



Balkinization

[Front page](#)
[Balkin.com](#)

Balkinization
an unanticipated
consequence of
Jack M. Balkin

E-mail:

Jack Balkin:
jackbalkin at
yahoo.com

Bruce Ackerman
bruce.ackerman at
yale.edu

Ian Ayres
ian.ayres at yale.edu

Mary Dudziak
mary.l.dudziak at
emory.edu

Joey Fishkin
joey.fishkin at
gmail.com

Heather Gerken
heather.gerken at
yale.edu

Mark Graber
mgraber at
law.umaryland.edu

Stephen Griffin
sgriffin at tulane.edu

Bernard Harcourt
harcourt at
uchicago.edu

Scott Horton
shorto at
law.columbia.edu

Andrew Koppelman
akoppelman at
law.northwestern.edu

Marty Lederman
marty.lederman at
comcast.net

Sanford Levinson
slevinson at
law.utexas.edu

David Luban
david.luban at
gmail.com

Gerard Magliocca
gmaglioc at iupui.edu

Jason Mazzone
mazzonej at
illinois.edu

Linda McClain
lmcclain at bu.edu

John Mikhail
mikhail at
law.georgetown.edu

Frank Pasquale
pasquale.frank at
gmail.com

Nate Persily
npersily at gmail.com

*Michael Stokes
Paulsen*
michaelstokespaulsen
at gmail.com

Deborah Pearlstein
dpearlst at
princeton.edu

Rick Pildes
rick.pildes at nyu.edu

Alice Ristroph
alice.ristroph at
shu.edu

Brian Tamanaha

Thursday, May 01, 2014

The Future Resists Control

Guest Blogger

For the Symposium on Bruce Ackerman, [We The People, Volume Three: The Civil Rights Revolution](#)

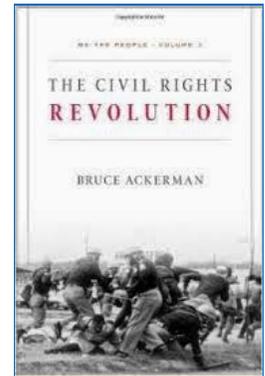
Richard Primus

Bruce Ackerman long ago persuaded me that Article V has not been the only route—or even the normal route—to legitimate constitutional change. Volume 3 admirably adds nuance to Ackerman's account of what happens instead. But nuance can be a vice of a theory as well as a virtue, depending on whether the goal is to understand a phenomenon in its complexity or to provide an actionable program for the future. [We The People](#) aims to do both: it is, after all, a grand project, probably the most important in constitutional thought in the last thirty years. But in spite of its ambitions, Volume 3 may have helped persuade me to take Article V *more* seriously—not as a matter of exclusive constitutional authority for official decisionmakers, but as a matter of prudence for the agents of constitutional change.

[We The People](#) presents an originalist theory, self-consciously and emphatically so. As such, it must reckon with this practical problem: human decisionmakers might not be good at enforcing the commitments of a prior time once those commitments have ceased to seem natural or persuasive to the decisionmakers themselves. Some will try. But it is just plain hard to understand the past on its own terms, rather than as a projection of the present, and judges (and Senators, and Presidents) are not selected for having the skills or habits of mind that make the enterprise more likely to succeed. There is a natural tendency to construe a prior heroic generation's commitments as similar to one's own, until the point where one's prior historical knowledge will not permit the dissonance, and decisionmakers often have little historical knowledge concretely on point until the need to make a decision both makes the knowledge necessary and shapes the desiderata of what the historical record should show. Under the pressure to make important decisions and to make them well, sane decisionmakers are likely to construe ambiguities of authority to permit, or require, decisions that strike them as sensible, rather than decisions that strike them as less so. For these reasons and others, even officials who in good faith wish to be bound by the commitments of the past are likely to fail in the attempt.

