take to be Amar’s, the more

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² See id. John Vile’s exclusivist declarations seem generally sympathetic to values of legal formality, see Vile, supra note 29, at 197-98, 205-06, 211-12; VILE, supra note 37, at 86-87, but do not depend primarily on them. See infra note 94 and accompanying text.


⁴ See, e.g., Vile, supra note 29, at 198-200; VILE, supra note 37, at 86-87. Of course, an ostensible consistent formalist might be using formalist pretensions to mask precisely the same substantive-visionary belief.
expressive name for him is "consistent nonexclusivist," not "consistent nonformalist."95

The sum of this quick study, of evidence offered by Levinson's volume, is as follows: On the terrain of interpretative dispute over the meaning of the amendment rule in American constitutionalism, methodological variations — variations in positions along the formality axis — should presumptively be construed as secondary, not primary. They are unlikely to have been assumed independently of extra-methodological, ideological perceptions or concerns. John Vile's consistent exclusivism is not, in all probability, a result of his being a committed formalist (if he is), but rather appears to flow from at least partially independent judgments of fact and value. Akhil Amar's consistent nonexclusivism is almost certainly not a result of his being an enthusiastic nonformalist, which he does not, in fact, appear to be.96 As for the straddlers, their views obviously cannot finally depend on methodological factors alone.

V. CONSISTENT STRADDLES

"Entrenchment" of a piece of higher law means, let us say, that the piece cannot be repealed by any purported procedure of amendment. By analogy to Ackermanian "structural amendment," and with an eye to American "constitutional tradition and practice," one might contend in favor of "structural entrenchment" of certain components of constitutional-legal substance, certain "constitutive principles" or "fundamental rights." One might, that is, interpretatively — if necessarily nonformally — conclude that such entrenchments are contained in fact in the Constitution understood as codified projection of the American URR.97

Bruce Ackerman, apostle of structural-amendment theory, stands outspokenly opposed to structural-entrenchment theory.98 Were the People to use Article V to declare both an establishment of Christianity as our state religion and a prohibition of all other religious observance, Ackerman believes the American URR would require us all to regard this "deep transformation of our heritage" as nonetheless valid higher lawmaking.99 Suppose the People were then to add a further amendment making advocacy of repeal

95. Cf. Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 HARV. L. REV. 22, 123 (1992) (examining "the cycle of rules and standards" in the work of Supreme Court justices and concluding that the answer to the question whether it is "the virtues of form" or "the substance to be governed" that drives the choice is: "both").
96. See supra note 13, 34.
97. See JOHN RAWLS, POLITICAL LIBERALISM 239 (1993); Fleming, supra note 27, at 371-72; supra text accompanying notes 19-22.
98. This is just another way of describing Ackerman's "straddle" between procedural nonexclusivism and substantive exclusivism when it comes to interpreting Article V.
of the Christianity establishment a capital crime. The People would thus, in effect, by their obvious aim of blocking popular reconsideration of a piece of higher law, be "repeal[ing] dualist democracy itself." Even then, Ackerman would refuse to conclude that their higher lawmaking action could be deemed invalid. He is explicit, at least, that judges have no "general authority to protect the fundamental principles of dualist democracy against repudiation by the People."100

We have already noticed the "evident incongruity" between Ackerman's nonformal interpretative receptivity to structural amendment and the formalist tendency of his rhetoric rejecting structural entrenchment.101 It is jarring to find that someone who works so hard to defend a nonformal reading of Article V on the procedural side would come on as "an Article V positivist" — as James E. Fleming remarks — when the question on the table is substantive amendment limits.102 Does this rhetorical incongruity disclose a deeper inconsistency in Ackerman's position?

Initially, it does not seem so. Had Ackerman sought to trace his procedural argument back to a transcendent standard for what an amendment rule properly is or ought to be, then eyebrows might well rise in response to his relentless "positivism" when the question on the table is substantive limits on amendment. Ackerman, however, has not pursued such a route. Rather, he has developed his procedural claim out of an immanent account — an interpretation, however nonformal — of American constitutionalism as he claims it is and has been. In that sense, at least, Ackerman has been consistently positivist across the board.103

Surely, however, Fleming meant "positivist," as he applied the term to Ackerman's approach to the entrenchment question, not in our sense of immanentist but in the quite different sense of what we have been calling interpretative formalism.104 Fleming was con-

100. Id. at 15 n.t. It is possible, and it may sometimes be important, to distinguish the question of what judges are authorized to disregard from the question of what really is legally invalid. See, e.g., Fleming, supra note 27, at 374. Ackerman does not, however, appear to be making such a distinction in this passage.

