Michigan Law Review

Volume 97 | Issue 6

1999

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Recommended Citation

Daniel J. Hulsebosch, *Civics 2000: Process Constitutionalism at Yale*, 97 MICH. L. REV. 1520 (1999).
Available at: <https://repository.law.umich.edu/mlr/vol97/iss6/15>

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CIVICS 2000: PROCESS CONSTITUTIONALISM AT YALE

*Daniel J. Hulsebosch**

WE THE PEOPLE: TRANSFORMATIONS. By *Bruce Ackerman*. Cambridge: Harvard University Press. 1998. Pp. xi, 515. \$29.95.

THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION. By *Akhil Reed Amar*. New Haven: Yale University Press. 1998. Pp. xv, 441. \$30.

One or another form of historical fidelity has long been in the repertoire of constitutional interpretation, and during the last two decades conservative jurists have searched for the "original intent" of various clauses. Increasingly, however, it is liberal law professors who are turning to history to make sense of American constitutionalism. What they find there is not a document listing eternal rights or duties but rather a multidimensional structure of government, captured as much in practice as on paper, that has metamorphosed over time. It seems we have, in that familiar phrase, a living Constitution. But interest is shifting from noun to adjective: how, and why, has the Constitution changed?

Two recent explorations are Bruce Ackerman's *We the People: Transformations*,¹ the second volume of his epic trilogy of American constitutional history,² and Akhil Reed Amar's *The Bill of Rights: Creation and Reconstruction*,³ also part of a larger project.⁴ Each of these well-written books is a rich contribution to the historical and theoretical literature of the Constitution and deserves a large readership. Although they differ in style and substance, both convey the same main point: the federal Constitution is premised on popular sovereignty, made by the People and for the People.

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1. Bruce Ackerman is Sterling Professor of Law and Political Science, Yale University.

2. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (Volume 1 of the trilogy) [hereinafter *FOUNDATIONS*]. Volume 3, *We the People: Interpretations*, is still to come.

3. Akhil Amar is Southmayd Professor of Law, Yale University.

4. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997); AKHIL REED AMAR & ALAN HIRSCH, *FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS* (1998).

The People have legitimately altered the document over the past two centuries, through the Article V⁵ amendment process and otherwise; it has also been interpreted, rightly and wrongly, along the way. In short, there has been and will continue to be good and bad constitutional change. Professors Ackerman and Amar try to distinguish one from the other and offer guidance on how to make better choices in the future. Though they occasionally criticize particular alterations and doctrines on their merits,⁶ the focus is on how such changes are made. They are more concerned with the procedures of constitutional changes than their consequences — though they imply, as Ackerman has written before, that “form [i]s substance.”⁷ Together, their books signal the rise of a new strand of constitutional studies, what might be called constitutional process. Ackerman and Amar are at the center of this movement but are not alone.⁸ It is a third-generation descendant of the legal process school, which Amar has elsewhere described in this “rough-and-ready” way:

The legal process school focuses primary attention on who is, or ought, to make a given legal decision, and how that decision is, or ought, to be made. Is, or ought, a particular legal question to be resolved by the federal or state government? By courts, legislatures, or executive agencies? If by courts, at the trial level or by appellate tribunals? If at trial, by judges or juries? Subject to what standard of appellate review? And so on. The question what is or ought to be the substantive law governing citizen behavior in a given area is no longer the sole, or even the dominant, object of legal analysis. Rather, legal process analysis illuminates how substantive norms governing primary conduct shape, and are in turn shaped by, organizational structure and procedural rules.⁹

5. 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

U.S. CONST. art. V.

6. More so Amar than Ackerman.

7. BRUCE A. ACKERMAN, *RECONSTRUCTING AMERICAN LAW*, v (1984) [hereinafter *RECONSTRUCTING*].

8. See, e.g., Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119 (1995); cf. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1246 (1995) (referring to recent work of Ackerman and Amar and stating that “I am tempted to note the emergence of a distinctive new ‘Yale school’ of constitutional interpretation”).

9. Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 691 (1989) (reviewing PAUL M. BATOR ET AL., *HART AND WESCHLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (3d ed, 1988)); see also NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 205-99 (1995); William N. Eskridge Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* li-cxxvii (1994); G. Edward

Ackerman and Amar have inherited the earlier school's keen sense of institutional competence. They are, however, more openly normative than the mid-century legal process adherents.¹⁰ Their efforts — in truth, too inchoate to label a school — are similarly distinguishable from second-generation democratic process theory (best represented in the work of John Hart Ely¹¹) because they hold that some substantive values are immune from ordinary democratic process and can only be changed by a complex constitutional process. Nonetheless, they concentrate on the means of change rather than the political values that actually change. The examples they give of the latter they find coherent and unproblematic: the Founding institutionalized popular sovereignty, the notion that the people could govern themselves; Reconstruction enshrined racial equality; and (for Ackerman) the New Deal legitimated the welfare state.

Ackerman and Amar have written large, dense books. No review can do justice to the intricate arguments of either, let alone both. This review aims only to sketch the historical accounts in each book, explore the premise of popular sovereignty in both, and suggest what this turn to history indicates about American constitutionalism.

I. MAPPING CONSTITUTIONAL TRANSFORMATIONS

Ackerman and Amar know the historiography of the federal Constitution well. They delve into the primary sources of certain transformative periods and offer many fresh insights about American law and history. Their research substantially overlaps. Both discuss the Founding of the Constitution in the 1780s (Ackerman pp. 32-95; Amar pp. 3-133) and Reconstruction following the Civil War (Ackerman pp. 99-252; Amar pp. 166-294). To these, Ackerman adds a third transformation: the New Deal (pp. 255-382). This is not the only difference between them. Ackerman's perspective is broader, encompassing the whole expanse of United States constitutional development. In contrast, Amar confines himself to the (still capacious) story of the Bill of Rights, its origins and revision in the 1860s. Moreover, Amar is more of a textualist, doggedly pointing out the repetition of key words, here in the main body of the Constitution, there in the amendments, once again in

White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973).

10. For Ackerman's critique of the legal process school, see RECONSTRUCTING, *supra* note 7, at 38-42.

11. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

The Federalist Papers, and so on.¹² As historians, both are more hedgehog than fox;¹³ the big truth they know is popular sovereignty.¹⁴ But Amar is more impressive when playing the fox. Tight and full of close readings, his book might affect constitutional law on the ground, perhaps footnoted beneath knotty analyses in the *United States Reports*. Ackerman is after bigger game: the constitutional consciousness of the legal community.

A. Ackerman's High Road to Constitutional History

"Th[e] focus upon successful moments of mobilized popular renewal," writes Ackerman early in *Transformations*, "distinguishes the American Constitution from most others in the modern world" (p. 5). His fundamental claim, argued now for fifteen years,¹⁵ is that the United States is a "dualistic democracy," meaning that its constitutional history follows two tracks: "normal politics" and "constitutional politics." On the first track runs most of American political history. Ordinarily, government is administered by the People's representatives, voted in and tossed out of office by a skeptical public, who devote more time to private than public concerns. This is as it should be, thinks Ackerman, for there is more to life than government. But then there are extraordinary moments when the People think seriously about their Constitution. At these times of constitutional politics, they may set aside the textual formalities of amendment and redefine the parameters of normal politics or "normal lawmaking."¹⁶

In his trilogy, Ackerman approaches the three moments — Founding, Reconstruction, and New Deal — from three angles. In the first volume, *Foundations*, Ackerman established his dualist framework, sketched his three-moment scheme of constitutional history, and declared his desire to reconstruct for "the caste of American lawyers and judges . . . something I will call a professional narrative, a story describing how the American people got from the Founding in 1787 to the Bicentennial of yesterday."¹⁷ In *Transformations*, he fleshes out the historical moments and traces

12. See, e.g., Amar at 27 (connecting use of "the People" in the Constitution, First Amendment, and in the ratification debates). Amar labels as "intratextuality" such "textual cross-references to the original Constitution and Bill" and relationships between the Bill and other key English and American documents. P. 296.

13. For this distinction, see ISALAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY* (1953).

14. See, e.g., Ackerman at 5, 13-14, 88, 92; Amar at xiii (arguing that "[t]he essence of the Bill of Rights was more structural than not, more majoritarian than counter").

15. He outlined the project in Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

16. Ackerman summarizes his "dualist" theory in *TRANSFORMATIONS*, pp. 5-6, but for a fuller treatment, see generally *FOUNDATIONS*, *supra* note 2.

17. *FOUNDATIONS*, *supra* note 2, at 4.

the different procedures used during each one to effect constitutional change. In the forthcoming third, *Interpretations*, he promises to examine how the Supreme Court has made sense of, or "synthesized," the People's serial transformations.

As has been pointed out,¹⁸ Ackerman's division of constitutional history into static periods punctuated by discontinuous change reflects the influence of paradigm theory.¹⁹ The dualism of normal and constitutional politics also artfully synthesizes the liberal and republican interpretations of American history, drawing on both while avoiding the sterile debate of when (or if) republicanism gave way to liberalism.²⁰ Ackerman's "liberal republicanism"²¹ has it both ways. The default mode of American constitutionalism is liberal, meaning that individuals are usually content to leave government to the governors and tend to their private interests. At crisis moments, however, visionary leaders initiate a dialogue about constitutional change and the People become republican citizens.

As has also been pointed out,²² Ackerman's logic suggests Hegel's. His People move through thesis and antithesis toward a new synthesis of freedom, then the process begins anew. The dialectic is everywhere in Ackerman's books, and the personification of political phenomena comes to him reflexively. There are "Madison & Co." (the Founding) (p. 33), "Bingham & Co." (Reconstruction), and "Roosevelt & Co." (the New Deal) (p. 260), in addition to "the People."²³ There is also an undercurrent of fatalism in this otherwise exuberant tale: time and again whatever happened is seen to have happened necessarily. But these are loose methodological connections, for Ackerman avoids reliance on any

18. See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1522-23 (1988).

19. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). In an earlier book, Ackerman acknowledged the influence of Kuhn on his own structure of thought. See *RECONSTRUCTING*, *supra* note 7, at 60 n.16.

20. See Daniel T. Rogers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992).

21. The term is used in *FOUNDATIONS*, *supra* note 2, at 29. See also Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988). Similarly, though at a higher level of historical generality, Ackerman claimed in his first volume that the Constitution was a "creative synthesis" of the Greek tradition of "political involvement" and the "Christian suspicion of claims of secular community . . . and [belief] that the secular state's coercive authority represents the supreme threat to the highest human values." *FOUNDATIONS*, *supra* note 2, at 321-22.

22. See Drucilla L. Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135, 1217 (1988).

23. In *Transformations*, Ackerman answers earlier charges of anthropomorphism by stating that "'the People' is not the name of a superhuman being, but the name of an extended process of interaction between political elites and ordinary citizens." P. 187. Cf. p. 162 ("I will argue that it was *the People themselves* who took this decision away from competing political elites in Washington and decided it on their own responsibility. It is this decision of a mobilized People, and not any textual formalism, that lies at the foundation of the Fourteenth Amendment.").

substantive body of political philosophy. So Hegel goes unnamed in these books, as does, save one negative reference, Rousseau.²⁴ A more doctrinaire exponent of the People's political will might have given them prominent roles (whether protagonists or antagonists). Instead, even the supporting European cast of Edmund Burke and Hannah Arendt in *Foundations*²⁵ has moved offstage. The spotlight in *Transformations* is trained on American political leaders, who initiate change, and the People, who respond.

