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.

The People have legitimately altered the document over the past two centuries, through the Article V 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, 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 [is] substance." 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. 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.

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.


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. 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 Ely) 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


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

The Federalist Papers, and so on. As historians, both are more hedgehog than fox; the big truth they know is popular sovereignty. 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, 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."

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." In Transformations, he fleshes out the historical moments and traces

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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 ISIAH 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").


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, Ackerman's division of constitutional history into static periods punctuated by discontinuous change reflects the influence of paradigm theory. 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. Ackerman's "liberal republicanism" 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, 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." 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

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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.
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.
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 Foundations25 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).


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-

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" 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." 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. 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 middleroad 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).

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-

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.


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. 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. After the Revolution, political debate continued in the key of empire: Should the Union become a continental empire? A transatlantic commercial empire? An "[e]mpire of liberty"? 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." 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. 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.

43. On temporal frames in argumentation, see Reconstructing, supra note 7, at 53-55.
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.
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. The presidential creation of interim southern governments served the triggering function. Then Ackerman retails the fascinating details

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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


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, the impeachment of President Johnson, congressional revocation of Supreme Court jurisdiction over habeas corpus cases, etc.), with Congress's repeated victories functioning as ratification. 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. 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 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

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54. Ex Parte McCordie, 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.” 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.” The Court complied: consolidation continued apace, accelerating when an unprecedented third term allowed FDR to pack the Court the old fashioned way.

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 (1933). 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 Dissenting Lawyer’s Life (1965).
“beyond Realism” — 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 lawmaker), 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. 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-
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' iliction returns").


the society against the injustice of the other part" — and argues that

[The 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, 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 . . . ." 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

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{75} Nor was it identical to the province or state, notwithstanding

\begin{itemize}
\item \textsuperscript{72} Id. at 351-52. See also Larry D. Kramer, Madison’s Audience, 112 Harv. L. Rev. 611, 627-36.
\item \textsuperscript{73} See generally 1 Herbert J. Storing, The Complete Anti-Federalist (1981).
\item \textsuperscript{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”).
\end{itemize}
Amar's repeated equation of "local" with "state." Instead, it con-
noted a jurisdiction smaller and more manageable. The social pol-
tics 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 oli-
garchy, others of violent subcultures defying simple characteriza-
tion. 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. 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. Some of them helped ensure that the jury was guaran-
teed in several state constitutions (a point worth revisiting), though
colonial summary justice endured written constitution-making in-
tact. 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 gov-
ernmental 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 Represen-
tation 1 (1988).

77. A convenient overview is Politics and Society in Colonial America: Democ-
racy or Deferece? (Michael G. Kammen ed., 1967).

78. See Julius Goebel Jr. & T. Raymond Naughton, Law Enforcement in Colo-
nial 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

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 incor-
porated into the state constitution).
eralism remains one of the under examined mysteries of the American Revolution and the early United States. 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. 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


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." 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." It was also unwise, for "there are many cases in which the trial by jury is an ineligible one" 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."

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." 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:

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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).
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. 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." 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. It never did. Instead, the Supreme Court, per Justice Joseph Story, laid down a historical test that looked to *English* practice in 1791, when the amendment was adopted — an option no one discussed at that time. But this fitted Justice Story's transcendent, Anglocentric conception of the common law, which served a variety of intellectual and political purposes in antebellum America. 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.

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


89. MADISON, supra note 86, at 630.


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).

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).
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.


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. 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 one) 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? Would not an account that emphasized solicitude for groups help explain both the *Slaughterhouse Cases* as well as those overruling them, including *Santa Clara County*, standing for the proposition that corporations were constitutional people too? 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).


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


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. 1 (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. Ackerman and Amar realize this, and they try to show how the \textit{procedural mechanisms} of popular sovereignty have changed over time. They assume that, \textit{substantively}, popular sovereignty has always meant majoritarianism. Both are combating the problem of the "countermajoritarian difficulty" (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.

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. At the very least, the Founders, Federalist and anti-Federalist alike, were not simple majoritarians. 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. 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.


110. See The Federalist No. 78 (Alexander Hamilton) at 524-25 (Jacob E. Cooke ed. 1961).


112. Amar embraces a much less complicated notion of majoritarianism than Ackerman. In addition to \textit{The Bill of Rights}, see Akhil Reed Amar, \textit{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 \textit{Democracy, Liberty and Property} (Merrill D. Peterson ed., 1968); see also Morton J. Horwitz & Orlando de Campo, \textit{When and How the Supreme Court Found Democracy — A Computer Study}, 14 QUINNIPiAC 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; \textit{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.\textsuperscript{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.\textsuperscript{115} let alone that of social historian Lizabeth Cohen, to name just some who have helped excavate the 1930s. The people in Cohen's book, \textit{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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 nationalist and redistributive constitutional regime in the twentieth century").


\textsuperscript{117} Michael Kammen cleared some ground in \textit{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. 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, Walter Lippman, Herbert Croly, Franklin D. Roosevelt, John F. Kennedy, evangelical nationalists, 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.


120. See Walter Lippman, Drift and Mastery: An Attempt to Diagnose the Current Unrest (1914).


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).


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. 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).
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.) 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"; 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. 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" out of the present historical situation.

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*

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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).


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 Republic\textsuperscript{135} 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.\textsuperscript{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?

\textbf{III. The New Legal Historicism}\textsuperscript{137}

Criticisms of Ackerman’s and Amar’s historical interpretations are open to the charge of irrelevance because they (especially Ackerman)\textsuperscript{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”\textsuperscript{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.

\textsuperscript{135} Gordon Wood, Creation of the American Republic, 1776-1787 (1972).
\textsuperscript{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.
At some level, this concern with legitimating constitutional change is a measure of the success of conservative originalism. 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. 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." 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. 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

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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." 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." 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. 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, 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” 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.

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

144. Id. at 71.
145. Id. at 19.
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.
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,\textsuperscript{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."\textsuperscript{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 \textit{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.\textsuperscript{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,\textsuperscript{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

\textsuperscript{151} \textit{See Reconstructing, supra note 7, at 43 n.13.}

\textsuperscript{152} P. 246; \textit{see also} p. 360.

\textsuperscript{153} \textit{Foundations, supra note 2, at 98-99.}

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.*

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" 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. 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, 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.*

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. And query whether his legitimacy-inducing narrative, especially as it achieves some autonomy from its author, may support something other than

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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.\textsuperscript{161} And it is rare to find a modern legal theory in which the Weberian concept of legitimation has such a positive connotation.\textsuperscript{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.

\textsuperscript{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, \textit{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.").

\textsuperscript{162} Ackerman has previously referred to the need to create a legitimating consciousness to support the law, citing Max Weber. See \textit{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, \textit{Critical Legal Histories}, 36 STAN. L. REV. 57 (1984).
The phrase "laboratories of democracy," as applied to the states, seems most often to mean something more like "democratic laboratories" — democratic testing grounds for various approaches to social problems. What sort of welfare reform will be most effective? Let Wisconsin try out Plan A, while Michigan experiments with Plan B. What combination of tort liability rules will achieve desired levels of compensation and deterrence? Let the states experiment with strict liability, comparative negligence, or various no-fault schemes. It is also true, however, that the states are literally laboratories of democracy — arenas in which democratic institutions are themselves experimented with and tested. One such experiment, an institution now being tested, is the plebiscite. Since South Dakota adopted the initiative a century ago, American states have been testing the efficacy of direct democracy.¹ Indeed, if the current array of states utilizing the initiative had been designed as an experiment to test that method of governance, one could hardly ask for a better distribution. Approximately one-half do and one-half do not allow for the initiative. Those that do are spread out from Maine to California, albeit with a somewhat greater concentration of initiative states in the West, and include both small and large states. Collectively, the states now have a great deal of experience with lawmaking sans legislatures.