In a subsequent writing, Ackerman allowed that "dualist theory" might, in the abstract, allow for absolute entrenchment of a narrow set of political participation rights, but he nevertheless held to his denial that American constitutionalism does so in the concrete. See Ackerman, supra note 13, at 531-33 (apparently maintaining that, according to the American URR, the Constitution contains no protection of participatory rights against "revocation by the People" and the People accordingly have the right "to commit suicide by stripping its members of their participatory rights").

101. Fleming, supra note 27, at 372; see supra text accompanying note 90.

102. Fleming, supra note 27, at 369.

103. See supra text accompanying notes 63-73.

104. The context makes this clear. To begin with, the idea of "structural entrenchment," to which Fleming is strongly sympathetic, is itself positivist in the sense of immanentist, so Fleming's worry cannot be the immanentist spirit of Ackerman's refusal of structural en-
trasting Ackerman's dogged interpretative resistance to structural entrenchment with the latter's ardent interpretative reach toward structural amendment. It is a distinct question whether Ackerman's embrace of the one is at bottom dissonant, in method or spirit or approach, with his rejection of the other.

It is true that Ackerman's negative conclusion about structural entrenchment roughly matches the conclusion a formal interpretation would reach. By no means, though, does it follow that Ackerman's own conclusion is formalist-inspired, because there is no reason to expect that formal and nonformal approaches to interpretative questions will usually yield different answers. Should Justice Scalia ever have occasion to pass on the notional possibility of an "unconstitutional constitutional amendment," we can imagine him possibly concluding against that possibility for reasons of interpretative method. It does not follow — rather, it seems unlikely — that when Professor Ackerman concludes against that same possibility, he also does so for methodological reasons.

Almost certainly, Ackerman's substantive-side conclusion comes from the same transtextual, substantive-value premise that underlies his structural amendment theory, namely, the strong idea of popular sovereignty that he finds nestled at the heart of the American URR. This premise directly supports the combined ideas of the Constitution's openness to higher-law procedural inventive-ness (contrary to the apparent formal meaning of Article V) and its openness to practically limitless change if the People so decree (consonant with the apparent formal meaning of Article V).105 So in these terms, too, Ackerman's straddle seems a model of consistency.

VI. BLOODLESS REVOLUTIONS

There is, however, another sort of seeming inconsistency, harder to dispel, worth talking about in Ackerman's oeuvre. To help us spot it clearly, we need to look at some implications of the "positivism" — the immanentism — in which, I have said, all of the contentions of Levinson's interlocutors are set.106

One of those interlocutors, David Dow, makes use of a distinction between the "right" and the "power" of someone to change the Constitution by ways not scripted in Article V.107 Dow is an Article

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105. See Fleming, supra note 27, at 369.
106. See supra note 13 and accompanying text.
107. See Dow, supra note 32, at 123.
V procedural exclusivist and formalist, and this distinction is evidently designed to let him grant the seemingly undeniable — that someone might succeed in altering drastically the Constitution’s meaning without formal Article V compliance\textsuperscript{108} — while continuing to insist that changes thus wrought are not according to law. In a similar way, Walter Murphy distinguishes the question of whether or how a people committed to constitutional democracy “can” exercise from their constitution the prerequisites of that form of government — guaranteed freedom of political speech, for example\textsuperscript{109} — from the question of whether or how they “may” do so.\textsuperscript{110}

These right-power, may-can usages may seem to stand in a puzzling relation to my claim that all of Levinson’s players, Dow and Murphy included, appear on stage in positivist — immanentist — dress.\textsuperscript{111} How can an immanentist-positivist speak of someone having the power but not the right to amend the Constitution in a certain way — by non-Article-V methods, or in violation of substantive limits? To amend the Constitution is certainly to exert an effect on what will be recognized as valid law. One might well ask, then, how Dow or Murphy can speak of anyone having the power but not the right to do \textit{that}, while using “right” (as I claim they both use that term) in the positivistic sense of validity-conferring within the terms of the regime that is regnant-in-fact.