Along with the distinction between normal and constitutional politics goes another: that between government and the People.²⁶ This is a variation on the dichotomy, much older than paradigm theory, the republican revival, and Hegelian logic, between a specific governing administration and a constitution. Historically, it was not always accepted; indeed, in the early modern English world it had an oppositional quality about it. In the seventeenth century, Edward Coke, John Davies, Matthew Hale, and other common law jurists invoked an "ancient constitution" to challenge royal power.²⁷ Similar was the contrast between a government of laws and one of men, articulated pithily during the Interregnum by English commonwealthman James Harrington²⁸ and circulated throughout the Atlantic world by Montesquieu in the eighteenth century, becoming commonplace in America.²⁹ But perhaps the clearest distinction between "the constitution" and "government" came in the early eighteenth century from a former Jacobite and disgruntled Tory, Henry St. John, Viscount Bolingbroke.³⁰ In his view, governments

24. See *FOUNDATIONS*, *supra* note 2, at 5. As for Hegel, Ackerman laments the turn among early twentieth-century historians to Marx and social explanations of American history, then celebrates the reclamation of the political by Hannah Arendt and the republican school of historians, *see id.* at 200-209 (Chapter Eight, "The Lost Revolution"), which might be interpreted allegorically as a recovery of the idealist thrust (though hardly the specific political program) of Hegel's philosophy. See G.W.F. HEGEL, *THE PHILOSOPHY OF HISTORY* (James Sibree trans., Dover Publications 1956) (1837).

25. See *FOUNDATIONS*, *supra* note 2, at 17-24, 204-12.

26. See also *id.* at 6-7 (arguing that a "dualist Constitution" distinguishes between decisions made by the American people and decisions made by their government).

27. See J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 30-69 (rev. ed. 1987).

28. See James Harrington, *The Commonwealth of Oceana*, in *THE OCEANA AND OTHER WORKS OF JAMES HARRINGTON, ESQ.* 33 (1737) (1652). On the commonwealthmen, see CAROLINE ROBBINS, *THE EIGHTEENTH-CENTURY COMMONWEALTHMAN: STUDIES IN THE TRANSMISSION, DEVELOPMENT AND CIRCUMSTANCE OF ENGLISH LIBERAL THOUGHT FROM THE RESTORATION OF CHARLES II UNTIL THE WAR WITH THE THIRTEEN COLONIES* (1959).

29. See MONTESQUIEU, *THE SPIRIT OF LAWS* (Anne M. Cohler et al. trans., Cambridge University Press 1989) (1748); *THE FEDERALIST* No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

30. On Bolingbroke, compare ISAAC KRAMNICK, *BOLINGBROKE AND HIS CIRCLE: THE POLITICS OF NOSTALGIA IN THE AGE OF WALPOLE* 4 (1968) (arguing that Bolingbroke and other Augustan thinkers "saw an aristocratic social and political order being undermined by money and new financial institutions and they didn't like it"), with Quentin Skinner, *The Principle and Practice of Opposition: The Case of Bolingbroke Versus Walpole*, in *HISTORI-*

came and went, some good and some bad, depending on whether their ministers adhered to the transcendent English constitution. This Bolingbroke defined as

that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed. . . . In a word . . . constitution is the rule by which our princes ought to govern at all times; government is that by which they actually do govern at any particular time.³¹

The distinction provided leverage to criticize the Whig administration of Robert Walpole while maintaining a posture of political loyalty. Ackerman's point is that the two are not exclusive. His "higher lawmaking" (p. 6) comes not from the fixed principles of reason or other fundamental law tradition; nor is it ancient law. Grounded on custom and consent, it is majoritarian, but of a special, dualist kind.³² That is, the Constitution is not merely the aggregate preferences of "the winners of the last general election," what Ackerman in *Foundations* calls "monist democracy."³³ Instead, it is based on a procedurally complex and restrained majoritarianism — process constitutionalism.

Ackerman's new book is long (420 pages, plus almost a thousand endnotes) and took many years to write. He remarks with disarming candor in his preface that

Foundations made many controversial historical claims, and I was obliged to substantiate them if I hoped to be taken seriously. I returned to my historical manuscripts with trepidation. Rereading them, I was impressed with the number of relevant investigations that I had not even attempted. Was I cut out for this job? [p. ix]

Once he leaves the roman numbered pages and enters the arabic, Ackerman regains confidence, as he should, for *Transformations* goes far toward making good on his earlier promises. He is an effective writer, though (deliberately, it seems) not an elegant one. The reader must work through five-part moments, incessant italics, and weighty capitalized nouns. Then come arrow diagrams, cross-self-references, and exhortations to go "deeper." Finally, however, it all begins to flow and it matters not where you dive in, for the whole thing circles around, making the same points at new levels of generality. One volume blends into the other, themes of even ear-

CAL PERSPECTIVES: STUDIES IN ENGLISH THOUGHT AND SOCIETY 93, 126 (Neil McKendrick ed., 1974) ("Bolingbroke simply wanted to remind his Whig enemies . . . of the views held by the accredited theorists of their own party about the concept of political liberty, in order to be able to make use of the immensely strong resonances of this tradition of thought to further his own wholly cynical and self-interested political ends.").

31. 2 BOLINGBROKE, *A Dissertation on Parties*, in THE WORKS OF LORD BOLINGBROKE 88-89 (1841).

32. See FOUNDATIONS, *supra* note 2, at 3-33.

33. *Id.* at 7-10.

lier works resurface, and chits are signed for Volume 3. His goal is to demonstrate that the American People, when amending the Constitution, have not always followed the "hypertextualist"³⁴ requirements of Article V; yet they have followed a formula that is similar, and paradoxically more demanding, than Article V. "For Americans, law-breaking does not necessarily imply lawlessness. It is sometimes seen as a civic gesture indicating high seriousness."³⁵ Their change has been "unconventional" (p. 82) but procedurally regular. They may transform political aspiration into higher law by a variety of institutional means, so long as they engage in a constitutional dialogue. Vocabulary and accent change; the dialogic grammar does not.

This structuralist formula for constitutional change has five stages: signal, proposal, trigger, ratification, and consolidation (pp. 39-40). Because this formula was fundamental to the Founding of the Constitution, it is intrinsic to it, not an interpretive outgrowth.³⁶ The process has recurred successfully twice, during Reconstruction and the New Deal. Ackerman tries to defuse the criticism that the claim of recurrence is "a tell-tale sign of a grim determination to impose my fivefold schema on constitutional history without serious attention to the particularities of particular cases" by asserting that "[t]he five-phase pattern recurs because the problems recur" (p. 67). Rather than a single instance, a moment is a contractual process, a series of repeated offers and acceptances between political elites and the People. By articulating the proposed change to the People, involving several governmental institutions, and heeding the returns of transformative elections, the Framers of the three constitutional transformations exercised statesmanlike vision and prudence. And each time the People tendered well-considered acceptances.

Rather than supposing that the People speak directly at the ballot box, the Federalist precedent promises *legitimation through a deepen-*

34. Ackerman labels "hypertextualist" those who treat Article V as the exclusive means of amendment. He does not call this position merely "textualist" because he argues that the Founders meant to allow other modes of change too; they believed, as an originalist matter, in "pluralist" methods of amendment. Thus his theory of unconventional change is middle-road textualism, neither hypertextualist nor extratextualist. See pp. 72-81.

35. P. 14. Ackerman could have cited historical works that examine the relationship between constitutionality and legality or (a related theme) resistance theory. See, e.g., PAULINE MAIER, *FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776* (1972); JOHN P. REID, *IN A REBELLIOUS SPIRIT: THE ARGUMENTS OF FACTS, THE LIBERTY RIOT, AND THE COMING OF THE AMERICAN REVOLUTION* (1979).

36. Ackerman refers approvingly to those who have rediscovered the "unwritten constitution" of the Founders but tries to avoid the textual-nontextual dichotomy. See, e.g., Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

ing institutional dialogue between political elites and ordinary citizens. The idea is that a form of complex, and temporally extended, institutional practice will ultimately permit a group of revolutionary reformers a kind of popular authority that is qualitatively different from normal electoral victories. [pp. 84-85]

In this qualified sense, Ackerman makes an originalist argument:³⁷ the writ of constitutional ejectment is not his; it is the Founders'. To document his case, Ackerman begins not quite at the beginning but rather the conventional beginning: the writing of the federal Constitution.³⁸ He argues that the Philadelphia Convention engaged in illegal constitution-making. Article 13 of the Articles of Confederation required unanimous approval by the state legislatures for any amendment. But the Convention took "the law into its own hands" and became "a secessionist body" (p. 35), creating the troublesome irony that the world's most famous constitution rests on a *coup d'état*. Well, Ackerman argues, not quite. The Federalists put aside Article 13, but not constitutional process. At each step toward organizing the new Constitution they won "*official confirmations*" for facially "illegal initiative[s]," thereby repeatedly gaining "enough acceptance by enough standing institutions to sustain their momentum" (p. 39).

Here follows an ingenious mapping of the "fivefold schema" onto the writing and ratification of the Constitution. Instead of "aiming for a single grand victory," "Madison & Co." followed "a stepwise process — in which one partial initiative built on the next in a series of sequential ratifications" (p. 42). They moved from small conferences with limited agendas (Mount Vernon, Annapolis) to larger ones, exceeding their mandate at each one, yet confirmed along the way by some of the states or the Continental Congress. Thus they *signaled* a desire to engage in higher track constitutional creation and established a precedent for the illegality of the Philadelphia Convention. There, Federalists *proposed* a new regime, and *triggered* "an entirely new procedure for ratification": *ratification* by state conventions rather than state legislatures. Finally, the Federalists *consolidated* their victory by obtaining legitimate support in the states slow to ratify: eventually, even North Carolina and Rhode Island joined the "institutional bandwagon" (pp. 41-65). All this is not to prove Ackerman can draw an impressive historical map. Rather, his ulterior motive is to demonstrate that the Federalists earned "a deep sense of constitutional authority even though they had not played by the rules" (pp. 39). They be-

37. Cf. Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 933 (1992) (reviewing FOUNDATIONS, *supra* note 2) (accusing Ackerman of proposing a "liberal originalism").

38. There are a few perfunctory references to the English Convention of 1688 as a loose precedent for 1787. Pp. 33, 81-82, 162, 169.

haved illegally but legitimately, adhering to a constitutional order if not textual law.³⁹

It is an impressive performance. There is something persuasive and hopeful about dualism.⁴⁰ It is wrong to consider the Founding a conspiracy and morally attractive to emphasize the participatory elements of American constitutional history. More were involved than Federalists, government bondholders, or other elite groups. And Ackerman correctly points out that the Constitution quickly attained legitimacy. True, he leaves out the important role the Bill of Rights played in this story, but Ackerman's scheme is flexible enough to incorporate this fact (it might fit nicely beneath consolidation) and others necessarily omitted in a sixty-page rendition of the Founding.

The flexibility of Ackerman's scheme resides in its abstraction. This is not an unqualified good. The Annapolis Conference was a "signal" for constitutional revision? For purposes of an historical survey, it may be useful to see it as such, now. But does it rob the actual moment, then, of its uncertainty? While Ackerman wants to restore the agency of the People, he glosses over the concrete choices made by key figures in the late 1780s, a variegated group not well captured by "Madison & Co." Figuring who wanted what, and realizing that not all the Founders (or the voting public, let alone the larger majority of the People without the vote)⁴¹ wanted the same thing, is not to backslide into Beardianism.⁴² In retrospect, historical development often looks linear, graduated, and rational. Depending on the facts marshalled, and how they are arranged, almost any transition might be anatomized in terms of signal, proposal, trigger, ratification, and consolidation. Like many models, it is difficult to disprove because it is (abstractly) descriptive and (politically) prescriptive, but not explanatory. Historians will criticize the theory and its proof not for being wrong but rather for not engaging several interesting levels of analysis.

39. In *Foundations*, Ackerman stressed that he found the Federalists' constitutional means, not their specific ends, attractive, and distinguished between "the *revolutionary process* through which the Federalists mobilized popular support for their constitutional reforms, and the *property-oriented substance* of their particular social vision." *FOUNDATIONS*, *supra* note 2, at 228.

40. See also Edmund S. Morgan, *The Fiction of 'The People'*, N.Y. REV. BOOKS 46 (Apr. 23, 1992); Jack N. Rakove, Book Review, 79 J. AM. HIST. 226, 227 (reviewing *FOUNDATIONS*, *supra* note 2) (1992).

41. See, e.g., "We, Some of the People": *Apportionment in the Thirteen State Conventions Ratifying the Constitution*, 56 J. AM. HIST. 21 (1969). Ackerman touches all too briefly on this problem of the extent of suffrage, which is surprising because his model of popular acceptance hinges on electoral participation.