¹ In the decade following South Dakota's adoption of the initiative, eight more states followed suit. By the end of the progressive era, nineteen states had adopted the initiative. Currently, twenty-four states plus the District of Columbia provide for lawmaking by initiative. Those states, in the order in which they adopted the initiative, are: South Dakota (1898), Utah (1900), Oregon (1902), Nevada (1904), Montana (1906), Oklahoma (1907), Maine (1908), Michigan (1908), Missouri (1908), Arizona (1910), Colorado (1910), Arkansas (1911), California (1911), Idaho (1912), Ohio (1912), Nebraska (1912), Washington (1912), North Dakota (1914), Massachusetts (1918), Alaska (1959), Florida (1968), Wyoming (1968), Illinois (1970), District of Columbia (1977), and Mississippi (1992). Dubois & Feeney, p. 28 tbl. 1.
Those of us hoping to learn from this experience need several distinct sorts of information. First of all, we need information about the initiative process itself. Who has used it? To what ends? How does it work? What procedural difficulties have arisen? What solutions to those difficulties have been attempted or suggested? Providing this sort of information is the aim of Philip L. Dubois and Floyd Feeney in *Lawmaking by Initiative: Issues, Options and Comparisons*. Dubois and Feeney survey the initiative process and outline the key procedural problems which have arisen in the practice of lawmaking by initiative. While they focus on the experience of California, Dubois and Feeney have collected data regarding direct lawmaking across the country and abroad. They accurately and cogently describe many of the procedural issues generated by the initiative: signature requirements, ballot complexity, voter understanding, campaign finance, and judicial review. Dubois and Feeney's valuable contribution is among the handful of books any student of direct democracy should have on his or her shelf.

Information about the initiative process itself is but one piece of the puzzle. Making sense of the experience of the states requires context. It requires an understanding of the political and social circumstances under which real world initiatives are proposed, debated, and voted upon. Alongside political science, we need political and social history; and that is precisely what Peter Schrag offers in *Paradise Lost: California's Experience, America's Future*. Schrag's book is not about direct democracy per se. It is about California. It is about the political life of the state, and the way in which that life has changed over the past two decades. As Schrag recognizes, however, to write about California politics is to write about the initiative. As a result, Schrag's book is as useful and interesting to students of the initiative generally as it is to those primarily interested in California politics. It puts meat on the bones described by Dubois and Feeney, and fleshes out the "too too sullied" political world in which the process must work.

I suggest, however, that the picture remains incomplete — at least two additional pieces of the puzzle are needed. Not only must we understand how the initiative process works, and not only must

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2. President, University of Wyoming.
3. Professor of Law, University of California, Davis.
5. Peter Schrag, recently retired, was for nearly two decades the editorial page editor of the *Sacramento Bee*. 
we understand the particular political goals of those who make use of the process, but also we should try and think carefully about two closely related aspects of the initiative picture. First, we need an applied theory of direct democracy. I use the term “applied” to emphasize that what is needed is not abstract theorizing but grounded justification. On what understanding of democracy, or of politics generally, is the plebiscite a wise or legitimate way to make political decisions? What does the plebiscite accomplish that representative government does not? What are we hoping to achieve through direct, popular lawmaking? It is neither adequate nor accurate to toss out airy abstractions about “the popular will,” or “giving the people a voice in government.” What, precisely, is “popular will”? On what basis can one conclude that the plebiscite is a reasonable way to measure it? Why is the initiative a sensible way to hear the voice of the people?

Second, we ought to check the popular resonance of our applied theory by investigating what might be called the social meaning of direct democracy. What does the initiative process mean to those who advocate its use? Is the public understanding of the plebiscite the same as, or even consistent with, any available theoretical justification? Why do people embrace the initiative as a form of government? It is not enough to respond that people will embrace whatever processes they think will get the results they desire. For some reason, or some combination of reasons, the initiative has been seen by many as more than simply useful. As Dubois and Feeney observe, “many see the initiative as the very essence of democracy” (p. 1). Why so? One can imagine a glib response to my question. The initiative has been accepted as the very essence of democracy, one might respond, because it is the very essence of democracy. The likelihood of such a response suggests the importance of the question itself. How and why have we come to see a practice eschewed by our federal Constitution and not permitted by the states for the first century of our nation’s history, as the paradigm of democratic government? What does the initiative mean to us?

I. THE INITIATIVE PROCESS

Lawmaking by Initiative grew out of research the authors did for the California Policy Seminar, a joint program of the University of California and the California state government. The book does not contain new empirical research, but rather marshals and organizes the available data in ways designed to allow an overview of the initiative process. In this effort it succeeds. Dubois and Feeney describe the process of initiative lawmaking with admirable breadth. Lawmaking by Initiative would be among the first books I would
recommend to a colleague or student interested in, but unfamiliar with, the practice of direct democracy in America. What the authors fail to provide, however, is an adequate conceptual framework in which to evaluate the description they offer.

_Lawmaking by Initiative_ begins with a brief discussion of the history of the plebiscite in America and an even briefer discussion of the theoretical issues surrounding direct democracy generally. These chapters are unsatisfying. For example, Dubois and Feeney gloss over the question of whether direct democracy is or is not compatible with the sort of republican government envisioned by the Founders. They offer little in the way of theoretical grounding and do not outline a view of the goals of government against which to evaluate the information they provide. Indeed, they seem uninterested in what to many might appear the fundamental question: Is the initiative process a sensible or appealing way to go about making laws? In their own words:

>This book does not seek to settle the question as to whether the initiative is a wise institution. Rather, it seeks to describe the major issues that have arisen in the use of the initiative and to discuss the policy options available for addressing these problems. By elucidating the problems that have arisen and the possible solutions to these problems, the book seeks both to inform the debate about the wisdom of the initiative and to offer suggestions for improvement to those jurisdictions that choose to use the process. [p. 2]

At one level, this is all well and good, there being nothing wrong with a decision to inform rather than evaluate or theorize. Unfortunately, the information provided is rendered less useful, and the accompanying "suggestions for improvement" less reliable, by the absence of a clearly articulated conception of democratic government. Put simply, it is difficult to describe problems with a process, let alone suggest improvements, without some sense of what the process can or should be trying to accomplish. Imagine an architect attempting to improve a building without thinking carefully about the uses the building is capable of serving or intended to serve.

This lacuna does not undermine the entire book. For example, the introductory chapters are followed by a comparative description of initiative procedures. There, Dubois and Feeney's "just the facts" approach is welcome and appropriate. In Chapter Four, the authors review the various forms of the initiative in use. Chapter Five briefly describes the initiative process in Switzerland and elsewhere. Chapter Six describes the processes employed by the several states in greater detail, addressing, for example, the distinction between state constitutional amendments passed through the initiative and initiative statutes. This information will, for the most part, not be new to students of the plebiscite, but it is well-organized, accurate, and above all, clearly presented. A series of charts outlin-
ing various comparative features provides a nice sense of perspective on the variety, frequency, and nature of initiative lawmaking in the United States (pp. 28-44). These descriptive chapters suffer little, if at all, from the book's lack of a thoroughgoing theoretical grounding.