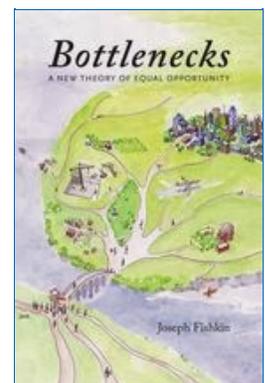
Ackerman's account has always seemed at least as vulnerable to these difficulties as other forms of originalism. If anything, the historical record from which Ackerman says authoritative constitutional meaning emerges is less determinate than a formally enacted amendment would be, which means that there is yet more room for decisionmakers to interpret prior commitments to conform with their own intuitions about common sense. To be sure, [We The People](#) has always offered criteria for identifying constitutionally significant decisions, rather than leaving interpreters completely at sea: the first two volumes offered a determinate model of the steps through which a new idea must pass in order to qualify as constitutional. But the dynamics of constitutional change are too varied to be captured by such a model, just as they cannot be captured by Article V. So it is an admirable virtue of Volume 3 that it acknowledges several variations on the model as earlier described. Sometimes this institution moves first, and then that one; sometimes the other way; and so on. This sensitivity to the need for a more flexible approach does more than display a level of open-mindedness not always seen in a leading senior theorist. It also lets Ackerman tell a more persuasive story about the constitutional dynamics of the Second Reconstruction than would be possible if he insisted on making events conform to earlier versions of the theory. But doubts about whether judges can recover and enforce the content of an earlier generation's constitutional commitments only grow as the relevant history becomes less schematized.

Books by Balkinization
Bloggers

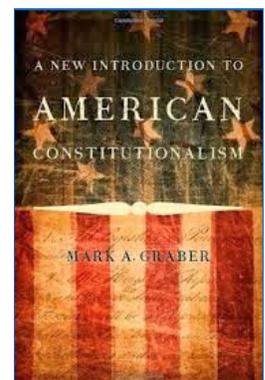


[Bruce Ackerman, We the People, Volume 3: The Civil Rights Revolution \(Harvard University Press, 2014\)](#)

[Balkinization Symposium on We the People, Volume 3: The Civil Rights Revolution](#)



[Joseph Fishkin, Bottlenecks: A New Theory of Equal Opportunity \(Oxford University Press, 2014\)](#)



[Mark A. Graber, A New Introduction to American Constitutionalism \(Oxford University Press, 2013\)](#)

btamanaha at
wulaw.wustl.edu
Mark Tushnet
mtushnet at
law.harvard.edu
Adam Winkler
winkler at ucla.edu

[Compendium of posts on Hobby Lobby and related cases](#)

[The Anti-Torture Memos: Balkinization Posts on Torture, Interrogation, Detention, War Powers, and OLC](#)

[The Anti-Torture Memos \(arranged by topic\)](#)

Recent Posts

[The Future Resists Control](#)



Just A Few Blogs

[ACS Weblog](#)
[The Agonist](#)
[Roger Ailes](#)
[Alas, a Blog](#)
[Eric Alterman](#)
[Althouse](#)
[Marc Ambinder](#)
[Arts and Letters Daily](#)
[Atrios \(Eschaton\)](#)
[Bad Attitudes](#)
[Bag and Baggage](#)
[Ted Barlow](#)
[Becker-Posner Blog](#)
[Michael Bérubé](#)
[Bill of Health](#)
[Blackprof.com](#)
[The Blotter](#)
[Body and Soul](#)
[The Buck Stops Here](#)
[Buzzflash.com](#)
[Buzz Machine](#)
[Cairns \(Beth Noveck\)](#)
[Capitol Hill Blue](#)
[Cato at Liberty](#)
[Anupam Chander](#)
[Cobb, the Blog](#)
[Juan Cole \(Informed Comment\)](#)
[Concurring Opinions](#)
[Connected Selves](#)
[The Constitution in 2020](#)
[Cooped Up \(Jeff Cooper\)](#)
[Copyfight](#)
[Corante](#)
[Corrente](#)
[Susan Crawford blog](#)
[Crescat Sententia](#)
[Crooked Timber](#)
[Cursor.org](#)
[Daily Howler](#)
[Daily Kos](#)
[Brad DeLong](#)
[Demosthenes](#)
[Digby \(Hullabaloo\)](#)
[Discriminations](#)
[Dispatches from the Culture Wars](#)
[Donkey Rising \(Emerging Democratic Majority\)](#)
[Ross Douthat](#)

None of this makes Article V a reliable mechanism for preserving the content of constitutional commitments. For all of the reasons given above, good-faith originalists who think of the text of the original Constitution and the Article V Amendments as exhausting valid constitutional authority still tend to reach substantive results that align with their own current intuitions about what would make sense. If present decisionmakers do not share the substantive commitments that underwrote an inherited constitutional text, the text will be of limited value in the attempt to preserve the substance of a constitutional enactment over time.