42. Ackerman flogged this much-too-dead horse in *FOUNDATIONS*, *supra* note 2, at 201-03, 219-21. For similar reservations, see Morgan, *supra* note 40; Eben Moglen, *The Incomplete Burkean: Bruce Ackerman's Foundation for Constitutional History*, 5 YALE J.L. & HUMAN. 531, 543 (1993).

Most of these would involve greater specificity and Ackerman might dismiss problematic facts as irrelevant where not assimilable, so many trees and no forest. Others involve a higher level of conceptualization and a broader temporal frame.⁴³ Take empire. The history of the British Empire in America is off Ackerman's conceptual radar. But the Empire comprised an important network of institutions, constitutional languages, and practices — exactly the sorts of things that interest him. And it mattered. It is not possible to understand constitutional reform in 1787 without having some grasp on how Britons in America had layered their institutions and the ways they tried to reform the Empire not once but several times in the century before the American Revolution, itself a rebellion against imperial reconstruction.⁴⁴ After the Revolution, political debate continued in the key of empire: Should the Union⁴⁵ become a continental empire? A transatlantic commercial empire? An "[e]mpire of liberty"?⁴⁶ Some combination? Alexander Hamilton referred to such questions in *Federalist* 1 when he exclaimed that the debate over the Constitution "speaks its own importance; comprehending in its consequences, nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire, in many respects, the most interesting in the world."⁴⁷ In short, making 1787 a discontinuous moment — no past, all future — obscures the Founders' conceptual architecture. Little wonder the People, liberal republicanism, Arendt, and Burke flood into the vacuum.

Many concede that the 1787 Constitution was born in some sort of illegality.⁴⁸ But Ackerman argues that the Federalist act of creation was no one-off. Like the common lawyers they for the most part were, the Framers of the 1860s and 1930s followed the Federalist precedent closely. Modes of change changed; the Federalist five-part formula endured — despite Article V.⁴⁹

43. On temporal frames in argumentation, see RECONSTRUCTING, *supra* note 7, at 53-55.

44. Suggestive essays include Jack P. Greene, *The Colonial Origins of American Constitutionalism*, in NEGOTIATED AUTHORITIES: ESSAYS IN COLONIAL POLITICAL AND CONSTITUTIONAL HISTORY 25 (1994); John M. Murrin, *The British and Colonial Background of American Constitutionalism*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 19 (Leonard W. Levy & Dennis J. Mahoney eds., 1987).

45. An imperially resonant term. See A UNION FOR EMPIRE: POLITICAL THOUGHT AND THE BRITISH UNION OF 1707 (John Robertson ed., 1995).

46. Thomas Jefferson to George Rogers Clark, December 25, 1780, 4 THE PAPERS OF THOMAS JEFFERSON 237.

47. THE FEDERALIST NO. 1, at 1 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

48. But see Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 465 (1994) (arguing that the actions of the Philadelphia Convention were legal under the law of treaties).

49. Ackerman's argument that the 1787 Framers did not intend Article V to be exclusive (pp. 71-81) is less compelling than his argument that, in fact, some future amendments did not adhere to Article V's rigid procedures. He follows the historical argument with a moral

But were not the Reconstruction amendments (numbers 13, 14, and 15) passed pursuant to Article V? Not exactly. Ackerman relates how these amendments were, more or less, forced upon the South. The Congress that passed the Thirteenth and Fourteenth Amendments was "a Republican Rump" (p. 106) and would not have mustered the two-thirds majorities necessary if the former Confederate states had been part of it. Paradoxically, the southern states that ratified the Thirteenth Amendment were considered legal for purposes of ratification but not for Congressional representation. Most of the Confederate states first rejected the Fourteenth Amendment, ratifying it only after a Radical Congress granted freedmen the vote while denying it to many Confederate veterans, and after Congress stipulated ratification as a condition for its reception of southern representatives. "It follows that the process by which Congress procured ratification of the Fourteenth Amendment simply cannot be squared with the text" (p. 111). Q.E.D.: The Reconstruction amendments are actually "amendment-simulacra" (p. 270). They might be justified as war measures, but this strikes Ackerman as constitutionally unattractive and historically inaccurate.

Rejecting the "dichotomy between legalistic perfection and lawless force" (p. 116), he finds instead the fivefold formula. But the formula did not operate in exactly the same way as it had at the Founding or for each Amendment. Here follows a gripping narrative of Reconstruction constitutional politics, the strongest part of Ackerman's book. The People approved the Thirteenth Amendment under Presidential leadership, while a convention-like Republican Congress organized acceptance of the Fourteenth.

First, Thirteen. Abraham Lincoln's election in 1860 *signaled* that a "new movement had gained sufficient political authority to demand that others take its constitutional intentions seriously" (p. 127). The Emancipation Proclamation of 1863 initiated the *proposal* for constitutional amendment abolishing slavery.⁵⁰ The presidential creation of interim southern governments served the *triggering* function. Then Ackerman retails the fascinating details

one: later transformations were in fact more democratic than that of 1787; thus it "seems morally bizarre, as well as legally inappropriate, to grant the Federalists the constitutional authority to lay down the rules for subsequent efforts to speak in the name of the People" (p. 88). It is a subtle argument, not without problems: the Federalists had no moral or legal right to constrain the People to Article V amendments; but future transformations must adhere to their fivefold formula of non-Article V amendment.

50. Ackerman here elides the story of how Lincoln's limited, and practically ineffective, proclamation (freeing only those slaves inside rebel lines — thus not under Union control) became transformed by an increasingly Radical Republican Congress into the nationally abolitionist Thirteenth Amendment. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 60-68 (1988). Instead, he interprets the amendment proposal as akin to the "institutional bandwagon . . . generated at the Founding." P. 134.

behind southern ratification, rightly calling attention, for example, to "the mix of legal and translegal elements displayed in South Carolina," concluding it was "a classic case of unconventional adaptation" (p. 148). Finally came *consolidation* in the form of presidential and secretary of state proclamations (pp. 150-57). Once again, Ackerman succeeds in demonstrating that fundamental constitutional change occurred at a crisis moment in American history and not by strict adherence to written procedures.

There were for Ackerman two procedural innovations distinguishing the passage of the Thirteenth Amendment. First was presidential leadership, allowing him to "claim that a national election amounted to a constitutional mandate from the People" and to "lead[] other deliberative institutions to give their assent to . . . his claim that *the People have spoken*" (p. 157). Here, Ackerman reminds us that there were, effectively, two Reconstructions: Presidential and Congressional. (Among other virtues, this model sets the stage for the New Deal.) Second, the process was "more nation-centered" than that of 1787 (p. 157). Reconstruction dealt the states a blow, not least to their role in making unconventional amendments.⁵¹

The story of the Fourteenth Amendment is one of congressional leadership. Congress's exclusion of the white South from its halls, and Johnson's vetoes of Radical legislation, *signaled* another phase of higher lawmaking. Then the Radical Republicans *proposed* the Amendment. The Radical landslide victory in the 1866 midterm election *triggered* fundamental change, bringing to Washington a "convention-like" Congress, meaning that "its perceived legitimacy reside[d] primarily in its appeal to the ideal of popular sovereignty, rather than its established legality" (p. 168). Ackerman reads the proposal as placing political identity above racial identity in American culture (p. 181), thus taking his stand with those who argue that the Radicals were dedicated to the ideal of racial equality and not just out to punish the "Slave Power."⁵² He also places the First and Second Reconstruction Acts alongside the Fourteenth Amendment as "*triggering* decisions — leaving it up to the (nationally defined) People of each state to determine whether they would go along with the nation-centered enterprise of constitutional redefinition initiated by the Fourteenth Amendment" (p. 205). Then came *ratification*. Here Ackerman does not accept the partially extorted state ratifications. Instead, he details various encounters between the

51. Historians have long debated how much Reconstruction altered federalism. Compare Robert J. Kaczorowski, *Searching for the Intent of the Framers of the Fourteenth Amendment*, 5 CONN. L. REV. 368 (1972-73), with WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* (1988).

52. Ackerman makes this clear in a footnote claiming that "Americans *can* transcend their racist instincts in response to the ideal of equal citizenship." P. 164, n.*.

three branches of the federal government (conflicts over implementing Reconstruction,⁵³ the impeachment of President Johnson, congressional revocation of Supreme Court jurisdiction over habeas corpus cases,⁵⁴ etc.), with Congress's repeated victories functioning as ratification.⁵⁵ In this non-Article V process, "the separation of powers was taking on a key role in the ratifying process formerly monopolized by the states" (p. 209). Finally, the 1868 elections and a newly "packed" Republican Supreme Court *consolidated* the amendment. The latter did so in the *Slaughterhouse Cases*.⁵⁶ Often these cases are read as eviscerating the national citizenship that Ackerman says the Radicals meant to establish, but his focus here is process not substance: the important fact was that "*Slaughterhouse* effectively ended all serious legal debate on the validity of the Fourteenth Amendment" (p. 246). What the Court made of them is another matter; Ackerman promises to elaborate judicial "synthesis" in *Interpretations* (p. 251).

The New Deal confronts Ackerman with his greatest challenge. The "professional narrative" of that era is based on a "myth of rediscovery" (pp. 7, 259) that the Court finally abandoned the illegitimate review of economic regulation symbolized by *Lochner v. New York*⁵⁷ and returned to a grand, Marshallian vision of federal power. This was, understandably, the story legal reformers told at the time. But it is historically incorrect and trivializes the revolutionary acceptance of the welfare state. It is especially important, thinks Ackerman, to recover this transformation now, because "[w]ith the Republican takeover of Congress in 1994, New Deal premises are an object of sharp legislative critique" (p. 258). Such fears date poorly; still, the People, or some portion of them, may someday decide to alter those premises. In any case, Ackerman's procedural point is that "[s]o long as America remains a dualist democracy, the death of a generation does not consign its constitutional achievements to the junk heap" (p. 258). These achievements, once again, were not funneled through Article V amendments. This time, "amendment-analogues" (p. 270) came in the form of extraordinary judicial decisions: "They memorialize the rare determinations of a massive and sustained conversation by the American people. These transformative precedents have, and

53. See, e.g., The Command of the Army Act, ch. 170, 14 Stat. 485 (1867); The Tenure of Offices Act, ch. 154, 14 Stat. 430 (1867).

54. *Ex Parte McCordle*, 74 U.S. 506 (1868).

55. Pp. 207-34. "Both [the President and Supreme Court] executed brilliant 'switches in time,' retreating before impeachment and jurisdiction-stripping in ways that saved them from permanent damage." P. 211.

56. 83 U.S. 36 (1872).

57. 198 U.S. 45 (1905).

should have, a special status in the legal conversation. Since lawyers did not make them, lawyers cannot unmake them" (p. 376).

Article V was not the means for this constitutional revolution. Instead, "[t]he New Dealers took a more nation-centered course — using a series of national electoral victories as mandates that ultimately induced all three branches of the national government to recognize that the People had endorsed activist national government" (p. 269). First, the Depression transformed the national election of 1932 into a "*signaling election*" (p. 281). Then came the New Deal *proposal* in the form of "corporatist legislation" that Ackerman claims would have "abolished market capitalism" and replaced it with business management, under "Presidential leadership."⁵⁸ Fortunately, the "Old Court" would not go along. Its rejection of the early New Deal, in Ackerman's narrative, played a constructive role of informing the People what was going on in Washington and forcing the New Dealers to rethink their approach to economic regulation. Hence the second New Deal: "Rather than seeking to displace the competitive market with the NIRA, Roosevelt and Congress now accepted the market as a legitimate part of the emerging economic order — so long as regulatory structures could be introduced to correct abuses and injustices defined through the democratic process" (p. 302). This "more refined" proposal, entailing a "revolutionary redefinition of the citizen's relationship to the nation-state," was the main issue in the *triggering election* of 1936 between Roosevelt and Alf Landon, an election that forced the People "to focus on fundamentals" (pp. 306, 309). FDR and the Democrats were free to alter the constitutional order — provided the Court allowed them to do so. Here is where the court-packing plan and congressional proposals for formal amendment enter the story. There was, Ackerman claims, broad support for both (*consolidation*). Only when the Court "switched" and upheld the second New Deal programs did popular support for coercion abate; "the spokesmen for the People in both Congress and the White House quite reasonably gave the Court a second chance to redeem its continued democratic legitimacy without imposing harsher measures in the form of court-packing or an Article Five amendment."⁵⁹ The Court complied: *consolidation* continued apace, accelerating when an unprecedented third term allowed FDR to pack the Court the old fashioned way.⁶⁰

58. P. 286. This is a questionable interpretation of the "first" New Deal.

59. P. 343. For a different interpretation of the New Deal Supreme Court, emphasizing doctrinal evolution over revolution, see BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998).