Beginning with Chapter Seven, the book turns to a discussion of the procedural issues surrounding the initiative. Even there, the absence of an expressly articulated conceptual framework is not a fatal flaw. Some procedural problems can be identified without articulating a vision of what the process is intended to accomplish. To return to the architectural analogy, regardless of the uses to which a building will be put, one can assume that certain basic features — a solid foundation, a sound roof — are desirable. Similarly, in the context of the initiative, it can be safely assumed, that providing voters with accurate information is better than misleading voters and that comprehensible ballots are better than confusing ones. For this reason, Dubois and Feeney's analysis of voter understanding and ballot complexity is straightforward and valuable. The authors describe the problem: voters often do not understand ballot issues or do not understand them as well as might be hoped. In fact, some initiative measures have been so poorly (or deceptively) drafted that substantial percentages of voters later reported having voted contrary to their own preferences (pp. 118-19). Dubois and Feeney review methods explored by various states in their efforts to reduce complexity and better educate voters (pp. 113-80). For example, voter comprehension can be improved by limiting the length and number of initiatives, requiring the subject matter of the initiative to be clearly stated in the title, and requiring the consequences of a "Yes" vote to be clearly stated. Similarly, it may be possible to improve the Voter Information Pamphlets provided to voters.

Other procedural issues, however, are more difficult to evaluate without some sense of the ends the process is meant to serve. Consider, for example, the method through which initiatives are qualified. Advocates of a measure are required to collect a certain number of signatures during a specified period of time prior to the election. The number of signatures required is generally calculated as a percentage — ranging from five to ten percent — of votes cast in the most recent gubernatorial election (p. 33). California, for example, allows supporters of an initiative 150 days to gather signatures totaling 5 percent of the votes cast in the last gubernatorial election, a percentage which currently translates to something in the neighborhood of 700,000 signatures (p. 97). This qualification process has become highly professionalized, with paid signature gatherers employed to supplement or replace volunteers. Dubois and Feeney report anecdotal evidence that the process emphasizes the efficient collection of signatures rather than the dissemination
of information or the gauging of public opinion. The upshot is that "paid circulators are able to qualify a measure even if no one cares strongly about it" (p. 99). Even volunteer signature gatherers are discouraged from any actual attempts at public education. According to one widely quoted campaign manual:

Volunteers should not converse at length with signers or attempt to answer lengthy questions. While such a conversation is in progress, a hundred people may walk by unsolicited. The goal of the table operation is to get petition signatures, not educate voters. All efforts to educate voters will be futile if the initiative does not qualify for the ballot.\(^6\)

Research suggests that "only a fraction of the citizens who sign petitions attempt to read or understand what they are signing" (p. 96). As a result, "[i]t is highly doubtful," Dubois and Feeney conclude, "that the signature qualification process has ever reflected careful voter deliberation" (p. 96).

Dubois and Feeney accurately identify one obvious problem with this state of affairs — the lack of necessary correspondence between petition signatures and public support. The authors assume that it is desirable, as a matter of state policy, to have an initiative qualification process that is more reflective of the degree of popular support for a proposal (or voters' willingness to submit the issue for a public vote) than it is the ability of supporters to circulate their proposal. [p. 100]

On this basis, they outline and evaluate a range of potential reforms to the initiative qualification process, all designed to increase the extent to which signatures on petitions reflect public support. The authors conclude that "if the signature solicitation process is to become meaningful as a barometer of the breadth and depth of public concern, ways must be found to separate the solicitation of signatures from the collection or acquisition of signatures" (p. 106). For example:

Solicitors could be limited to discussing ballot measures with prospective signators and to distributing the official ballot title and summary along with appropriate campaign literature urging voters to support placing the matter on the ballot. Petitions for signatures could then be made available for voters to sign in a number of prominent public locations, such as state and local government offices, public libraries, and fire stations. [p. 107]

Dubois and Feeney's suggestion may or may not offer a method of improving the signature-based qualification process, depending on what counts as improvement. Severing the solicitation of support from the gathering of signatures would in all likelihood reduce the number of signatures obtained through pressure, but it might

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6. P. 95 (quoting SCHMIDT, supra note 4, at 199).
also reduce the number of "legitimate" signatures that advocates are able to obtain. Before one can decide whether the authors' prescription would make the process more effective, one needs to decide what the process ought to affect.

Dubois and Feeney are ambiguous on this point. They assume that the process ought to reflect "the degree of popular support for a proposal (or voters' willingness to submit the issue for a public vote)" (p. 100; emphasis added). But of course these are two different things entirely. Do we want to measure popular support for a particular issue? If so, we might want to ensure that as many signatures as possible represent informed decisions on the merits. Or do we want to measure popular willingness to put the issue to a vote? In that case, voters may well be able to decide with little or no information about the proposal itself. One can imagine, for example, a citizen reasoning as follows: "I don't know what I think about this issue yet, but I do think that in general people ought to be given the chance to vote on issues of this sort." Elsewhere, the authors argue that:

The goal of reform should be to ensure that voters are sufficiently informed about the contents of initiative petitions so that their signatures, considered in the aggregate, represent a critical minimum number of individuals who are sufficiently dissatisfied with the substance of existing policy (or the absence of policy) that they want the matter brought before their fellow citizens for discussion and disposition by majority vote. [pp. 99-100]

This represents yet another potential criterion. Perhaps signature-based qualification requirements ought to measure popular dissatisfaction with current legislative policy. If so, why the emphasis on voters being "sufficiently informed about the content of initiative petitions" themselves?

What sorts of issues ought to get on the ballot? Those with a high likelihood of success? Those touching on issues as to which popular dissatisfaction is high? Or might there be substantive criteria? Are certain kinds of issues better suited to plebiscitary lawmaking than others? These questions cannot be answered without some understanding of what the initiative process as a whole is designed to accomplish.

It might appear that the theoretical basis for the initiative is self-evident. Indeed, one reading of Dubois and Feeney would be that they do not eschew theory, but rather assume it — they assume that the theoretical pedigree of the initiative is so clear as to require neither explanation nor defense. For example, the authors observe that the initiative was supported during the Progressive Era by "reformers who were searching for ways to make the political system more responsive to the popular will" (p. 10) and was "designed to increase the power of the electorate" (p. 3). They further note that
the initiative is "widely regarded as a useful method for expressing the popular will" (p. 3). Perhaps the theory behind direct democracy is nothing more complicated than populism. The populist might put it this way: We believe in popular sovereignty. That means that we, the people, are the source of political power. We can and do delegate to our representatives the authority to make many day-to-day political decisions, but we remain in charge. Direct democracy is simply a way in which we are able to make some decisions ourselves. Call this the basic populist defense of the plebiscite.

This understanding, or something like it, seems to have informed the decisionmaking of the Supreme Court in its most well-known direct democracy case, *City of Eastlake v. Forest City Enterprises.* There, the Court, in an opinion by Chief Justice Burger, upheld the constitutionality of a City Charter provision, enacted by popular vote, which required that any land use changes passed by the City Council be approved by referendum. The provision had been challenged as a standardless delegation in violation of the Due Process Clause. The Court, however, held that:

A referendum cannot ... be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create.... In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature. The plebiscite, by going directly to the source of political power, is, on this reading, the process *least* in need of guiding standards or legitimating justification. According to the Court, direct democracy is a straightforward way to "give citizens a voice on questions of public policy."