The question is not unanswerable. What it means to speak in that way is this: In the event of a change in effective legal content wrought by power contrary to (positivistic, immanent) right, there will have occurred not a lawmaking within an extant regime but an alteration of the regime itself, a revolution in amendment’s cloth-

\textsuperscript{108} As, for example, Bruce Ackerman contends was lawfully done by a New Deal “structural amendment.” \textit{See Ackerman, supra} note 23, at 47-52, 119-20, 195, 268; Bruce Ackerman, \textit{The Storrs Lectures: Discovering the Constitution}, 93 \textit{Yale L.J.} 1013, 1051-57 (1984).

\textsuperscript{109} The example is not fanciful for those who believe that a “flag-desecration” amendment would be a fateful rollback of constitutionally guaranteed freedom of political speech. \textit{See, e.g., Jeff Rosen, Was the Flag Burning Amendment Unconstitutional?}, 100 \textit{Yale L.J.} 1073 (1991), \textit{described and critically discussed in Vile, supra} note 29, at 206-11.

\textsuperscript{110} \textit{See Murphy, supra} note 11, at 175. “[P]ower,” in Dow’s lexicon, is to “right” as “physics” is to “philosophy — and hence . . . law.” \textit{Dow, supra} note 32, at 136. Thus the term “right” signifies a precondition of legal validity, meaning cognizability as valid law, or as something freighted with whatever special obligatory force (on judicial officers, other officers, citizens at large) we may attribute to law as such. Similarly, Murphy’s “can” refers to “might” as opposed to “right,” whereas “may” refers to right itself, or to “validity” or “legitimacy.” \textit{See Murphy, supra} note 11, at 174-75.

\textsuperscript{111} For the evidence in Murphy’s case, see \textit{supra} note 13. As for Dow, there can be no doubt that his “right” and his “philosophy” are not that of a natural lawyer but rather that of a legal positivist — a right and a philosophy observed in an empirical social practice. Throughout Dow’s essay, they are said to be the stuff of “what we [in fact] believe.” \textit{See Dow, supra} note 32, at 119, 122, 124, 129, 139 n.91; \textit{Dow, Constitutional Midrash, supra} note 46, at 548, 551, 553.
ing. A sufficiently strong majority, sufficiently determined to conform the Constitution to its will, can undoubtedly do so in ways that appear to contravene the preexisting URR or "source of legitimacy." The regnant majority might work its will by purporting to amend the Constitution explicitly, or it might do so by influencing judges to find the Constitution already amended "structurally." In many such instances, Frederick Schauer's preferred account would be that the real event of legal change occurred in the background political culture sometime prior to the purported explicit or structural amendment or transformative judicial utterance. For it is Schauer's contention that "the Constitution necessarily can be amended by the . . . process of amending, socially and politically, [the] extraconstitutional foundations," the supporting cultural predispositions and presuppositions or URR on which it and its meanings rest. Other writers, such as Dow and Murphy, would apparently be more inclined to locate the event of legal change at the point where "power" is focally exercised, presumably the moment of enactment or recognition of a purported, surface amendment.

Schauer on the one hand, and Dow and Murphy on the other, all agree on a positivistic differentiation between the within and the beyond of an extant regime, where what's within carries ipso facto a special normative force for the inhabitants and yet the question of what is within and what beyond rests not with socially transcendent philosophies of right but with socially immanent facts of belief that could be other than what they are. Still there may be something significant at stake in the difference between locating regime-change events in the infra-legal or background culture, as Schauer would often do, and locating them on the surface of political-institutional action, as Dow and Murphy would more likely do. Regarded as background-cultural events, regime changes would often or usually appear to be morally indifferent events; they would simply be things that happened in cultures. Regime changes take on a more obvious moral freight when you regard them as acts of power, moments of political choice and action. Regime changes are then always, as a class, morally tainted occasions (although some of them