60. Ackerman refers to this change in Court membership as the second half of the two-phase process of constitutional "transvaluation." P. 372. Compare CUSHMAN, *supra* note 59.

Missing from this rethinking of the New Deal is legal realism. Ackerman equates realism with negative criticism; lacking any affirmative program, the realists offer little help to the progressive legal thinker today. In particular, he blames the realists for the "myth of rediscovery" that has obscured the New Deal's constitutional creativity. But an unwillingness to accept the legal realist story of the 1930s should not blind one to the role that realism played in the constitutional transformation of that time — whether characterized as a dramatic switch, a thirty-year doctrinal evolution, and/or a generational shift on the Supreme Court. Realism, in short, supplied not just an interpretation of New Deal constitutionalism; it was constitutive of it. Ackerman tells the story well:

For twentieth-century critics of laissez-faire, the common law was the problem, not the solution: its vision of property, contract, and tort had created a false vision of economic freedom — ignoring the questions of distributive injustice, monopoly power, and other market failures that condemned millions to poverty and exploitation. Rather than genuflecting before this common law vision, the New Dealers sought to create a new foundation for economic freedom through democratic politics and legislative reform. [p. 370]

There is no citation in this paragraph to any primary or secondary source. Perhaps one can now take silent scholarly notice of realism — but not at the same time criticize realists for failing to supply a positive vision. For the attack on common law ideology, along with an irreverent posture, came from Progressive legal thought generally and legal realism in particular.⁶¹ What effect it had on the People at large is more difficult to gauge. A place to start may be with Thurman Arnold: law professor, New Deal administrator, antitrust activist, and popular author.⁶² There are, after all, institutions other than national elections through which to influence public opinion and by which public opinion exerts influence. Get-

61. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* (1992); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 13-22 (1996); Note, *The New Deal Court: Emergence of a New Reason*, 90 COLUM. L. REV. 1973, 2008-14 (1990). Earlier in the book Ackerman states that "New Deal doubts about Article Five reflected the larger pragmatic revolt against formalism that had swept through much of American culture during the early twentieth century," and admits that realists "expressed similar doubts, but it is a mistake to exaggerate their direct role in this affair. The academics with the greatest influence on Roosevelt — men like Frankfurter or Edward Corwin — were not Realists in any narrow sense, but they were pragmatists." Pp. 347, 486 n.3. This is again a top-down approach to the New Deal, and even on its own terms has problems: Frankfurter's "general preference for the amendment route and his opposition to '[court]-packing' were well known." Joseph P. Lash, *A Brahmin of the Law*, in *FROM THE DIARIES OF FELIX FRANKFURTER* 59 (1974).

62. See THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937); *THE SYMBOLS OF GOVERNMENT* (1935). Of the leading realists, Arnold has perhaps been least well served by historians. A good place to start is THURMAN W. ARNOLD, *FAIR FIGHTS AND FOUL: A DISSIDENTING LAWYER'S LIFE* (1965).

ting "beyond Realism"⁶³ — as jurisprudence and history — may enlighten. Omitting realism from an account of the New Deal does not.

Ackerman applauds the substance of the New Deal constitutional revolution but has reservations about its modes. From the perspective of constitutional process, a presidentially led, judicially effected, non-Article V amendment-analogue offers too simple a means for unscrupulous Presidents to alter the Constitution by filling the Supreme Court with ideological Justices — what might be called actuarial court-packing. This has been attempted, Ackerman claims, most recently in the Reagan-Bush era, and it has led to "the hyperpoliticization of the Supreme Court" (p. 415). He does not, however, suggest sticking to Article V. Instead, he concludes *Transformations* by recommending a statutory amendment process, "the Popular Sovereignty Initiative":

Proposed by a (second-term) President, this Initiative should be submitted to Congress for two-thirds approval, and should then be submitted to the voters at the next two Presidential elections. If it passes these tests, it should be accorded constitutional status by the Supreme Court. [p. 415]

This procedure preserves the role of Presidential signaling (a positive legacy of FDR's higher lawmaking), a crucial role for Congress, and part of both Article V and the Reconstruction experience — while avoiding the need for ratification by three-fourths of the states. Demoted during Reconstruction, they deserve a lesser role in the amending process.

For the most part, *Transformations* complements *Foundations*. But in one important sense the two volumes differ: the author's attitude toward the People's unconventional power that is central to his story. *Foundations* was published in 1991 and Ackerman was skeptical of the political atmosphere in which he wrote. He spoke of Ronald Reagan's attempts at "transformative Supreme Court appointments," "President Bush's proposal of a flag-burning amendment," and warned of "false positives" and "false negatives" when testing for the five elements of legitimate change.⁶⁴ In short, Ackerman stressed how rare constitutional moments are and concluded that there was not one in the 1980s. In the final pages, he recommended an unamendable Bill of Rights, like that in the post-war German Basic Law. True, even unamendable rights might not be safe.

Nonetheless, entrenching the Bill might make the triumph of a Nazi-like movement more difficult. It would serve as a reminder to all fu-

63. RECONSTRUCTING, *supra* note 7, at 72.

64. FOUNDATIONS, *supra* note 2, at 51, 320, 278-80.

ture generations of a time when Americans solemnly recommitted the nation to the *unconditional* protection of fundamental rights. . . .

I myself would be proud to be a member of the generation that took this burden upon itself — finally redeeming the promise of the Declaration of Independence by entrenching *inalienable* rights into our Constitution.⁶⁵

In *Transformations*, Ackerman remains cautious about the popular amending process, but is in the end more hopeful about and supportive of constitutional change. What happened between 1991 and today? Mr. Dooley might have had an answer.⁶⁶ Whatever the cause, Ackerman now is not just an archeologist of popular sovereignty; he is also a (qualified) champion of it. He remains a dualist, but thesis and antithesis are closer together now than then, which may just be the logic of such things.

B. Amar's (*Nouvelle*) Federalism

Where Ackerman rides the high track of constitutional politics, Amar follows its twists and turns, surveying where the Founders tried to lead the nation and where the Supreme Court has redirected it. In part I, a revision of an earlier article entitled *The Bill of Rights as a Constitution*,⁶⁷ his goal is nothing less than to turn the conventional wisdom about the Bill of Rights on its head. He should succeed. Amar argues that the original ten amendments were not intended solely, or even primarily, to defend individual rights. Instead, they were designed to elaborate and qualify the structural principles of the Constitution. Most important was federalism: the Bill was supposed to maintain the power of the states relative to the federal government.⁶⁸

To frame his case, Amar quotes James Madison in *Federalist* 51 — “[i]t is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of

65. *Id.* at 320-21.

66. Cf. FINLEY PETER DUNNE, MR. DOOLEY AT HIS BEST 77 (Elmer Ellis ed., 1938) (observing after the *Insular Cases* that “th’ Supreme Coort follows th’ illiction returns”).

67. 100 YALE L.J. 1131 (1991).

68. Charles Black Jr., has long argued for structural interpretations of the Constitution. CHARLES BLACK JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). Still, no one has conveyed the message about the (Anti-) Federalist Bill with as much power and sustained analysis as Amar. The fundamentally federal nature of the 1787 Constitution (including the Bill of Rights) has received new, powerful support from a host of early American historians. See JACK P. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES* (1986); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996); JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION*, 4 vols. (1986-93); Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990).

the society against the injustice of the other part”⁶⁹ — and argues that

[t]he conventional understanding of the Bill seems to focus almost exclusively on the second issue (protection of minority against majority) while ignoring the first (protection of the people against self-interested government). Yet as I shall show, this first issue was indeed first in the minds of those who framed the Bill of Rights. [p. xiii]

As Amar enjoins, “first things first” (p. 3). Does it matter that Madison in *Federalist* 51 was not thinking about the Bill of Rights (which did not yet exist)? Perhaps not, if he was discussing the rights of majorities and minorities at a sufficiently abstract level. Primarily, though, in this essay Madison sought to show that the federal government, much more than the state governments, obeyed the salutary principle of separated powers, which would prevent one institution within it from predominating — in particular, the legislature. The “vices of the political system of the United States,” as Madison entitled his survey of the states and Confederation,⁷⁰ made him fearful of legislatures. His goal in 51 was to explain how legislative will would be diluted and checked, not to celebrate majoritarian democracy.

Just after the sentence in *Federalist* 51 that Amar quotes, Madison explained how the structure of the federal government (again, not the Bill of Rights) would check the majority: “Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.” He saw two ways to protect minorities. The first was to create a hereditary ruler, embodying “a will in the community independent of the majority.” The second was to “comprehend[] in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole very improbable”⁷¹ The latter was the way of the federal Constitution. He was elaborating his argument in *Federalist* 10 that a large republic mitigated the problem of factional majorities throughout the whole and applying the same logic to institutional competition within the federal government. Hence the bicameral, not unicameral, legislature. In addition, “[a]s the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature, appears, at first view, to be the natural defence with which the executive magistrate should be

69. THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

70. “Vices of the Political System of the United States,” 9 THE PAPERS OF JAMES MADISON 345-58 (Robert A. Rutland et al. eds., 1975). For a reconsideration of Madison’s influence on the Founding, see Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611 (1999).

71. THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

armed.” Madison had failed to get such a veto included at Philadelphia; in *Federalist* 51 he proposed (as an amendment?) a veto council composed of the President and Senators.⁷² So much for using *Federalist* 51 to frame a majoritarian interpretation of *any* part of the Constitution.

However decontextualized his quotation, Amar is on to something. He might have used Madison's *Federalist* 10 and 51 to make an even stronger case that the Bill of Rights was intended to protect the states (or localities) more than minorities had he contrasted them with any number of anti-Federalist criticisms of the new Constitution as a threat to local control over government.⁷³ In this juxtaposition, the Bill was, as conventional wisdom has it, designed to remedy the weaknesses of the Constitution. But rather than protect minority interests, it was supposed to protect more familiar institutions — state and local — from the new, distant, and purposely elitist federal government. To push this interpretation farther, there may be more protection of minorities (economic and regional) in the main body of the Constitution than in the Bill of Rights. But this would require revisionism on a scale quite beyond even that of Amar's.

Similarly, Amar is right to emphasize the importance of the jury in eighteenth-century America. For him, the jury connotes localism, fear of distant decisionmakers, populism, and majority rule. He is right about the first two. In a constitutional history of the British Empire, the American Revolution, and early United States, it would be hard to exaggerate the jury; it was a metaphor for localism, due process, and open lawmaking and enforcement. Eben Moglen reminds us that there was a “cluster” of rights associated with the jury, many not individual but rather communal rights.⁷⁴ Amar drives this theme home effectively. Too effectively. Localism is not — at least, was not in the eighteenth century — the same as populism or majoritarianism. The latter words were foreign to both Federalists and anti-Federalists, few of whom were democrats.⁷⁵ Nor was it identical to the province or state, notwithstanding

72. *Id.* at 351-52. See also Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 627-36.

73. See generally 1 HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* (1981).

74. See Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1114 (1994); see also WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975).

75. Amar enjoins lawyers to study “the lessons of the ‘republican revival,’” which he equates with majoritarian government. P. 302. But see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 282 (1967) (noting that “‘democracy’ . . . was generally associated with the threat of civil disorder and the early assumption of power by a dictator”).