Despite its pedigree, this basic populist justification is neither sufficient nor satisfactory. It is insufficient because it begs the question of which issues should be decided directly. Presumably, not even the staunchest supporters of the initiative would be willing to forego entirely the benefits of representation. Dubois and Feeney list, as the first of several guiding principles: "The concept that laws should normally be developed through the legislative process and that the initiative is a device to be used primarily when the legislative process is blocked" (p. 223). It is far from clear, however, what one ought to understand by the term "blocked." Does this mean "procedurally precluded from considering an issue," as in the case of an entrenched state constitutional provision? Dubois and

8. 426 U.S. at 672 (citations omitted).
Feeney do not recommend limiting the initiative to situations in which the legislature appears literally unable to consider an issue. At the other extreme, "blocked" in this context could mean simply "unwilling to give the people what they want." If that is the meaning of blocked, however, it provides literally no guidelines for limiting the appropriate scope of initiative lawmaking.

If, as seems likely, Dubois and Feeney mean to suggest that direct lawmaking is appropriate on some occasions but not others — that some but not all issues ought to be submitted to a popular vote — they need to provide some criteria. In a brief discussion of "Subject Matter Restrictions," the authors offer a clue as to what sort of criteria they might endorse. They note that many states limit the extent to which budget matters can be decided by initiative. "Because the appropriations process necessarily involves comparisons among programs, it also seems unwise and ultimately unworkable to allow a great proportion of a state's resources to be appropriated through the initiative process" (p. 83). This suggests a criterion that might be called severability. The initiative should be used for issues that can be distinguished conceptually from others, such that the decision on those issues will have limited impact on other matters. This understanding would fit well with Dubois and Feeney's emphasis on the single-issue requirement and with their willingness to disparage logrolling (pp. 126-29).

But how does a severability criterion fit with the authors' assertion that initiatives should be used primarily when the legislature is "blocked"? More to the point, fiscal issues are hardly the only example of issues requiring comparisons. One's opinion on any issue is likely to be influenced by one's expectations and understandings of numerous other points. At bottom, the concerns apparently underlying a severability criterion reflect just one manifestation of a long-recognized difficulty with direct democracy — complex, real-world problems are difficult to articulate in the form of the yes/no dichotomies required by the plebiscite. If one were to limit the initiative to those issues which truly stand alone in the minds of voters, one might well end up with an empty set. It would, however, be unfair of me to criticize the severability criterion after having myself foisted it on Dubois and Feeney. Perhaps they would not embrace that basis for identifying the proper role of the initiative. Perhaps they would instead articulate an account of what it means for a legislature to be blocked, so as to render direct lawmaking appropriate. Perhaps they would offer some other criteria entirely. My point here is that they have not done so in this book.

Dubois and Feeney's vagueness over the proper role of direct democracy is perhaps indicative of a familiar tendency on the part of students of direct democracy. There seems to be some sense that
we can avoid comparing or adjudicating between direct and representative lawmaking because the two can coexist. Direct democracy, it is said, is not intended to replace representation, but merely to supplement it. At one level, this is true. In terms of numbers of issues decided, the initiative may be understood as a mere supplement. That is not the key question, however. The heart of the matter is not frequency but authority, and the question confronting people deciding what sort of political processes to employ is this: What process has the last word? Direct democracy, where it exists in the United States, always trumps representative democracy. An initiative can overrule the legislature. The initiative does not supplement representation, it sits above representation, wielding, in the words of the Court "a veto power, over enactments of representative bodies." That this hierarchy (initiative over representation) goes unchallenged, indeed unremarked upon, is evidence of the force and pervasiveness of the basic populist defense of direct democracy described above. If the people are in charge, and if initiatives measure the will of the people, then of course initiative outcomes should trump. Not only does the basic populist defense appear incapable of providing limits upon the role of the initiative, it seems as well to deny the existence of such limits. If one desires, as do Dubois and Feeney, to somehow limit the role of the initiative, one needs to qualify (or provide an alternative to) the facile assertion that the initiative captures the voice of the people.

Fortunately, the basic populist defense of direct democracy is not only insufficient but also unsatisfactory. First of all, plebiscites suffer from a range of practical difficulties, many of which are documented by Dubois and Feeney. Given realities such as confusing and poorly drafted ballot issues, uninformed voters, limited and uneven voter turnout, and the pervasive influence of money, it is fair to ask whether initiatives ever identify the preferences of an informed and considerate majority. While recognizing many of the problems with direct democracy as practiced, Dubois and Feeney fail to acknowledge that a sufficiently egregious set of practical failings can undermine an otherwise appealing theoretical foundation.

10. See Richard Briffault, Distrust of Democracy, 63 TEXAS L. REV. 1347, 1350 (1985) (book review) ("Indeed, to proceed by contrasting direct and representative democracy may miss the point. We do not have to choose between the initiative and the legislature: in twenty-three states we have both. In these states the legislature and the initiative not only coexist but interact in a system of lawmaking.").

11. 426 U.S. at 673.

12. I do not mean to suggest that representative government is free from similar difficulties — agency costs, if you will. Rather, my point is that the practical problems attached to the plebiscite make it impossible to conclude, a priori, that "direct" democracy is more responsive to the electorate. Indeed, we will be unable to decide which method is more re-
More fundamentally, it is not at all clear that the plebiscite would be capable of meeting the goal so frequently attributed to it — that of hearing the voice of the people — even if all of the practical problems were resolved. For example, as I have argued elsewhere, even a perfectly conducted plebiscite would disregard the intensity of preferences and thereby submerge interissue priorities.13 On this understanding, the "preference of the majority" and "the voice of the people" are two different things entirely, with the latter including information about the relative importance of issues. Single-issue majority votes may tell us what the most people want, but they cannot tell us what the people want most.

It may well be possible to answer this and other objections by outlining a role for the initiative in the resolution of issues as to which inter-issue priorities are less important. My concern with Dubois and Feeney’s book is not that it fails to come to terms with my or any other particular theoretical objection to direct democracy. Rather, the difficulty is that the authors fail to offer any grounding of their own — other than to note in passing that initiatives are “widely regarded as a useful method for expressing the popular will” (p. 3). This will not do. While I would and indeed do recommend Dubois and Feeney’s Lawmaking by Initiative for its valuable and well-presented information about the initiative in America, I would recommend as well that the authors’ recommendations for improvement be taken with a grain of salt. Each of the recommendations seems perfectly sensible, but I hesitate to take directions from someone who has not paused to ask me where I want to go.

II. THE POLITICAL CONTEXT OF INITIATIVE LAWMAKING

Peter Schrag ran the editorial page of the Sacramento Bee for two decades, and is as well-placed an observer of California politics as one could desire. In Paradise Lost, he describes what he has observed. Schrag lets us know what he sees, and he also lets us know where he stands. He believes that California politics is a lesser thing than it was decades ago in the heyday of Governor Pat Brown, and that the initiative is part of the problem. Nostalgic for the era of big, ambitious government, Schrag sees the initiative as the tool and emblem of a pinched and small minded anti-communitarian social and political ethic. While it is possible to dispute Schrag’s characterization of California politics and easy to question his allegiance to tax and spend governance, it is impossible to doubt responsive until we decide to what we want to respond — that is, until we fill in the underlying theoretical gap I have attempted to identify.

the value of Schrag’s book to those interested in understanding the role played by the initiative in the state which has used it the most.