112. Murphy has made this explicit. See Murphy, supra note 11, at 174-75 (speaking of "systemic transformation" and "political transmutation"); Murphy, supra note 13, at 757; Rawls, supra note 97, at 239; Fleming, supra note 27, at 372.
114. See Schauer, Amending the Presuppositions, supra note 3, at 156; see also id. at 148 ("Constitutions are . . . subject to amendment as their supporting presuppositions are amended, even though it cannot be the case that the amendment of those supporting presuppositions can be thought of in anything other than . . . prelegal terms."); Dow, Constitutional Midrash, supra note 46, at 555 n.41 ("to talk of amending certain provisions is to concede that we are no longer the same culture that we once were").
might possibly also, all things considered, be morally excused or justified); they are then always occasions of acts in excess of (immanent) right, therefore occasions of presumption, of breach of faith with the fellowship of the country.

Bruce Ackerman as legal interpreter does not believe the American Constitution as it is entrenches participatory or any other human rights. Bruce Ackerman as political philosopher faults our Constitution in this respect; he holds a “liberal foundationalism” to be morally preferable to the democratic dualism that is, in fact as he sees it, the American regime. He says that he would like to see the regime-fact change from democratic dualist to rights foundationalist, and that he would in principle be willing, if he came to think — as he does not now — that the need for such an effort outweighed its dangers, to work at rebuilding our political language and practice from its very foundations.”

Is there any sense, any degree, in which it could be held wrong, even by a philosophically committed rights-foundationalist such as Ackerman himself, for Ackerman and other Americans to undertake such a course of radically transforming what they themselves hold to be the extant democratic-dualist foundations of America? Maybe so: How can one in good faith approach a People of allegedly democratic-dualist “political identity” with the proposition of throwing overboard their democratic-dualist regime in favor of an opposite, alien, rights-foundationalist kind? How can one coherently urge that People “self-consciously” to go ahead and “make clear” what must be false for them as long as they remain themselves: that they place justice ahead of democracy?

Consider, then, Schauer’s view. Perhaps it can alleviate the difficulty. If it is correct, then no one need “self-consciously amend” the Constitution in order to make rights foundationalism the new American way. It would suffice to reshape the political background culture to the point where it simply was true that structural entrenchment had come in from the cold and become a part of the American URR. Would it be in all respects morally permitted — or would it, to the contrary, be in any respect morally prohibited — to attempt fomentation of such an infra-legal revolution by going to

115. See Kent Greenawalt, Dualism and Its Status, 104 Ethics 480, 484 (1994) (speaking of attempts at constitutional change that might be morally justified even though ultra-legal).

116. Ackerman, supra note 13, at 535.

117. Id. at 533.

118. See ACKERMAN, supra note 23, at 204 (discussing the potential for revolutionary changes in “political identity”).
work deliberately on the background culture (as a radio talk show host, maybe)?

If prohibited, by what value or principle, if not the true moral superiority (which Ackerman rejects) of the way of unqualified popular sovereignty? If permitted, on the other hand, why hesitate from the effort? It is hard to see that it need be dangerous. What need one risk, other than loss in the United States of the sense of unqualified popular sovereignty itself, along with whatever moral value that carries (which by Ackerman's philosophical reckoning is less than the moral value carried by the way of rights foundationalism)? If these are fair questions, they point toward a residual hesitation on Ackerman's part to make rights precede democracy, even in philosophy. Or perhaps what they point to is a hesitation to make philosophy prior to democracy, or to citizenship. I do not say this hesitation is a fault.  

VII. THE THREAT OF INTERPRETATION

One so minded can make out an architectonic design in Responding to Imperfection. All told, the book contains thirteen chapters by thirteen authors — Levinson wrote two chapters, while Holmes and Sunstein co-authored one. The exact middle is Chapter Seven, but let that pass for a moment. On each side of it, we find a cluster of three chapters, each composing an interpretative debate about the exclusivity of Article V. In Chapters Four through Six, Professors Ackerman, Amar, and Dow contend over procedural exclusivity. In Chapters Eight through Ten, Professors Murphy, Vile, and Brandon — and also indirectly, through Brandon's accounts of their views, Professors Barber and Harris — contend over substantive exclusivity.