Amar's repeated equation of "local" with "state."⁷⁶ Instead, it connoted a jurisdiction smaller and more manageable. The social politics in these places were quite complex, varying widely across space and through time, but few historians would characterize them as populist; rather, they would talk of deference society, some of oligarchy, others of violent subcultures defying simple characterization.⁷⁷ Whatever the nature of the Revolution, the constitutional debate certainly was about who should rule at home — and the boundaries of that home.

So the jury deserves a closer look. As those most familiar with law enforcement in early America have noted, the ideal of the jury trial had its limits. When it came to everyday crime, the jury was seen by provincial legislative houses as obstructionist — as it was by imperial eyes in gubernatorial forts, Council chambers, and in Whitehall. Thus colonial legislatures became innovators in the business of summary jurisdiction: quick, efficient criminal process, without juries.⁷⁸ To risk too fine a point, what was good enough for urban rowdies, slaves, and frontier squatters was not good enough for transatlantic merchants and substantial land speculators.

Of course, these "lawless" elements could invoke the jury, too. For them, the jury functioned as a safety valve against both imperial and provincial jurisdiction, vindicating interests as local as those of a family.⁷⁹ Some of them helped ensure that the jury was guaranteed in several state constitutions (a point worth revisiting), though colonial summary justice endured written constitution-making intact.⁸⁰ Intraprovincial jurisdictional politics (for lack of a better phrase), like imperial-provincial jurisdictional politics, was a real phenomenon, though undertheorized and also unnamed. After the Revolution, the latter received a name (federalism); the former did not. By framing the controversy as the federal government (and the People) versus the states, the Federalists (in part accidentally) eliminated local government from the articulate debates over the Constitution. Yet local units remained important parts of the governmental order. Unfortunately, the fate of this intraprovincial fed-

76. On the contemporary ambiguity of "state," see J.R. Pole, *The Politics of the Word "State" and its Relation to American Sovereignty*, 8 PARLIAMENTS, ESTATES AND REPRESENTATION 1 (1988).

77. A convenient overview is *POLITICS AND SOCIETY IN COLONIAL AMERICA: DEMOCRACY OR DEFERENCE?* (Michael G. Kammen ed., 1967).

78. See JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776)* 379-83 (1970); Moglen, *supra* note 74, at 1105-11.

79. See Daniel J. Hulsebosch, *Imperia in Imperio: The Multiple Constitutions of Empire in New York, 1750-1777*, 16 LAW & HIST. REV. 319, 350-54 (1998).

80. See, e.g., *Jackson ex dem. Wood v. Wood*, 2 Cow. 819 (N.Y. 1824) (upholding special sessions trial for petit larceny without indictment or jury because colonial practice was incorporated into the state constitution).

eralism remains one of the under examined mysteries of the American Revolution and the early United States.⁸¹ In the constitutional debate, local government was the dog that did not bark.

Or did it? Amar inadvertently permits us to listen again. When anti-Federalists championed the jury, the militia, church establishments, and so forth, many meant to protect the states, certainly, but some also hoped to vindicate those familiar local worlds. This is what makes Amar's work so intriguing. He comes close to rediscovering those worlds in Chapter Three, on "The Military Amendments." There he argues that "the right of the people to keep and bear arms" for purposes of "a well regulated Militia" was a "states'-right," not an individual right (p. 52). Given the choice, he is more correct than not. But he acknowledges that "this chain of argument has some weak links" (p. 52). The same language appears in several state constitutions, suggesting that the militias and arms-bearing were not fully controlled by the states. While state governments could (as the federal government could) organize and discipline militias in emergencies, they too lacked the power to disarm their members (p. 52). It is to Amar's credit that he concedes problems with a "states'-rights" reading of the Second Amendment. But he declines his own invitation to explore how the militia actually functioned. It has its historians, and they tell us that it was a local institution — which is to say, more often than not, organized by elites at the most local level, county or town.⁸² The state-versus-individual model fails to capture these provincial sociopolitics.

Which brings us back to anti-Federalist worship of the jury. Time and again anti-Federalists criticized the Constitution for not specifying that criminal jury trials would be held in the vicinage of the alleged crime and failing to guarantee the jury trial in federal

81. Excellent exceptions include HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870* (1983), and WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996). For an analysis of local government in practice, see Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990), and Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990).

82. The jealous localism of these outfits was the bane of a string of imperial commanders — from British commanders in chief to George Washington — and one of the reasons why the federal government was given the power to raise an army. See LAWRENCE D. CRESS, *CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812* (1982); JAMES KIRBY MARTIN & MARK EDWARD LENDER, *A RESPECTABLE ARMY: THE MILITARY ORIGINS OF THE REPUBLIC, 1763-89* (1982); JOHN P. REID, *IN DEFIANCE OF THE LAW: THE STANDING-ARMY CONTROVERSY, THE TWO CONSTITUTIONS, AND THE COMING OF THE AMERICAN REVOLUTION* (1981); JOHN SHY, *A PEOPLE NUMEROUS AND ARMED: REFLECTIONS ON THE MILITARY STRUGGLE FOR AMERICAN INDEPENDENCE 23-33* (1976); JOHN SHY, *TOWARD LEXINGTON: THE ROLE OF THE BRITISH ARMY IN THE COMING OF THE AMERICAN REVOLUTION 3-20* (1965); Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 LAW & HIST. REV. 567, 589 (1998); Louis Morton, *The Origins of American Military Policy*, 22 MIL. AFF. 75 (1958).

civil trials at all. Hamilton responded to the latter complaint in *Federalist* 83 by surveying the state legal systems. He pointed out that "there is a material diversity as well in the modification as in the extent of the institution of trial by jury in civil cases in the several states."⁸³ In light of this diversity, the Constitutional Convention could not have created a general rule consistent with all the state systems. Hamilton treated state proposals for a jury amendment as unworkable and unwise. Such an amendment was unworkable because it might require the federal courts to alter their use of juries as they circulated among the states: "The capricious operation of so dissimilar a method of trial in the same cases, under the same government, is of itself sufficient to indispose every well regulated judgment towards it."⁸⁴ It was also unwise, for "there are many cases in which the trial by jury is an ineligible one";⁸⁵ for example, diplomatic cases, those involving the law of nations, prize, and equity. Perhaps the Convention might have used "one state as a model for the whole," but in the end it was thought best to leave the "arduous" task of devising a uniform plan to "the discretion of the legislature."⁸⁶

Anti-Federalists got their jury amendments: the Sixth guaranteed a local jury in criminal cases, the Seventh declared that "In Suits at common law . . . the right of trial by jury should be preserved."⁸⁷ It would seem that this compromissary language ignored the difficulty Hamilton and others pointed out, that there was among the states no standard against which to determine when and how to use the jury in federal civil trials. Amar concludes that the Seventh Amendment was designed to incorporate that diversity:

83. THE FEDERALIST NO. 83, at 566 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

84. *Id.* at 567 (referring to the proposal of the Pennsylvania ratifying convention).

85. *Id.* at 568.

86. See *id.* at 566-67; see also THE FEDERALIST NO. 81 (Alexander Hamilton); JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 630, 647 (1966). The jury trial provision evoked little discussion in Philadelphia, reaching the table late in the proceedings. For a shrewd foreshadowing of Hamilton's logic, which soon became conventional Federalist wisdom, see the comments of James Wilson several months earlier at the Pennsylvania ratification convention. See James Wilson, Address at the Convention of the State of Pennsylvania (Dec. 7, 1787) in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 486, 488 (Jonathan Elliot ed., 2d ed. 1937) [hereinafter DEBATES]; James Wilson, Address at a Public Meeting in the Pennsylvania State House Yard (Oct. 6, 1787) in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 339, 340-31 (John P. Kaminski & Gaspare J. Saladino eds., 1981); see also Thomas Dawes, Address at the Convention of the State of Massachusetts (Jan. 30, 1788) in 2 DEBATES, *supra*, at 113, 114; James Iredell, Address at the Convention of the State of North Carolina (July 28, 1788), in 4 DEBATES, *supra*, at 144, 144-45 (relying on Mr. Spaight's comments regarding jury trials in civil cases); *id.* (July 29, 1788), in 4 DEBATES, *supra*, at 164, 165-66; James Madison, Address at the Convention of the State of Virginia (June 20, 1788), in 3 DEBATES, *supra*, at 531, 534-35; Charles Pinckney, Address at the Convention of the State of South Carolina (Jan. 16, 1788), in 4 DEBATES, *supra*, 253, 260.

87. U.S. CONST. amend. VII.

the federal courts were to employ the jury, or not, as state law where they sat dictated, notwithstanding administrative inefficiencies. In short, the Founders intended federal courts to follow a "dynamic" approach to procedure (pp. 89-93) like that now used for substantive law under *Erie*. There is evidence that a few anti-Federalists did indeed assume that jury trials in the federal courts would fluctuate with location.⁸⁸ But most did not give too much thought to how the guarantee would operate in practice. As George Mason, a Virginia anti-Federalist, said in Philadelphia, the diversity of state practice meant that "jury cases can not be specified. A general principle laid down on this and some other points would be sufficient."⁸⁹ The key, as always, was the *principle* of the jury; here, as with those "other" principles, practical operation was ignored. It is difficult to conclude, with Amar, that a "dynamic" approach to the civil jury is most faithful. Many agreed with Hamilton that Congress should determine a standard form.⁹⁰ It never did. Instead, the Supreme Court, per Justice Joseph Story, laid down a historical test that looked to *English* practice in 1791,⁹¹ when the amendment was adopted — an option no one discussed at that time. But this fitted Justice Story's transcendental, Anglocentric conception of the common law, which served a variety of intellectual and political purposes in antebellum America.⁹² Federalist politics inspired in Hamilton and others a moment of positivist apprehension of the common law, but a generation later the nature of those politics had changed and so too the attitude of Federalist legates toward the common law.⁹³

Amar might agree that intrastate localism was an important element in the original constitutional order, but this would not affect his analysis of Reconstruction. The point of Part II of his book is

88. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 712-13 (1973).

89. MADISON, *supra* note 86, at 630.

90. See Wilson, Address at the Convention of the State of Pennsylvania, *supra* note 86, at 488; Wilson, Address at a Public Meeting in the Pennsylvania State House Yard *supra* note 86, at 344; see also Dawes, *supra* note 86, at 114; Iredell, Address at the Convention of the State of North Carolina (July 28, 1788), *supra* note 86, at 144-45; *id.* (July 29, 1788), *supra* note 86, at 165-66; Madison, *supra* note 86, at 534-35; Pinckney, *supra* note 86, at 260.

91. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

92. The best study of these dynamics remains PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 99-265 (1965).

93. There are many moments of positivist perception of the common law scattered throughout Anglo-American history. Rarely mere intellectual epiphanies, they arise instead amidst concrete political controversies — or, more accurately, operate as arguments within those controversies. Cf. Ackerman, *Transformations*, at 370-72; Amar, *supra* note 9, at 694-95; Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1786 (1997) (arguing that "Erie-effects" are "product[s] of a certain respect for democratic authority"); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 426-32 (1995) (discussing Justice Holmes's repudiation of Justice Story's opinion in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).

that the Reconstruction amendments demoted federalism, the states, and implicitly all local units in the constitutional order. Here is where the individualist connotation of the Bill of Rights emerged. In short, the Founder's structural Bill became our minorities-protective Bill; states' rights became individual rights. No longer partners in an ambiguous division of governmental duties, the states were subordinated in the constitutional hierarchy, and the federal government defined the rights of federal citizenship.⁹⁴

The shift was not as stark as all that. Amar nicely describes how the more individualistic interpretation enjoyed an underground life during the antebellum period.⁹⁵ Always latent, it came out of recession and into dominance with the Thirteenth, Fourteenth, and Fifteenth Amendments.