In the Introduction to *Paradise Lost*, Schrag cogently and accurately summarizes the five sections of his book:

- A section briefly describing California’s heyday of post-World War II optimism, itself probably founded on excessive expectations, that peaked in the era of Pat Brown — roughly 1958-66 — and an examination of the demographic, economic, and political stresses that so quickly began to undermine it.
- A snapshot of California today, focusing on the state’s Mississippi-fied public services and infrastructure and the fundamentally changed government structure and social relations that California’s tax revolt and its political progeny have produced.
- A section on the causes of the radical tax revolt that’s associated with Proposition 13, and its consequences in California’s ability to manage its affairs. Although 13 has become its enduring symbol, the attempt to mandate fiscal policies has run through scores of other ballot measures, some of them (in reaction to the tax limits) mandating certain kinds of spending, most further restricting either revenues or spending.
- An elaboration of the history, dynamics, and broader implications of California’s orgy of plebiscites, as well as a discussion of the major measures of the past two decades, and their consequences both in substantive policy and in the increasingly constrained exercise of policy choices imposed on representative government in California.
- A brief coda examining the possibilities for a new political integration and a revitalized social ethic in California, describing the contrary forces pushing even further toward a market-based governmental ethic, and appraising the national implications and the stakes that ride on the outcome of the conflict between them.

As Schrag sees it, California once represented everything good and hopeful about American political life. During the postwar years, the state poured millions into ambitious infrastructure programs including, among other things, a highway system once the envy of the nation. The public education system was unparalleled and actually aimed for the now hardly imaginable goal of free college education for all who could benefit from it. To this end, a total of nine new state colleges were opened between 1957 and 1966 (p. 36). Government was big, energetic, and above all, confident. The state government displayed, as Schrag puts it, “a cheerful willingness to raise taxes” (p. 35). Schrag quotes Governor Pat Brown’s response to an assistant who, in 1960, questioned the availability of funds for the ambitious, multi-billion dollar California Water Project given the rising expenses attached to public education. Brown was undaunted: “We’ll find enough money to do both. We’ll build the water project and we’ll build new universities and new state colleges and new community colleges and elementary
schools, too. We’ve got plenty of money and we have to do it” (p. 35). As Schrag notes, this “was something that no California governor — and probably no other American governor — would ever say again in the same way” (p. 35).

Things have changed. For example, California has opened no new branches of the state university system in the last two decades. The state has, however, opened twenty new prisons. California’s public schools, once among the nation’s best, now rank near the bottom. The state’s once gleaming freeway system is crumbling — functional, but hardly the model it once was. Schrag attributes these changes — this fall from grace — to a narrow and selfish, market-based, political and social ethic. Schrag sees a state whose more prosperous residents have come to view taxes as an unwarranted, external imposition rather than a legitimate, shared community obligation. The device which in Schrag’s view has both encouraged and facilitated the growth of this anticommunitarian ethic is the initiative, the very paradigm of which is Proposition 13.

By the mid-1970s in California, inflation and economic growth, combined with political measures designed to control development, were driving property values sky high. While this growth represented a boon for those who sold their homes, it meant just one thing for millions of Californians with no plans to move — higher property taxes. Between 1975 and 1978, assessed values for owner occupied homes more than doubled, and the share of the total property tax burden borne by the owners of single family homes increased from thirty-two to forty-two percent (p. 139). The prevailing attitude among California homeowners was anything but “cheerful willingness.” Conditions were ripe for revolt — a revolt which took the form of Proposition 13, a property tax limitation initiative created by long-time political gadfly Howard Jarvis and conservative activist Paul Gann. As Schrag accurately describes it, Proposition 13 was designed to capture the interest, attention, and votes of those who feared being taxed out of house and home:

[Proposition 13] would be a simple scheme that any voter could understand: Property values would be rolled back to their 1975 levels and could be raised by no more than 2 percent a year for inflation until the property was sold and transferred, at which point it could be reassessed at the purchase price. The tax rate would be limited to 1 percent on the value of each parcel, with the legislature determining how that 1 percent would be apportioned among the various local agencies that had previously set their own tax rates. The only exception to that 1 percent would be for the cost of amortizing whatever local bonds were still outstanding. But henceforth, local agencies, in-
cluding schools, would effectively be prohibited from issuing any new bonds.14

With a remarkable sixty-nine percent of voters turning out, Proposition 13, the Jarvis-Gann Initiative, won in a landslide, receiving nearly two-thirds of the votes cast.

It is certainly possible to take issue with the substance of Proposition 13, and Schrag does allow himself a few shots. For example, as predicted from the outset by opponents of the measure, the overwhelming beneficiaries have been corporate, rather than residential, landowners. More generally, of course, one can ask whether the particular balance stuck by Jarvis-Gann is ideal or desirable. But Schrag’s point is a larger one. The passage of Proposition 13 signaled not merely a dramatic shift in policy, but a fundamental shift in the very form and method of government as well. In the past two decades, increasing numbers of key political issues have been decided by initiative rather than by the legislature. Schrag outlines this transformation in a section of his book appropriately headed “March of the Plebiscites.” He describes in detail what he calls the “modern plebiscitary cycle,” a “spiral of public alienation and disengagement, of constitutional reform, gridlock, unintended consequences, further alienation, and more reform” (p. 188).

As Schrag sees it, the difficulty with initiative lawmaking is not only that the wrong decisions are made, but also that decision-making is itself distorted. On one hand, the move to initiative lawmaking is generally understood as taking power from politicians and putting it into the hands of the people.15 Whatever one thinks about this characterization, initiative lawmaking certainly does one other thing. The plebiscite moves decisionmaking away from an arena in which a range of issues are considered in connection with each other over a period of time, to an arena in which issues are addressed in isolation, one at a time. It is this narrowing of focus, this blinkered vision and concomitant piecemeal decisionmaking, that is to Schrag, at least, as salient as the purported popular nature of the initiative.

The most obvious way in which the tunnel vision promoted by single-issue initiatives manifests itself is through poor or shortsighted decisionmaking. Sounding a theme which he has emphasized elsewhere,16 Schrag describes the way in which California has painted itself into a series of corners from which any movement at all, let alone effective governance, is virtually impossible. One mea-

14. P. 140. The limitation on new bonds was subsequently amended, in 1986, to allow for school districts to issue construction bonds if approved by two-thirds of the electorate.

15. As I have suggested, this characterization appears unwarranted. See supra note 12 and accompanying text.

16. See Peter Schrag, California, Here We Come, ATL. MONTHLY, Mar. 1998, at 20; Peter Schrag, California’s Elected Anarchy, HARPER’S, Nov. 1994, at 50.
sure limits taxation and thus caps revenue, while another mandates expenditures. Absent legislative accountability, responsibility is divided between (or lost among) a dizzying array of state and local agencies. Schrag describes the situation nicely:

Paradoxically, the further the initiative process goes, the more difficult and problematic effective citizenship becomes. California has not just seen a sharp decline in the quality of public services — education, public parks, highways, water projects — that were once regarded as models for the nation. It has also seen the evolution of an increasingly unmanageable and incomprehensible structure of state and local government that exacerbates the same public disaffection and alienation that have brought it on, thus creating a vicious cycle of reform and frustration.

Each measure, because it further reduces governmental discretion, and because it moves control further from the public — from local to state government, from the legislature to the constitution, from simple majorities to supermajorities — makes it even harder to write budgets, respond to changing needs, and set reasonable priorities. And since many of those measures have irrationally — though sometimes necessarily — divided authority between state and local governments and among scores of different agencies, the opportunity for buck passing is nearly unlimited. To cite the most glaring example, because Proposition 13 specifically (and ironically) transferred a great deal of effective spending authority from local governments to the state, the state legislature, itself increasingly constrained by constitutional limits and mandates, allocates funds for local schools. But local school boards have, at least in theory, and, again, within the constraints of their own limits, the authority for spending it.