These two debate clusters make up the book's foreground action, its ostensible main events. Their spirit and content are dominantly and unmistakably prescriptive or "normative." That is, they work at persuading us toward the authors' own conclusions about how we as citizens ought to conceive of the business of ordering our constitutional-legal affairs, how we ought and ought not practically to go about that business and permit our public office-

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holders to go about it, and how we ought to respond to claims (or
denials) of re-orderings coming from officeholders or other citizens.

Smack in the middle of the book, right between the two three-
chapter clusters of normative debate, stands Chapter Seven, in
which Frederick Schauer proposes that constitutions change when
their culturally embedded attitudinal and perceptual underpinnings
change beneath them. Schauer's chapter is descriptive and analytic,
not prescriptive; it offers a view about how things work, not about
what is to be done or not done. The same is largely true of the
book's chapters that flank the prescriptive debates on their outer
sides.\textsuperscript{121} In Chapters Two and Three, Levinson\textsuperscript{122} and Stephen M.
Griffin\textsuperscript{123} raise and press a descriptive point, distinct from
Schauer's, about the possibly modest role of official "amendment"
evants in the real-life history of change in constitutional-legal
meanings, and the point they raise is echoed on the other flank, in
Chapters Eleven through Thirteen, by Donald S. Lutz,\textsuperscript{124} Stephen
Holmes and Cass R. Sunstein,\textsuperscript{125} and Noam J. Zohar.\textsuperscript{126}

For Schauer, the interesting alternative mode of constitutional
change is subterranean shift in the cultural ground. For Levinson
and Griffin, by contrast, the interesting alternative mode is surface-
textual, not infra-textual. It consists of official interpretations of
the expressly given text, whether done explicitly by judges deciding
cases (Levinson), or implicitly by legislative and executive office-
holders enacting and enforcing statutes (Griffin), in either case with
the kind of eventual acceptance from the other branches and the
public that turns the interpreted meaning into effective law. The
same descriptive point recurs dramatically at the book's end, where
Zohar describes how midrashic commentary achieves — and not
only achieves but celebrates as divinely intended — radical altera-
tion by human work of the evident meaning of a divinely revealed
legal text.\textsuperscript{127}

\textsuperscript{121} Here we disregard chapter 1, Levinson's general introduction. Levinson, supra note
28.

\textsuperscript{122} Sanford Levinson, How Many Times Has the United States Constitution Been
Amended? (A) \textsuperscript{<} 26; (B) 26; (C) 27; (D) \textsuperscript{>}
27: Accounting for Constitutional Change, in IMPE
PERFECTION 13.

\textsuperscript{123} See Griffin, supra note 17.

\textsuperscript{124} Lutz, supra note 2.

\textsuperscript{125} Holmes & Sunstein, supra note 2.

\textsuperscript{126} Zohar, supra note 2.

\textsuperscript{127} The point recurs less dramatically when Lutz and Holmes-Sunstein remind us of the
equilibrium or trade-off relations among various routes to constitutional-legal change. These
routes include "amendment" schemata made more or less procedurally demanding to ensure
broad and deep popular backing for an enacted change, activist judicial interpretation of
enacted constitutional texts, and a wide berth to ordinary lawmakers to change constitutio-
nal-legal meanings, either by interpretation or by textual revision using relatively easy
procedures. See Holmes & Sunstein, supra note 2, at 279, 295, 300-01; Lutz, supra note 2, at
245-46.
Are Levinson and Griffin to be understood, then, as lending support to the prescriptive claims of Ackerman and Amar for the virtues and benefits of amendment procedures outside of Article V? That is not how they speak in these pages. Neither Levinson nor Griffin makes any claim here that the People's voice is heard or represented in nearly every instance of effective constitutional change wrought by officials' interpretative initiatives. More generally, Levinson's and Griffin's nonexclusiveisms are descriptively, not prescriptively, presented; they speak of what happens, not of what ought to happen.

So what we have, in sum, is this: at the book's exact center, a descriptive-analytical proposition—call it "realist"—about how higher legal meaning can change out of sight of official higher lawmaking; surrounding this, as what appear to be the book's featured events, twin clusters of normative-interpretative debate about how we are meant to go about official higher lawmaking, proceeding without reference to the realist proposition; and as prelude and postlude to those clusters, chapters raising and reraising another troublesome descriptive-analytic point that the normative debaters keep mainly out of sight. This structure cannot be accidental.