Having traced the structure-to-rights transformation, Amar turns to the issue of whether the framers of Reconstruction intended to incorporate the first ten amendments against the states. In a subtle theory of "refined incorporation," Amar argues that some should be incorporated and some should not. In any case, the vehicle should be the Privileges and Immunities Clause, not the Due Process Clause, for Amar argues that the crux of Reconstruction was the redefinition of national citizenship. In determining whether this or that right is a privilege of national citizenship, he embraces neither the "traditions of English liberty" approach associated with Justice Felix Frankfurter nor the total incorporation approach of Justice Hugo Black. He instead asks whether a particular protection "is a personal privilege — that is, a private right — of individual citizens, rather than a right of states or the public at large" (p. 221). If the latter, then it seems to him contradictory to apply the states'-right against the states. But if it is an individual right, or a structural right that was transformed into an individual right, then it should be incorporated against the states.

The most interesting example of the last sort is the First Amendment's prohibition against religious establishments. Many states had established churches in 1789; the fear behind the Establishment Clause was that the federal government might erect a national church similar to the Church of England. Amar nicely calls it "a home rule — local option provision" (p. 246). Thus it is, from an originalist perspective, illogical to incorporate the clause, as it was supposed to protect some state establishments.⁹⁶ But Amar argues

94. For a similar earlier interpretation, see Kaczorowski, *supra* note 51, at 398 (arguing that the Fourteenth Amendment "wrought nothing less than a revolution in American federalism" and enlarged the civil rights guaranteed by national citizenship).

95. See also William E. Nelson, *The Impact of the Anti-Slavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

96. See Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347 (1997).

that the disestablishment of state churches by Reconstruction and the prohibition of establishments in the Western territories together transformed constitutional attitudes toward religion: there was fear of *any* state favoritism toward particular denominations. This was not because of declining religiosity; perhaps just the opposite. The splintering of old denominations and creation of new ones increased mutual suspicions. In a perfect world, some denominations would have liked state support. In early national America, however, better that the state remain neutral.⁹⁷

Incorporating "the freedom of speech, or of the press," is easier. It was from the beginning a mixed right, of states (relating to parliamentary privileges) and individuals (for example, the right to petition).⁹⁸ The rights interpretation spread in reaction to Southern suppression of abolitionist literature and reached the *Congressional Record* in the 1860s (pp. 235-39). But again Amar's analysis is too neat. While exploring the intersection of the First and Fourteenth Amendments, he looks ahead one hundred years to justify modern free speech doctrine. In particular, he must confront "the doctrinal rules crafted by *Sullivan* and its progeny [that] reflect obvious suspicion of juries — resulting, for example, in various issues being classified as legal questions or mixed questions of law and fact inappropriate for unconstrained jury determination." (p. 243). Where has the jury gone?

Once the Fourteenth Amendment is on the books, the agency theory of free speech is less explanatory than the minority-protection theory, for the latter better accounts for speech limitations on majoritarian state legislatures. And the minority-protection theory suggests a different optimal allocation between judge and jury. [p. 244]

This is quite a jump and leaves out much history of the relationship between judge and jury in American law.⁹⁹ And why is Amar certain that judges are more competent guardians of rights than juries? He never explains; he might assume that it has something to do with the different origins, socialization, and peer group of those who rise to the bench compared to those in the jury box. But this sort of history resides in sources largely outside those he explores — largely, but not completely, for such reasoning is similar to Hamilton's celebration of a cosmopolitan judiciary in *Federalist* 78, 81, 82, and 83.

97. See NATHAN O. HATCH, *THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY* (1989). This attitude began in some colonies before the Revolution. See Perry G.E. Miller, *The Contribution of the Protestant Churches to the Religious Liberty in Colonial America*, 2 HARV. REV. 60, 69 (1964).

98. Though this too was a mixed individual and state right. See Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2178-87 (1998).

99. See, e.g., NELSON, *supra* note 74, at 165-74.

Finally, Amar claims that the individualistic interpretation of the Bill is a product of Reconstruction. But most of the cases cited to prove this date much later, the most important after 1890, making for a long Reconstruction moment.¹⁰⁰ More importantly, Amar's three-level institutional framework — nation, state, and individual — makes it difficult to see other ways to interpret the constitutional shift of the late nineteenth century. As with the lack of focus on local government at the Founding, the automatic move from state to individual misses other actors: groups located between the state and the individual. Amar writes that "between 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman" (p. 266; emphasis added). But was that Carolina freedman a single, rights-bearing individual? Or did his right (assuming Amar is correct that he had one¹⁰¹) depend on a different but still collective identity, namely, as a newly liberated African American in the deep South? The problem here parallels that of equating the local with the state at the Founding. In short, is the story of the Bill of Rights from Reconstruction to the present really about *individual* rights?¹⁰² Would not an account that emphasized solicitude for groups help explain both the *Slaughterhouse Cases*¹⁰³ as well as those overruling them, including *Santa Clara County*, standing for the proposition that corporations were constitutional people too?¹⁰⁴ Instead, Amar's iconoclastic narrative turns back toward the conventional wisdom. Only the dates were wrong. Having corrected those, his story becomes familiar: "the Reconstruction generation — not their Founding fathers

100. By the 1890s, this rhetorical trickle had swelled into a steady stream of references to the "first ten amendments . . . in the nature of a bill of rights" to protect "persons and property" and "unalienable rights" . . . Gone was the view, publicly expressed by Supreme Court Justice Samuel F. Miller as late as 1880, that "our Constitution, unlike most modern ones, does not contain any formal declaration or bill of rights."

Pp. 287-88 (first omission in original, endnotes omitted).

101. See Robert J. Cottrol & Raymond T. Diamond, "Never Intended to Be Applied to the White Population": *Firearms Regulation and Racial Disparity — The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI-KENT L. REV. 1307 (1995).

102. See AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* 80-101 (1995); Owen M. Fiss, *The Supreme Court 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Morton J. Horwitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 604-13 (1979); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1072-77 (1980).

103. 83 U.S. 36 (1872). Herbert Hovenkamp illuminates the background to these cases in HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937* 117-24 (1991).

104. *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394 (1886). The emergence of the "real entity" theory of the corporation was actually a gradual process in the late 19th century. See Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985-86); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987); see also Robert J. Kaczorowski, *Reflections on Monell v. Department of Services*, URB. LAW. (forthcoming 1999) (arguing that "the conclusion [in *Monell*] that [the Reconstruction] Congress intended municipal corporations to be sued under sec. 1983 is far from compelling").

or grandfathers — took a crumbling and somewhat obscure edifice, placed it on new, high ground, and remade it so that it truly would stand as a temple of liberty and justice for all” (p. 288).

One can disagree with Amar’s analysis of whether a particular right represents a state prerogative, a privilege or immunity of national citizenship, or a group right, but the theory of refined incorporation has much to offer. Also intriguing is his suggestion that the Bill be approached “holistically,” rather than as “discrete blocks of text, with each segment examined in isolation” (pp. xi-xii). Historically this makes much sense; jurisprudentially, it may be based upon unreal expectations about how adjudication operates. In the end, Amar is not terribly concerned about the latter because he believes that “[s]elective incorporation is largely right in result and instinct,” so that “today’s judges and lawyers have often gotten it right without quite realizing why.”¹⁰⁵ He does not elaborate what he means here by “right” but implies that judges should interpret the amendments according to the historical meaning ascribed to their text when written, or in light of new meanings generated by subsequent constitutional experience similarly memorialized in text. He, like Ackerman, is engaged in a form of evolutionary originalism. The means and telos of this process is popular sovereignty.

II. POPULAR SOVEREIGNTY

Despite the many differences between these books, popular sovereignty is the dominant theme in both. In their collective constitutional history, federalism becomes less important after the Civil War, and the separation of powers has always been a secondary theme. Popular sovereignty, on the other hand, was fundamental to the Constitution’s creation, played a key role in its reconstruction(s), and remains today the most important premise of American constitutionalism. Accordingly, “the People,” as a heuristic device, does a lot of work in these histories, giving rise to moments of rhetorical populism.¹⁰⁶ But this devotion to the People invites special scrutiny, not least because these books will most likely not be read by the people on the street.¹⁰⁷

105. P. 307. Amar notes that an exception is constitutional criminal procedure, the subject of another book. See p. 307 n.*; AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997).

106. See Ackerman p. x (stating in his acknowledgments that “I hope this book partially repays my enormous debt to the institutions, and the country, that made it possible”); Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, n.† (1988) (dedicating article to his father who asked him to write something “for the people”).

107. But see Amar p. 296 (stating that “this is a book written not just for lawyers and judges but for ordinary citizens who care about our Constitution”).

The persistence of the principle of popular sovereignty over two centuries does not mean that it conveys the same thing today as in 1787.¹⁰⁸ Ackerman and Amar realize this, and they try to show how the *procedural mechanisms* of popular sovereignty have changed over time. They assume that, *substantively*, popular sovereignty has always meant majoritarianism. Both are combatting the problem of the "countermajoritarian difficulty"¹⁰⁹ (i.e., judicial review) in constitutional studies in two ways. First, they shift focus away from the Supreme Court to other institutions. Second, they emphasize how profoundly majoritarian American constitutionalism is, so that one can see, with Alexander Hamilton, that judicial review is actually one more instrument of the people's will.¹¹⁰

Popular sovereignty, however, does not necessarily imply majoritarian democracy — whether monist or dualist; invocations of popular sovereignty have often been ambiguous, part devotion to the people, part interested rhetorical strategy.¹¹¹ At the very least, the Founders, Federalist and anti-Federalist alike, were not simple majoritarians.¹¹² The democratic connotation of popular sovereignty did not become widespread for decades after the Revolution and involved a massive constitutional transformation almost unnoticed in these books, perhaps because it took place at the state level. That history is associated with the Jacksonian era, but even then it resulted in a limited version of democracy, working toward universal white male suffrage, the abolition of property qualifications for elective office, and an increased number of elected officials.¹¹³ The trend resumed in the Progressive Era, which saw the extension of the vote to women (especially native-born white women), initiatives and referenda, and directly elected Senators.

108. For an excellent study of the concept before 1787, see EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988).

109. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

110. See *THE FEDERALIST* No. 78 (Alexander Hamilton) at 524-25 (Jacob E. Cooke ed. 1961).

111. See LOUIS HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860* (1948); MORGAN, *supra* note 108; G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787 (1994) (criticizing Amar for equating popular sovereignty with majoritarianism).

112. Amar embraces a much less complicated notion of majoritarianism than Ackerman. In addition to *The Bill of Rights*, see Akhil Reed Amar, *The Central Meaning of Republicanism: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994). Still, both believe that American constitutional culture has been essentially majoritarian from its beginning.

113. See *DEMOCRACY, LIBERTY AND PROPERTY* (Merrill D. Peterson ed., 1968); see also Morton J. Horwitz & Orlando de Campo, *When and How the Supreme Court Found Democracy — A Computer Study*, 14 QUINNIPAC L.J. 1 (1994) (graphing the slow shift in judges' use of "democracy" in nineteenth and twentieth centuries). For brief references, see Ackerman p. 270; FOUNDATIONS, *supra* note 2, at 76-77.

To date, the constitutional history of Progressivism remains unwritten. When it is, Ackerman's compression of his third constitutional moment to the 1930s may seem less persuasive — as Amar suggests in his afterword.¹¹⁴ Instead, constitutional development will be seen to have played out on a larger stage of social and intellectual change, turning on the construction and legitimation of the administrative state. It is an interesting question, for example, how one might reconcile Ackerman's New Deal with that of legal historian Edward Purcell Jr.¹¹⁵ let alone that of social historian Elizabeth Cohen, to name just some who have helped excavate the 1930s. The people in Cohen's book, *Making a New Deal*, for example, do not look much like the People in Ackerman's. Cohen's people had racial, ethnic, class, regional, and other identities. They were not passive consumers of political debates, responding yea or nea to the calls from the federal capital. Instead, they absorbed media in a much more complicated manner, reinterpreting political news and a host of mass-distributed signs in unexpected ways.¹¹⁶ Maybe there was a "deeper" story being scripted in Washington, D.C., in 1936; but how was that text read? Did voters believe they were engaged in a referendum on a constitutional "amendment-analogue"? Quite plausibly many did. It is equally plausible that most voted along (literally) familiar party lines. Possibly many accepted FDR because he lived up to his promise to do something — though that something remained unrealized, unclear, and controversial — and that when others rejected Alf Landon they were rejecting Alf Landon, not embracing a new constitutional paradigm. These explanations are all probably true to some extent. To find out which are more true than others would require more research, in a wider variety of sources, than has hitherto been attempted. Court opinions, presidential speeches, and election returns will not carry the burden of proof.¹¹⁷ Perhaps it is a proposition that will not admit of historical proof — or disproof. That FDR was popular, and the Supreme Court's doctrine was not, and that the latter changed — somehow, at some point — and came into accord with the program of the

114. See Amar p. 300 (surveying the Progressive amendments and asking whether it is "necessary to postulate an unwritten amendment in the 1930s to account for a more nationalistic and redistributive constitutional regime in the twentieth century").