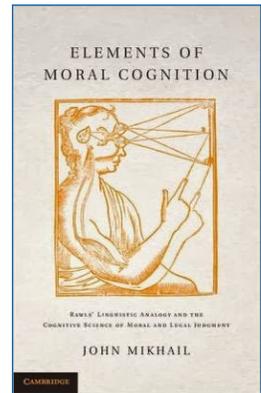
But the triumph of a political movement today is also no guarantee of some principle's becoming entrenched as a constitutional rule for any length of time: substantive commitments shape constitutional law, with or without constitutional text, but only as long as those commitments are compelling to the decisionmakers. To a greater degree in Volume 3 than in the prior Volumes, Ackerman recognizes this positive reality—that officials have in practice unwound the achievements of constitutional transformations that no longer command popular assent, even in the absence of some next change that qualifies as constitutionally transformative by Ackerman's standards. The book still contends, though, that proper constitutional interpretation would recognize certain ideas that the People espoused during the Second Reconstruction as authoritative and entrenched. But it doesn't offer reasons why decisionmakers would be likely to treat those ideas as authoritative and entrenched, except of course to the extent that those decisionmakers were sympathetic to those ideas on their merits. And a theory of how officials should interpret the Constitution needs to assign those officials a task that they could realistically execute.

Constitutional lawmaking is an attempt to control the future. But the future resists control. That is why neither Article V nor any other determinate process can contain all the ways in which constitutional arrangements might change, and it is also why neither a formal amendment nor a successful popular movement can guarantee the longevity of any particular practice. But if the future cannot be controlled, it can sometimes be influenced—partially, uncertainly, probabilistically. That is, we can do things today that make things more or less likely to happen in the future—or at least that we reasonably guess will have those effects. Changing hearts and minds is one way to try to have that influence; establishing institutional arrangements is another. Enacting formal texts that purport to be binding authority can be a third. Not because those texts have the power or authority to direct the action of future decisionmakers in the way that a civics-book constitutional theory might suppose, but because it is foreseeable that there will be future moments when substantive commitments are unsettled or contested, and in those moments decisionmakers will make use of (and be influenced by) a range of argumentative resources, formal constitutional texts included. Perhaps the leaders of the Civil Rights Revolution never had the capacity to enact Article V amendments; perhaps any such amendments would have been of limited long-term value even if adopted. But the same is true of the means that those leaders did employ. In the very uncertain game of trying to entrench constitutional principles, it seems prudent to deploy as many tools as are available in order to maximize one's chances—and then to be unsurprised if the future declines to cooperate.

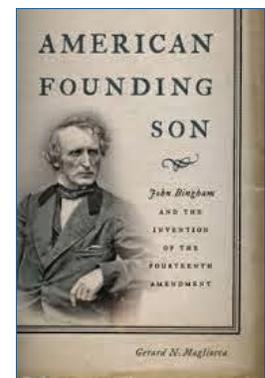
Richard Primus is a Professor of Law at the University of Michigan Law School. He can be reached at rprimus@umich.edu.

Posted 1:48 PM by Guest Blogger [link]

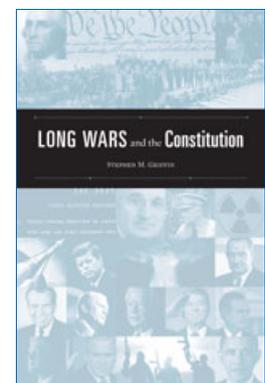
[Home](#)



[John Mikhail, Elements of Moral Cognition: Rawls' Linguistic Analogy and the Cognitive Science of Moral and Legal Judgment \(Cambridge University Press, 2013\)](#)



[Gerard N. Magliocca, American Founding Son: John Bingham and the Invention of the Fourteenth Amendment \(New York University Press, 2013\)](#)



[Stephen M. Griffin, Long Wars and the Constitution \(Harvard University Press, 2013\)](#)