Let us return to the normative debates. Although they do not and cannot stay clear of methodological and analytical issues—of interpretative method and the sources of law—we have seen how they turn mainly on ideas about the substantive values that a constitutionalist or higher-law system is meant to serve. The responses they make to interpretative questions about the procedural and substantive exclusivity of Article V are suffused with differing views about the primarily intended good of a dualist legal structure. Is it justice, ensuring that those who govern on a daily basis do so in a manner consistent with human rights? Is it democracy, ensuring that the People, who cannot remain in constant session, have the ultimate word regarding the basic terms on which they live together in a legally ordered world? That, for the most part, is the choice we are given.128

What we have before us, then, are prescriptive debates over constitutional amendment rules,129 responding to regulative ideas of justice and democracy. Debates of this character rest on certain epistemological and sociological presuppositions. The necessary epistemological premises—regarding what inhabitants of a constitutional system are capable of knowing or discerning—would

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128. We need not, for present purposes, resolve whether ideals of justice and democracy are or are not best conceived as standing in any degree in a relation of polar opposition. Nothing in what follows depends on whether these are conceived as two separate ideals or as two facets of one ideal.

129. See supra text accompanying notes 23-28.
seem to be at least two in number. The first is that we can securely 
distinguish events on the level of "routine legal change," occurring 
by processes and within bounds set by extant higher law, from 
events on the level of change in the higher law itself. If we could 
not, we could never know that the dictates ensconced in the higher 
law were really ruling over the daily affairs of government. So 
whether these are regarded as dictates of the People or of justice, 
we could never know that our dualist practice was serving its sup-
posed ideal objective.

This first epistemic requirement of normative dualism may not 
seem terribly threatening by itself. It simply restates, after all, in a 
general form, the question of "constitutionality" (of some piece of 
ordinary-governmental activity) that we deal with all the time in the 
practice and teaching of constitutional law. But the first epistemic 
requirement leads to the second, and the second seems to pose a 
clear and present danger to the normative amendment-rule project.

The second epistemic presupposition of the normative debates 
is that we can, at the higher-legal level, distinguish an innovation or 
change in the law from an interpretation or re-interpretation of ex-
isting law, law that is not itself thereby made or changed. The 
normative debates all take it that amendment rules matter because 
of their bearing on how closely the legislative product issuing from 
them — the higher law — approximates the true dictates of justice 
or the People, it being the whole point of a dualist system to ensure 
that dictates from these sources effectively constrain everyday gov-
ernment. The debates, then, are so much whistling in the wind un-
less the express higher legislative product that issues from the 
amendment rules whatever they be — the higher law containing 
those dictates — is securely demarcated from interpretations of it 
at the point of concrete application. Dictates of justice or the Peo-
ple may well leave some room for interpretative applicational vari-
ance. But unless the law remains a clearly visible constant beneath 
its interpretative overlay, the dualist project (as we have thus far 
conceived it) is defeated.

The sociological presupposition of the normative amendment-
rule project is somewhat similarly derived. It is that we can be con-
fident that higher legal content remains unchanged as long as there 
is no express change in the visible surface law or its interpretation. 
The more fully and truly it were the case that higher-legal meaning 
undergoes alteration by nonvisible, nonregulable processes such as 
cultural shift or drift, the less point there would be in pretending 
either that we are ruled by dictates of justice or the People con-
tained in express higher-law formulations or, therefore, that the exact shape of our official amendment rules matters very much.

Here, then, would be one way of understanding and explaining the arrangement of the chapters in Responding to Imperfection: On the wings and at upstage center, we see the presuppositions of the foregrounded normative amendment-rule debates under serious attack. Schauer at the center rear is cutting ground from under the sociological presupposition, while Levinson and Griffin on one wing and Lutz and Zohar on the other are, in their different ways, casting doubt on the second, crucial epistemic presupposition.