115. See EDWARD A. PURCELL JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973).

116. See ELIZABETH COHEN, *MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919-1939* (1990).

117. Michael Kammen cleared some ground in *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 255-81 (1986). Ackerman applauds a study of public support for FDR's court-packing plan before and after the Supreme Court's "switch" in 1937, which indicates that a majority of the polled public approved the plan as a means to defeat judicial obstructionism. P. 324. But support for court-packing is not the same thing as support for a de facto constitutional amendment.

former, is enough for Ackerman. Constitutional change happened; therefore the People willed it to happen. He is interested in the political process — the constitutional process — of unconventional amendment, not the cultural conflict behind it, so he can be forgiven for leaving out from what is already a substantial undertaking the sort of close historical analysis necessary to explain a shift in constitutional meaning. The problem is that his method of research and argumentation bear an uncertain relation to his ultimate claim that the People, *en masse*, participated in the process.

To bolster his cultural history of the Constitution, Ackerman uses a literary technique increasingly found in legal scholarship: the fictitious voice.¹¹⁸ In Ackerman's case, it speaks in a monologue: "the Prophetic Voice" of We the People. This device is new to Volume 2 and is meant to be critical. But unlike most law review *dramatis personae*, Ackerman's lacks irony. The People speak truth, clearly. Listen as the Prophetic Voice opens chapter one:

My fellow Americans, we are in a bad way. We are drifting. Our leaders are compromising, compromised. They have lost sight of government's basic purposes.

It is time for us to take the future into our own hands. Each of us has gained so much from life in America. Can we remain idle while this great nation drifts downward?

No: We must join together in a movement for national renewal, even if this means self-sacrifice. We will not stop until the government has heard our voice.

The People must retake control of government. We must act decisively to bring the law in line with the promise of American life. [p. 3]

Ackerman reenters the book to observe that "[s]ince the first Englishmen colonized America, this voice has never been silent." The Voice is a composite of a Puritan Jeremiah,¹¹⁹ Walter Lippman,¹²⁰ Herbert Croly,¹²¹ Franklin D. Roosevelt,¹²² John F. Kennedy,¹²³ evangelical nationalists,¹²⁴ civil rights protestors, and

118. See, e.g., DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL* (1992); RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1995). Ackerman has long been interested in the role of "storytelling" in the law. See RECONSTRUCTING, *supra* note 7, at 29, 31, 52-55, 73.

119. See SACVAN BERCOVITCH, *THE AMERICAN JEREMIAH* (1978).

120. See WALTER LIPPMAN, *DRIFT AND MASTERY: AN ATTEMPT TO DIAGNOSE THE CURRENT UNREST* (1914).

121. See HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* (1909).

122. The phrase "My fellow Americans" evokes Roosevelt's fireside chats. See 2 Roosevelt, *The First "Fireside Chat" — An Intimate Talk with the People of the United States on Banking, March 12, 1933*, in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 61-65 (1938).

123. See John F. Kennedy, *Inaugural Address, January 20, 1961*, in *THE KENNEDY READER* 7-11 (Jay David ed., 1967).

124. See PERRY MILLER, *The Evangelical Basis*, in *THE LIFE OF THE MIND IN AMERICA* 3-95 (1965).

others. The melody is eclectic, though Progressive tones dominate. It sounds more prosperous than not, with the peremptory cadence of talk radio. The Voice speaks rarely in Ackerman's pages, but it remains the protagonist. "It is this voice that will concern us here, as well as the distinctive attitude Americans have cultivated in its exercise" (p. 3). Listen, and government will be returned to the People's control.

Why the Prophetic Voice? Perhaps its most arresting quality is that it sounds so different from another abstraction influencing legal studies, an abstraction that Ackerman has explored elsewhere: the Market.¹²⁵ The Voice shows faith in human agency, affirmative social justice, and redistribution — at least of political power. When the government is out of control, the People should reassert power, not repose faith in the invisible hand.

But is government out of the People's control? Certainly the federal government sometimes appears to be so, especially when observed on Washington-originated news programs: repetition, punditry, stone-skipping history, and much talk of the People. Change the channel, however, and a more meaningful, if more tedious, government comes into focus. On local access channels, little is heard of the People; instead, actual people discuss concrete needs, desires, and fears. There one hears about tax rates, public improvements, and education. Then there are the myriad controversies about the physical environment in which people live and work each day, all the tough, sometimes nasty social and cultural politics that fall under the rubric of zoning. To find out what popular sovereignty means today, it may be time to take a new look at local government.

Along with zooming in on the local world, one might pan out beyond the nation. Of course, deciphering the past is difficult enough. Still, query whether the jurisdictions studied in these books — the United States, as a nation and constituent states — will remain the primary units of jurisdictional analysis in law schools of the future. With the resurgence of zip-code identity on the one hand, and world wide web access on the other, where precisely will nationality fit in? Reports of the nation-state's death have been exaggerated. Nonetheless, it is unclear how Ackerman's and Amar's students will receive the professors' nationalist narrative. To the historian of twenty-first century consciousness, any disjunction might indicate changing recruitment and socialization within that profession or between its scholars and practitioners.

Of course, the nation will not pass. But it will continue to change shape, and its claims on the identity of its citizens will

125. See generally RECONSTRUCTING, *supra* note 7.

change too. Similarly, any decline of national identity would not mean the decline of the United States. Is there a framework for understanding how people might draw on several political identities simultaneously, emphasizing one for certain purposes and a second or third for others? Consider that the United States emerged from an early modern empire, became gradually in the nineteenth century a nation, and may now be metamorphosing again into another kind of empire, one marked by the diffuse but palpable spread of its culture, including its legal culture. It is a special kind of imperialism, full of informal modes of operation, more like those of the early modern period than the nineteenth-century. Here is where the pre-history of American constitutionalism might be instructive. Ackerman writes that the prophetic Voice of the People has spoken "[s]ince the first Englishmen colonized America" (p. 3) but is uninterested in what it was saying for almost two centuries before 1787. In the early modern world, English influence spread less through official foreign policy than the "ventures" of privileged groups, often joint-stock companies possessing, to one degree or another, license from the crown. At various times the King, his Privy Council, or his agents in America tried to centralize imperial policy, failing more often than not, so that it is only a bit of an exaggeration to see the American Revolution as less a progressive fight for democracy than a reactionary defense of long (and not so long) accrued local privileges against an increasingly interventionist central government.¹²⁶ Earlier it was argued that early modern localism was greatly concerned with jurisdictions smaller than the state. These were not just towns and counties. A corporation, for example, could be a territorial jurisdiction, or it might be something else. As the etymological fiction had it, corporations were alive. And they moved. Or if the head — the governing board — was immobile,¹²⁷ at least the arms might reach out to new lands, across political boundaries, redrawing them in the process. This had been true of corporations in the Anglophone world at least since the earliest settlement of the American continent, much of which was conducted by groups organized as corporations.¹²⁸ In short, such scripts did not always protect "a local communitarian spirit."¹²⁹ Claims of immunity from central government could, paradoxically, serve imperial ambitions.

126. With some differences, this is the theme of GREENE, *supra* note 68.

127. For a mobile corporation council, see GEORGE L. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN* 15 (1960).

128. See 1 CHARLES M. ANDREWS, *THE COLONIAL PERIOD OF AMERICAN HISTORY* 41 (1934).

129. P. 105; see also Carol M. Rose, *Ancient Constitutionalism vs. the Federalist Empire: Anti-Federalism from the Attacks on "Monarchism" to Modern Localism*, 84 Nw. U. L. REV. 74 (1989).

Today's functional equivalents might be multinational corporations. The multinational is just that: operative in many jurisdictions, ambivalently related to each. But usually it speaks American-English, and so too its default legal vocabulary derives from the United States. The global marketplace, after all, looks and sounds familiar. Negotiating among these corporations are the new diplomats, investment bankers and consultants; a top-notch American professional degree (more often M.B.A. than J.D.)¹³⁰ replacing striped pants as the anthropological marker. More pertinent to the books at hand is the influence of U.S. constitutionalism abroad. The federal Constitution has long been an international model, at least a source of concepts and vocabulary carried abroad by legal missionaries. The Founders claimed (as both Ackerman and Amar approvingly note) that they were contributing to "the Science of Politics";¹³¹ it was to be a constitution on a hill, a beacon to those less fortunate. Witness the constitutional scholars who flocked to Eastern Europe ten years ago, as well as the traditional conflation of U.S. constitutional norms and universal values.¹³² The old historical debate here about the sources of U.S. legal culture (Anglicization? Americanization?) may soon replicate itself, with cosmopolitan mutations, at an international level (Americanization? globalization?). Thus American ideas may well dominate global constitutionalism, and so discussion of the standards of legitimate constitutional change may persist. But five-step formulae and American paradigm cases will probably not "translate"¹³³ out of the present historical situation.¹³⁴

When highlighting the popular sovereignty premise of American constitutionalism, both are indebted to the "republican revival" in early American history. But times are changing in the history departments and republicanism, liberalism, and the ideological interpretation are not what they used to be. Gordon Wood's *Creation*

130. See Bruce Ackerman, *Four Questions for Legal Theory*, in NOMOS XXII: PROPERTY 351, 372 (1980) (noting that "new professions" pose a "challenge [to] the dominion of the traditional American caste of public policymakers — called lawyers").

131. THE FEDERALIST No. 9 (Alexander Hamilton), at 51 (Jacob E. Cooke ed. 1961).

132. See, e.g., BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION (1992); CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Douglas Greenberg et al. eds., 1993). The reflexive conflation of United States and universal law is no new theme in the new nation — "A world of our empire, for a world of our laws," wrote lawyer and Connecticut wit David Humphreys in the 1790s. The equation persists, as Michael J. Sandel has remarked about the work of Ronald Dworkin. MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 145-46 (1982).

133. See Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165 (1993).

134. See ACKERMAN, *supra* note 132 (on the "velvet revolutions" as a constitutional moment for Eastern Europe); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 774-75 (1997) (warning law professors that "[i]f we fail to contribute our fair share to the analysis of world constitutionalism, it will be tough for others to fill the vacuum" while warning that "the American experience [i]s a special case, not . . . the paradigmatic case").

of the American Republic¹³⁵ will for a long time remain the best study of the constitution-making period. But it must be supplemented by newer work in social and institutional history, and studies just emerging from the renaissance of Atlantic history.¹³⁶ Of course, republicanism is not going away; it was not just a product of the Cold War. It will, however, be assimilated into an ever expanding historiographical repertoire, as historians turn to other old and new frameworks to understand the movement of people and ideas throughout the world. Whiggish histories of how Americans perfected the science of politics are already turning stale, as historians become more skeptical of national exceptionalism and triumphalism (the juggernaut of popular sovereignty included). Consequently, the historical premise of both Ackerman and Amar seems a bit dated. But often fashions change too fast in the academy, and some interpretations deserve the long half-life they enjoy in the survey literature. The question is why embellish this one now? Or, what is the point of reconstructing American constitutional history as the progressive vindication of popular sovereignty?

III. THE NEW LEGAL HISTORICISM¹³⁷

Criticisms of Ackerman's and Amar's historical interpretations are open to the charge of irrelevance because they (especially Ackerman)¹³⁸ deny that they are writing professional history. Instead, they are trying to rewrite (again, in Ackerman's terms) the "professional narrative" of constitutional change. Theirs are explicitly forward-looking, usable pasts, not so much "lawyers' history," "forensic history," or "lawyers' legal history"¹³⁹ as *history for lawyers*. Which is to say that their historical constitutionalism is intended less to add weapons to the advocate's arsenal than to change the way the legal community conceptualizes the Constitution and change beneath it.