Thus, when funds run low or programs have to be cut, it is nearly impossible to determine whether accountability rests with the state’s elected politicians for not providing enough or with the local board for spending it wastefully. Something similar is true for county governments. And since spending is so hopelessly tangled in formulas that have been written into the constitution — directly by measures like Proposition 98, which established mandatory minimum state funding requirements for the schools; indirectly by a three-strikes initiative that threatens to devour a large part of the state’s discretionary funds in escalating prison costs — the system often runs largely on autopilot, beyond the control of any elected official. The whole fiscal system, in the view of Elizabeth Hill, California’s nonpartisan Legislative Analyst, has become “dysfunctional.” It “does not work together to achieve the public’s goals.” [pp. 11-12]

Schrag details many of the negative, if generally unintended, consequences of this situation, including the effect upon governmental decisionmaking generally. State and local policymakers, hedged about by limitations and mandates, make decisions based not on the long-term best interest of constituents, but based rather on the arbitrary but inescapable exigencies of the near-gridlock im-
posed by piecemeal, initiative governance. As an excellent example, Schrag describes the way in which local governments, barred by Proposition 13 from making reasoned property taxation decisions, pursue sales tax revenues above all else, seeming to eschew long-term light industrial or high tech development which might bring high paying jobs (pp. 178-80).

It should come as no surprise that blunderbuss fiscal measures have unintended consequences, or that measures passed without a careful consideration of the big picture fail to form a coherent financial policy. Initiative decisionmaking, however, not only disfavors careful and deliberate policymaking, it also severely inhibits, if not precludes, big-picture thinking. Initiatives, by their nature, force voters to confront one issue at a time. On one day the voters are asked whether they want lower taxes. On the next day they are asked if they want funding for schools. On yet another day the question is whether repeat felons should stay in jail. At no time are voters, or their representatives, given an opportunity to evaluate the relative importance, costs, and benefits of the particular measures in a world of limited resources and interconnected political realities.

Schrag makes a persuasive argument that the initiative is not conducive to wise decisionmaking, but he also suggests a subtle and potentially more troubling point. The plebiscite may bring out not only the fool in each of us, but the knave as well. Direct democracy is often lauded on communitarian grounds as a method of recalling people to their status and duty as citizens. It seems, however, that forcing voters to focus on issues one-at-a-time, and in isolation, leads to decisionmaking which is not only short-sighted but selfish, or worse.

Without making crass or oversimplified accusations, Schrag builds a persuasive case that older, well-to-do, predominantly white voters have become increasingly hesitant to fund programs they see as benefiting primarily younger residents (those with school-age children), minorities, or immigrants. Schrag correctly sees this hesitance as not a new phenomenon, but one which was evident as early as 1978, when Howard Jarvis "was writing articles complaining about aliens 'who just come over here to get on the taxpayers' gravy train.'" Schrag does not blame the initiative for selfishness. In his view, the initiative has been an outlet for, rather than a source of, the narrow, anti-communitarian ethic he laments. But it hardly seems a stretch to suggest that issue-by-issue initiative decisionmaking might be less conducive to communitarian generosity than other forms of governance. When political issues are couched not

in the form of "What should we do?" (as is at least possible in the legislature), but rather in the form of "What do you want?" (as is the unavoidable tenor of the ballot issue), an increased level of self-centered decisionmaking appears likely if not inevitable.

Paradise Lost contains even less theory than does Dubois and Feeney's Lawmaking by Initiative. Unlike Dubois and Feeney's work, however, Schrag's book does not suffer by the omission. Schrag does not purport to be analyzing direct democracy. Nor does he purport to offer suggestions for improving the process. Indeed, it might be fair to say that Paradise Lost is not about direct democracy at all, although that might be an exaggeration, given that the book is well-researched and does contain a fair amount of information about the evolution and use of the initiative in California. My point is that the book is useful, even invaluable, to students of the plebiscite not for what it says about the initiative, but for its description of the political world in which certain well-known initiatives were enacted. Accordingly, one does not expect Paradise Lost to offer a theory of the plebiscite, and one is neither disappointed nor misled by the absence of any such theory.

This is not to say, however, that Schrag's analysis is completely satisfying. Although it would be unfair to expect him to provide the applied theory found wanting in Dubois and Feeney, it would not be at all unreasonable to ask Schrag to help fill an analogous gap in our understanding of the plebiscite. Schrag is admirably, perhaps even uniquely placed to describe and evaluate the public equivalent of applied theory — social meaning. Paradise Lost is less useful than it might be because he does not strive to understand or communicate to the reader any sense of what the processes of direct democracy mean to those who make use of them.

It is easy to miss an important distinction here. Schrag does an excellent job explaining what the issues mean to the parties involved. He is an astute and careful student of human motivations. Not only does Schrag give us a good sense of what moved the key political players in the drama he describes, but he also provides valuable insight into the ways in which the current political environment in California — meaning, in this context, the motivations and understandings of the voters — is intimately interconnected with the changing demographics of the state. Schrag understands that political issues have meanings and that those meanings can matter as much as the concrete, material costs and benefits of this program or that. What Schrag fails to recognize, or at least fails to discuss, is the possibility that political processes may have meanings as well.

One might be tempted to ask whether political processes mean anything at all. Do people really care about which political processes are employed, apart, that is, from the strategic question
of which process is likely to effect a particular, desired result? Historically, the answer seems to be a resounding yes. Wars are fought over forms of governance. People care not only about what the rules are, but also about how they are made, and those who would debate the propriety of lawmaking by initiative need to figure out what that process means to those who support and utilize it. I have argued elsewhere that jurists, journalists, politicians, and academics tend to argue as though “more direct” meant “more democratic.” On one potential understanding, therefore, direct democracy stands to representative democracy as the authentic to the second best. On this reading, the plebiscite is “us” while the legislature is “them.” If this understanding — an understanding I have attempted to challenge — is, as seems likely, shared by the people at large, criticisms of direct democratic outcomes will face an uphill battle. If the process is in fact sanctified in this manner, pragmatic critiques are likely to be perceived as elitist — academics and journalists trying to tell the people that they don’t know what’s good for them.

It will be argued that popular understanding of the initiative is more complicated than this. I agree. What the people think about direct democracy — what the process means — is not something one could hope to capture in any simplistic formulation. No doubt the “more direct equals more democratic” equation is part of the social meaning of the initiative, but only a part. Journalists like Schrag would appear to be, along with social scientists, the best source of information regarding public understandings of direct democracy. Given that Schrag has so cogently captured the public debate surrounding so many of the particular issues California voters have decided, one wishes he had also fleshed out the public meaning of the processes through which those issues have been confronted. What do Californians, and others, understand themselves to be doing when they decide an issue by initiative?

III. Conclusion

The two questions left unanswered by the books reviewed here — the questions of applied theory and social meaning — are closely related: What do we understand ourselves to be accomplishing, or trying to accomplish, through the initiative? Until we come to terms with this question, it will be difficult for us to learn from our collective experience with the plebiscite. Dubois and Feeney describe the process. Schrag puts the process in context. We know where we have been, and that is useful, but it will be hard for us to decide which road to take from here unless and until we devote some thought to where we are trying to go.

18. See Clark, supra note 13, at 434-36.
MAKING THE LAW SAFE FOR DEMOCRACY: A REVIEW OF “THE LAW OF DEMOCRACY ETC.”

Burt Neuborne*


I.