A part of Griffin’s message, reinforced by Lutz and Holmes-Sunstein as already described, is that pressure to maintain the semblance of a transpolitical higher law — a higher law that regulates rather than reflects ordinary politics — forces needed major constitutional change into the mold of on-going implicit interpretation by government officeholders. Levinson simultaneously contends that we lack and can never obtain the means by which to demonstrate that a given ruling or other action, taken in the higher law’s name, is “really” interpretation as opposed to innovation. Much as we need the amendment-interpretation distinction, he says, we cannot have it. It is a “nested opposition,” a “basic notion[] that structure[s] our thought even as [it is] constantly subject to conceptual revision and ‘deconstructive’ analysis.”

VIII. Conclusion

It does not follow, nor do I believe Levinson is trying to tell us, that normative amendment-rule debates are aimlessly delusive. From that inference there seem to be at least two routes of escape. One is to posit a point or objective for dualist constitutionalism that doesn’t depend on higher-legal meanings not changing subterraneously, or on them not changing in the guise of interpretation from which the law “itself” cannot be securely distinguished. For example, the point might simply be to do what we can to protect ourselves against utterly unrestrained, capricious, or despotic

132. See supra text accompanying notes 123-25.
133. See Griffin, supra note 17, at 42-43.
134. Levinson supra note 2, at 33 (quoting J.M. Balkin, Nested Oppositions, 99 Yale L.J. 1669 (1990)).
135. Id.
136. See supra text accompanying note 127.
137. It is clear not only from his contributions to this volume, but also from some of his other work, that Levinson takes the normative debates very seriously. See, e.g., Sanford Levinson, The Political Implications of the Amending Clause (unpublished manuscript, on file with the author).
government\textsuperscript{138} (without, that is, insisting that the constraints coincide with express dictates of moral reason or of the People). Maintaining the sociopolitical forms of dualist constitutionalism might well serve that objective, regardless of whether higher-law meanings are or can be secured against infiltrations from either muscular interpreters or the background political culture. If so, then how well the objective is served could well depend, in part, on an apt choice of express amendment rules.\textsuperscript{139}

The same holds for a society's conceivable objective, attributed by some to constitutionalist practice, to commit the governable aspects of its life to the governance of the word, "to constitute itself politically by reference to a text."\textsuperscript{140} While such an undertaking doubtless requires that attributions of constitutional-legal meanings satisfy, from occasion to occasion, certain experiential demands of comprehensibility and coherence,\textsuperscript{141} there is no reason why this satisfaction cannot — indeed, there seems every reason why it would have to — rest in part on a correspondence, achieved in part by interpretation, of law with prelegal form-of-life.\textsuperscript{142} An express amendment rule would doubtless be required to sustain such a venture in living-by-logos, and it could be more or less aptly designed to lead to better coherence.\textsuperscript{143}

Levinson's collection supplies us with these possible ways to salvage normative concern with amendment rules from the critiques coming from the wings and center background of his conversational stage. Yet I don't take them to be his way. His, I gather, is more quizzical and relaxed, and at the same time more unabashedly attached to the classical substantive constitutionalist values of justice and democracy. It is, simply, that we live by ideals and, concomitantly, make do with counterfactuals. Does a justice-and-democracy driven constitutional ideal presuppose a perceptual ability (to tell apart amendments and interpretations) that we cannot have? So be it:

\textquoteleft[R]egardless of our inability to provide an allegedly firm, and formalistic, conceptual grounding of our terms, we nonetheless find that we make our way through the world — or more accurately, through the

\begin{itemize}
\item[138.] See, e.g., Griffin, \textit{supra} note 17, at 39.
\item[139.] This may pretty closely describe the view of Holmes and Sunstein. \textit{See} Holmes & Sunstein, \textit{supra} note 2, at 304.
\item[140.] Brandon, \textit{supra} note 5, at 226 (describing the view of William Harris II); \textit{id.} at 229 (asserting the same in his own voice).
\item[141.] \textit{See id.} at 230-31.
\item[143.] Cf. Margaret Jane Radin, \textit{The Pragmatist and the Feminist}, 63 S. Cal. L. Rev. 1699, 1710-11 (1990) (discussing "bad coherence").
\end{itemize}
forms of life that make up our worlds — by recurrence to basic no-
tions that we simply seem unable to leave behind.\textsuperscript{144}

Of course, that is only my reading, my interpretation. But what else did you have any immanent right to expect?

\textsuperscript{144} Levinson, \textit{supra} note 122, at 33.