135. GORDON WOOD, *CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1972).

136. For a history of the idea of Atlantic history and a partial prospectus, see BERNARD BAILYN, *THE IDEA OF ATLANTIC HISTORY* (International Seminar on the History of the Atlantic World, Harvard University, Working Paper No. 96-01, 1996).

137. Cf. BROOK THOMAS, *THE NEW HISTORICISM AND OTHER OLD-FASHIONED TOPICS* (1991).

138. "There is lots of history in this book, some political science, a little philosophy — but these interdisciplinary excursions are in the service of a fundamentally legal enterprise." P. 28.

139. Good discussions of this problem include Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 ("law-office history"); William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986) (distinguishing "lawyers' legal history" and "historians' legal history"); and John P. Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 203 (1993) ("forensic history").

At some level, this concern with legitimating constitutional change is a measure of the success of conservative originalism.¹⁴⁰ Proposed amendments to undo postwar liberal jurisprudence and candid, actuarial court-packing suggested to Ackerman a stultifying “hypertextualism” on the one hand and a “legal realist” approach to constitutionalism on the other — the tasteless extremes, he thinks, of the constitutional menu offered in today’s law schools. He criticizes both and works to define a middle road for constitutional theory.¹⁴¹ In a different way, Amar’s “one-two synthesis” of the Founding and Reconstruction (p. 300), showing how and when the rights-oriented Bill became “America’s Parthenon” (p. xi), is implicitly designed to refute the deliberately ahistorical, plain meaning version of textualism that might undermine those rights, as well as cast doubt on historically untethered, extratextual rights.

A frustrating aspect of Amar’s book is that he never discusses his minor premise: that historically informed textualism is the correct way to interpret the Constitution today. He assumes that if his history and interpretations are correct they should be the standard against which to measure constitutional law. Even if he is right about that history and those interpretations, this is a large assumption and needs more support. He never explicitly discusses the plain meaning textual approach. He never explains, as Ackerman does, why his method is preferable to democratic “monism” or neo-Kantian rights jurisprudence. About unenumerated rights, he writes that “we need a good account of these rights before we can use open-ended language to interpolate between and extrapolate beyond these textual rights.”¹⁴² One might agree with this approach, but is its legitimacy self-evident?

Ackerman is more explicit about his methods. Many have talked about the importance of legal consciousness, but few agree on what it is and how it might be changed.¹⁴³ Ackerman actually wants to alter the profession’s consciousness; given the number of pages he publishes and reviews he receives, he may. Not all of his discursive innovations will survive the Darwinist process of law-school mainstreaming, but many will — some already have. After

140. See KALMAN, *supra* note 61, at 132-43 (discussing the “turn to history” in the legal academy).

141. This is not the first time Ackerman has embraced and transformed the methodological innovations of those whose politics conflict with his own. See RECONSTRUCTING, *supra* note 7, at 42-45 (challenging law professors to accept techniques of law and economics while rejecting its conclusions).

142. P. 299. While Amar claims that he is not opposed to judicial protection of unenumerated rights, his tone, at least, suggests serious reservations about them. See, e.g., p. 297 (referring to the “these are a few of my favorite rights” style of constitutional theory).

143. See RECONSTRUCTING, *supra* note 7, at 70-71.

Ronald Dworkin, he is arguably the preeminent liberal jurisprudent of his generation.

He means to make the most of his lectern. Long ago Ackerman flagged socialization as integral to the "reconstruction" of American law. It was imperative, he wrote, "to consider how the law shapes social perception and evaluation through a complex process of education and indoctrination."¹⁴⁴ At the same time, "no group of professionals can survive economically, sociologically, spiritually without a general sense that it provides a distinctive service of value."¹⁴⁵ In other words, law — its institutions and discourses — influences valuation; but in turn, the legal community demands that its resources be normatively grounded. A basic narrative of constitutional history might change that conceptual basis and supply those values. Historical integrity is not the point. Professional integrity is.

So Ackerman has constructed the most ambitious outline of American legal history since that of Roscoe Pound.¹⁴⁶ Like Pound, Ackerman is trying to awaken the profession to its formative eras. He too is drawn to social science methods, and he has an uncomfortable but intellectually genetic relation to legal realism (Pound a pedantic, long-lived ancestor,¹⁴⁷ Ackerman a scolding heir). Missing, of course, is Pound's academic Germanophilia. Indeed, a striking aspect of Ackerman's work is its fealty to English-American ways. "I have been trying," he writes early in *Transformations*, "to redeem the promise of Anglo-American legal method" (p. 66). Similarly, in *Foundations* he complained that his colleagues' "exalted talk of Kant and Locke only emphasizes the elitism involved in removing fundamental questions from the democratic process"¹⁴⁸ and then celebrated the empirical, "Burkean" common lawyer:

What counts for the common lawyer is not some fancy theory but the patterns of concrete decision built up by courts and other practical decisionmakers over decades, generations, centuries. . . . The task of the Burkean lawyer or judge is to master these precedents, thereby gaining a sense of their hidden potentials for growth and decay.¹⁴⁹

What Ackerman means by the common law is not always clear (not, of course, an idiosyncratic problem).¹⁵⁰ At times common law

144. *Id.* at 71.

145. *Id.* at 19.

146. See ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (Peter Smith ed., 1950).

147. See N.E.H. HULL, *ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE* (1997).

148. *FOUNDATIONS*, *supra* note 2, at 12.

149. *Id.* at 17. On Ackerman's use of Burke, see Moglen, *supra* note 42, at 547-52.

150. "Ask a Lawyer, What is Common Law? . . . He knows not what common law is . . ." Jeremy Bentham Mss., University College, London, *cited in* DAVID LIEBERMAN, *THE PROV.*

method means simply respect for precedent. At others it sounds like evolutionary custom. It can also mean the induction of principle from the raw material of legal behavior on the ground. Once found, it remains the same, even as its derivative rules and applications mutate,¹⁵¹ not unlike the fivefold formula of constitutional amendment. Finally, Ackerman's common law recalls Pound's distinction between law in action and law in books. "For common lawyers," Ackerman writes, "the key is not what a court says, but what it does."¹⁵² So too it is with the Constitution, practice fleshing out text.

Of these, abstraction most characterizes his history. Take for example his metaphor in *Foundations* illustrating the contention that "the path of the law is from the particularistic to comprehensive analysis":

Think of the American Republic as a railroad train, with the judges of the middle republic sitting in the caboose, looking backward. What they see are the mountains and valleys of dualistic constitutional experience, most notably the peaks of constitutional meaning elaborated during the Founding and Reconstruction. As the train moves forward in history, it is harder for the judges to see the traces of volcanic ash that marked each mountain's political emergence onto the legal landscape. At the same time, a different perspective becomes more available: as the second mountain moves into the background, it becomes easier to see that there is now a mountain range out there that can be described in a comprehensive way.¹⁵³

This is remarkable: the judiciary as a backward-looking institution, struggling to make sense of the whole constitutional experience, constantly moving out from the specific intent of a transformative amendment toward its more general, fundamental meaning. As with so much of Ackerman's elegant analysis, it is hard to refute, standing as it does on its own premises and following the logic of induction almost instinctive to lawyers. The result is a wonderful picture. Start with the way it naturalizes constitutional development, leaving the judiciary as an artificial element in the landscape,¹⁵⁴ with no agency but passive, myopic observation. Forget the concrete, contingent, human disputes that fuel litigation. When that surface grime is cleaned away, the masterpiece is revealed. The Supreme Court's role is less to say what the Constitution is than gradually behold the wonders of constitutional creation, as

INCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 235 n.71 (1989).

151. See RECONSTRUCTING, *supra* note 7, at 43 n.13.

152. P. 246; see also p. 360.

153. FOUNDATIONS, *supra* note 2, at 98-99.

154. A familiar trope of American romanticism. See LEO MARX, THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA (1964).

Justices glimpse beyond the picturesque (or not so picturesque) to the beautiful, perhaps farther. Theirs is an art of mimesis. But it is just a metaphor. Ultimately, Ackerman remains a constitutional positivist; the law may be sublime but not otherworldly. *Deus ex machina* is the People. And the Court does play an active role of "intergenerational synthesis," an idea rehearsed quickly in the first two volumes and the promised subject of the third, *Interpretations*. The highlight there will be his treatment of *Brown v. Board of Education*.¹⁵⁵

Ackerman is genuinely concerned with how unrooted the legal presumptions of his generation seem, how susceptible they have been to conservative attack: originalism and textualism in the case of constitutional jurisprudence, invocations of the market in private law. He has asked whether his is "a generation of betrayal"¹⁵⁶ because it has not persuasively justified the New Deal or the Supreme Court's postwar civil rights cases. Which might be to say that it has yet to answer the question of whether *Brown* adheres to a neutral principle.¹⁵⁷ Ackerman's civics lesson is designed to tutor lawyers in more creative ways of apprehending both the New Deal and postwar liberal jurisprudence. He hopes to replace the *Lochner* image of judicial review,¹⁵⁸ which led to the countermajoritarian interpretation, with a popular sovereignty one. The goal is to demonstrate that a synthesis of Reconstruction's popularly accepted principle of racial equality with the New Deal's popularly accepted principle of the national welfare state justifies *Brown*.¹⁵⁹ This is a laudable jurisprudential objective, notwithstanding its historical simplifications. But communal narratives have their ambiguous side (not least because resistant to conscious rewriting); orthodox theories tend to scant heterodox practices.¹⁶⁰ And query whether his legitimacy-inducing narrative, especially as it achieves some autonomy from its author, may support something other than

155. 347 U.S. 483 (1954).

156. Bruce Ackerman, *A Generation of Betrayal?*, 65 *FORDHAM L. REV.* 1519 (1997).

157. The question posed by Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959). See also Richard B. Bernstein, *Charting the Bicentennial*, 87 *COLUM. L. REV.* 1565, 1599-602 (1987) (arguing that "Ackerman proposes to construct a new understanding of judicial review different from the traditional view of that doctrine as 'countermajoritarian.'").

158. See Steven A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 *N.C. L. REV.* 1 (1991).

159. Cf. Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 *HARV. L. REV.* 32 (1993) (arguing that modern constitutionalism ought to rest on a substantive, not a procedural, theory of democracy).

160. Although Ackerman and Amar are committed to demonstrating that the Constitution has changed over time, they hesitate to acknowledge that multiple interpretations might exist at any one time.

Ackerman's version of popular sovereignty.¹⁶¹ And it is rare to find a modern legal theory in which the Weberian concept of legitimation has such a positive connotation.¹⁶² It is not for the faint of heart, this project of uncritical, mythic history. The standard of success is not acceptance among professional historians, political scientists, or philosophers; success, on Ackerman's own terms, depends on the absorption of his narrative into the legal community. Hence his emphasis on taxonomy and structure. He may judge the project a success if, when lawyers talk about the Constitution, they talk in terms of moments, constitutional politics, eruptions (but very controlled eruptions) of the People, and so forth, even if many dispute his analysis here and there. In consciousness formation, control over vocabulary is half the battle, as Ackerman learned when struggling with the law and economics movement. The model is in the language, not separate from it. Accept Ackerman's language and you are pretty much lodged inside his conceptual world, whether or not it is the world we have lost or know now. Only time will tell if this new civics can produce the constitutional world of the future.

161. Such uncertainty is now treated as a mark of a rigorous constitutional theory. See Amar p. 297 ("In a textualist book . . . I was obliged to confront the stubborn text that stands between the words of Amendment I and III"); Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relationship Between Principle and Prudence*, 43 DUKE L.J. 1, 54 ("One could reach nearly any substantive result . . . from within the interpretive framework that I recommend.").

162. Ackerman has previously referred to the need to create a legitimating consciousness to support the law, citing Max Weber. See RECONSTRUCTING, *supra* note 7, at 71 n.31; Ackerman, *supra* note 130, at 372 (1980). For a different, Gramscian approach to consciousness and legitimation, see Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).