Henry Hart began his 1964 Holmes Lectures by asking what a “single” would be without baseball. We rolled our eyes at that one, reveling in the maestro’s penchant for the occult. As usual, though, Professor Hart was trying to tell us groundlings something precious. He was warning us that conventional legal thinking, by stressing rigorous deconstructive analysis, can obscure an important unity in favor of components that should be analyzed, not solely as free-standing phenomena, but as part of the unity. Without recognition of the unity, analysis of the components risks being carried on in a normative vacuum that will inevitably be filled by another tie-breaking mechanism, often to the detriment of the larger enterprise. A ban on littering in the park, for example, taken in isolation, might justify stringent prophylactic measures, like a ban on picnicking, or leafleting, or bringing newspapers into the park. Only when the littering ban is subsumed into the larger unity of a law of recreation (or something else) can its scope be properly analyzed.¹ Thirty-five years late, I assume that was what Professor Hart meant when he warned us against thinking about “singles” without thinking about baseball.

Nowhere is Professor Hart’s warning about the potential pitfalls of excessively deconstructive legal analysis more important than in thinking about the law of democracy. Conventional legal analysis has ruthlessly deconstructed democracy into component parts, and analyzed the components with only cursory attention to the larger democratic enterprise. A functioning democracy is, after all, the sum of crucial components — free speech, political equality, liberty, toleration, empathy, self-interest, efficiency, and much more. In the

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¹ See Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring).
fifty-odd years that American courts have struggled seriously with the care and feeding of the democratic process, however, legal doctrine has paid little attention to democracy as a unifying normative ideal. Instead, the functional reality of democracy in the United States is, and has been, held hostage to the law governing its components. First Amendment analysis dictates the ground rules governing campaign financing without any real attention to what kind of democracy comes out the other end. Equal protection analysis dominates voting rights law, and dictates what kind of representational patterns we can have, without much, if any, thought about what the effect will be on democracy. In truth, American courts often appear to govern our democracy much like a well-meaning umpire who thinks that rules governing “singles” can be crafted without thinking much about baseball.

Until we begin to think about the law of democracy as an interrelated set of legal principles designed to serve a normative ideal, the quality of American democracy will remain hostage to the law governing its components. That is why publication of The Law of Democracy: Legal Structure of the Political Process, the first casebook to treat the legal rules governing the democratic process as a unified field of study, is such a welcome event. One of the most important functions of an excellent casebook is to identify and reinforce a unity, helping us to approach its components not simply as freestanding doctrinal events, but as integral parts of a greater whole. While The Law of Democracy is only the beginning of the process, by persuasively conceiving of the law of democracy as an academic unity worthy of classroom attention, the authors Samuel

2. Somewhat arbitrarily, I date the beginning of modern judicial involvement in the law of democracy as occurring during the late 1940s with the decision in Colegrove v. Green, 328 U.S. 549 (1946), followed by the White Primary cases, including Terry v. Adams, 345 U.S. 461 (1953). Of course, earlier intersections exist. See, e.g., Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Herndon, 273 U.S. 536 (1927); United States v. Guinn, 238 U.S. 347 (1915); Giles v. Harris, 189 U.S. 475 (1903). The earlier cases dealt less with contestable ground rules governing democracy than with the indefensible exclusion of black Americans from the nation’s political life, an act of bigotry having little or nothing to do with serious thinking about democracy.

3. See Buckley v. Valeo, 424 U.S. 1 (1976). It is probably impossible to overstate the damage to American democracy caused by Buckley’s insistence on linking free speech and money.

4. Carrington v. Rash pioneered the use of equal protection analysis to protect voting rights. See generally 380 U.S. 89 (1965). It turns out that using equality to define voting rights promotes formality and inhibits thinking about the qualitative aspect of the right to vote.


6. An earlier casebook, Daniel Hays Lowenstein, Election Law: Cases and Materials (1995), provided an extremely helpful summary of aspects of the electoral process, but did not attempt to link the material in a conceptual whole.
Issacharoff, Pamela Karlan, and Rick Pildes have performed an invaluable service.

Without denigrating the book's generally excellent content, its most important achievement may well be its very existence. By providing academics with a set of challenging and useful teaching materials in the area of democracy, the book helps to establish the law of democracy as an independent field of study. One can expect challenges to the vision (or the lack of vision) projected by this book, but I do not believe that it will be possible to ignore the need for a democracy-centered critique of the various strands of doctrine that coalesce to form the legal matrix for our politics. Moreover, once the teaching of the law of democracy proliferates in our law schools, it is only a matter of time until considerably more serious legal academic discussion of the normative questions surrounding democracy emerges. Now that the important questions that swirl about the law of democracy in a rich mixture of normative debate and descriptive assessment have an academic focus in a discrete field of legal study, we can finally begin thinking about littering, for example, not as a freestanding idea, but in the context of an overarching law of recreation.

7. Charles Tilford McCormick Professor of Law, University of Texas School of Law.
8. Professor of Law and Roy L. and Rosamond Woodruff Morgan Research Professor, University of Virginia School of Law.
9. Professor of Law and Roy F. and Jean Humphrey Profitt Research Professor, University of Michigan Law School.
10. Among those questions are: Why is democracy preferable to other forms of government? What is it that we hope to achieve by turning to democracy instead of to some other form of government? What version of democracy best advances the values that incline us towards democracy in the first place? How should we define the electorate? Is voting a right, a duty, or a privilege? Should the onus of registration be borne by the individual? Is voter registration in advance of an election still necessary? What would happen if we moved to same-day registration? Why isn't election day a holiday? Why not vote on the weekend? Why not vote on the Internet? What does it mean to cast a meaningful vote? Do perennial losers in politically gerrymandered districts have a real vote? How do we decide which interests are entitled to representation? What is the role of a protest vote? Should (must) the ballot be enriched to include "none of the above"? Who should be able to run for office? What is the role of major political parties? What roles do minor parties play? How should we staff the electoral process? Is it healthy to allow the two major parties to administer our electoral processes? How should we finance democracy? Should restrictions be placed on extremely wealthy participants in the name of equality? In the name of preventing corruption? Should we subsidize aspects of the campaign? What do we mean by fair representation? What is the responsibility of a representative? Should we have term limits? What is the role of groups in establishing representation? Is race different from other group characteristics? When, if ever, should we move from single-member districts to forms of at-large representation? Should we be experimenting with aspects of proportional representation? What role do groups play in the democratic process? What is the role of direct democracy? How can we improve the quality of democratic discourse? And, what is the relative role of courts, legislatures, and the people in answering these questions?
II.

Despite its occasionally arbitrary organization, *The Law of Democracy* teaches quite well. I attempted a course in the law of democracy before the book's publication. The absence of a carefully selected set of edited cases forced students and the instructor to reinvent the wheel each semester. As anyone who attempts to teach in a new field can attest, the burden of putting together teaching materials is extremely daunting. My efforts to assign voluminous, unedited case readings were only partially successful. As a practical matter, therefore, the book's publication makes a demanding course on the law of democracy generally available for the first time.

*The Law of Democracy* opens with a short but challenging Chapter entitled "Introduction to the Selection of Democratic Institutions" built around an apportionment case — *Lucas v. Forty-Fourth General Assembly of Colorado.* In *Lucas*, Colorado voters approved an apportionment scheme that favored rural districts in allocating seats in the State Senate. The apportionment plan, which significantly deviated from the one-person, one-vote standard, was adopted by a majority of the voters in every Colorado county, including the urban counties receiving disproportionately low representation. The authors present students with excerpts from Chief Justice Warren's now-conventional defense of the one-person, one-vote principle, and two dissents by Justices Clark and Stewart, raising institutional and philosophical challenges to a single approach to apportioning both houses of the legislatures of the fifty states. The authors use the opinions skillfully to raise troubling questions about the role of courts in setting the ground rules for democracy. Characteristically, the chapter is more successful in raising doubts about the institutional competence of courts than it is in introducing students to normative arguments in favor or against certain conceptions of democracy. Indeed, if *The Law of Democracy* has a serious flaw, it is a seeming reluctance to go beyond judicial opinions to explore the fundamental normative questions of democracy that underlie the cases. But more about that later.

I also have a minor quibble with confining the Introduction to *Lucas*, which seems to me a bloodless case that does not reflect the passion that often surfaces in democracy litigation. I find it helpful to pair *Lucas* with a second case involving another judicial effort to define basic democratic ground-rules.

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The introductory chapter gives way to Chapter 2, entitled "The Right to Participate," an exploration of the struggle to establish a constitutionally protected right to vote. The chapter opens with provocative cases a century apart upholding denial of the right to vote to women and convicted felons, and continues with cases like Harper v. Virginia State Board of Elections and Kramer v. Union Free School District No. 15 that establish the modern contours of the right to vote. While the material in the chapter is thorough and analytically precise, it suffers, I believe, from three weaknesses: a curious failure to discuss the potential doctrinal underpinnings of a constitutional right to vote; a reluctance to explore the qualitative dimensions of voting; and a reluctance to confront broadly the normative question of who should be allowed, encouraged, or required to vote. The chapter continues with an exhaustive historical treatment of the struggle for black enfranchisement, and closes with a tease — eight pages on the problem of declining voter turnout, especially at low income levels.

The sad fact is that fifty years of judicial struggle to remove formal barriers to voting have not resulted in a robust level of voter participation. 

17. As Harper and Kramer illustrate, the Warren Court turned to the fundamental rights aspect of the Equal Protection Clause to fill the void in the constitutional text. What would happen if voting and running for office were perceived as quintessential acts of speech and association? See Anderson v. Celebrezze, 460 U.S. 780 (1983). Does the guarantee of a "republican form of government" provide a basis for developing the law of democracy, despite the dictum in Luther v. Borden, 48 U.S. (7 How.) 1 (1849)? Is there a nontextual concept of democracy similar to the nontextual concepts of "Our Federalism" and "the doctrine of separation of powers" that awaits judicial development? Will evolving notions of customary international law ever provide judicial protection for democratic values?
18. The Supreme Court appears to have adopted an extremely narrow conception of voting, limiting it to a formal, instrumental opportunity to choose the winner in an election, and rejecting any effort to infuse it with qualitative, expressive or associational values. See Burdick v. Takushi, 504 U.S. 428 (1992) (finding no constitutional right to cast write-in ballot); Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) (upholding ban on the ability of minor party to endorse major party candidate because minor party adherents are free to vote for preferred candidate on a major party line).
19. Although cases denying the right to vote to women and convicted felons raise the issue provocatively, there is no systematic exploration of competing theories of suffrage. Should less-educated voters be encouraged to vote? Should voting be a duty?
20. Throughout the book, the authors struggle with a genuine dilemma: Whether to stress general democratic theory or the struggle for black enfranchisement? The history of the systematic disenfranchisement of African Americans is the most egregious failure in our democratic past. Its importance in any casebook about democracy is obvious. Moreover, many of our most difficult contemporary democracy law issues are shaped by the desire to overcome that history of racial exclusion. Treating the narrative of African-American exclusion as a separate topic, however, interferes with a coherent theoretical presentation. In my opinion, Chapter 2 on the Right to Participate is weakened by failing to integrate the story of African-American disenfranchisement into the general question of how the electorate is to be defined.
participation. Less than half the eligible electorate voted in the last Presidential election.\footnote{21} The turnout for the most recent Congressional elections was thirty-six percent.\footnote{22} Often, state and local turnouts are even lower. Worse, turnouts are skewed by race and economic status, so that the voting electorate is much richer and whiter than the nation.\footnote{23} Many believe that extremely low levels of voter turnout, especially among the poor, threaten the moral integrity of the democratic process. While it is refreshing to see the issue raised at all, the leading casebook on the law of democracy should spend more time and intellectual energy considering why poor people do not vote, and whether anything can, or should, be done about it.

Chapter Three, entitled “The Reapportionment Revolution” is a thorough treatment of the rise of the one-person, one-vote principle, taking students from \textit{Colegrove v. Green}\footnote{24} through \textit{Baker v. Carr}\footnote{25} and \textit{Reynolds v. Sims}.\footnote{26} The authors perceptively note that the one-person, one-vote principle protects formal voting equality, but is vulnerable to gerrymanders and other techniques that maintain formal equality but erode voting power. The chapter includes thoughtful material on apportioning local government and closes with an excellent discussion of the United States Senate as an example of a defensible apportionment that radically departs from one-person, one-vote standards.\footnote{27}

I have three quibbles with the Reapportionment Chapter. The first is an organizational disagreement about the best place to discuss so-called “limited purpose” elections that permit only a small slice of the population to vote.\footnote{28} The authors treat limited purpose elections as a problem in local apportionment. I find it more useful to introduce the issue as a problem in defining the electorate, which would be better dealt with in a more ambitious chapter on the the-
ory of suffrage. Second, except for the thoughtfully edited judicial opinions, the Reapportionment Chapter has little or no material on the normative questions of what constitutes fair representation, what groups or interests deserve representation, or what the duties of a representative should be. I find it difficult to assess the one-person, one-vote principle in a normative vacuum. Finally, the chapter ends just when it is becoming interesting. Once the formalistic limits of one-person, one-vote have been so convincingly demonstrated, it makes far better pedagogic (and analytic) sense to move immediately to techniques that comply with formal voting equality, but erode real-world voting power, like vote dilution, vote fragmentation, racial gerrymandering, and political gerrymandering. That material is presented extremely well almost 200 pages later in Chapter Six ("Majority Rule and Minority Vote Dilution"), Chapter Seven ("Racial Vote Dilution Under the Voting Rights Act"), and Chapter Eight ("Redistricting and Representation"), three of the strongest chapters in the book.

The long hiatus between the one-person, one-vote cases in Chapter Three, and the vote dilution/gerrymandering issues in Chapters Six, Seven, and Eight, is due primarily to a 100-page exegesis on the preclearance provisions of Section Five of the Voting Rights Act, requiring so-called "covered jurisdictions" to obtain clearance from the Justice Department before altering their election laws. The exhaustive approach to the preclearance chapter is repeated in the section in Chapter Two dealing with black disenfranchisement, and Chapter Seven on the workings of Section Two of the Voting Rights Act. While the treatment of the material is uniformly excellent, as I have suggested, an organizational tension exists between the authors' understandable desire to chronicle the struggle for black enfranchisement and the more general problems of democratic theory posed elsewhere in the book. Preclearance is


30. The tension between theoretical coherence and broad narrative coverage of black disenfranchisement is illustrated in Chapter 7, which explores the intricacies of Section 2 racial vote dilution at substantial length. It might be possible to combine the three chapters into a more focused discussion of the intrinsic problems that one-person, one-vote alone cannot resolve.

31. See 42 U.S.C. § 1973(c) (1994). Preclearance zeros in on areas likely to have engaged in improper efforts to disenfranchise minorities, and requires them to obtain Justice Department approval to assure that changes in election laws do not adversely affect minority voters. Preclearance is triggered by a sub-50% voter turnout as of a particular election, coupled with the existence of a "test or device," like a literacy test, capable of being used unfairly to disenfranchise minorities. Ironically, the entire nation met the sub-50% test in the 1996 Presidential election. The states of the old Confederacy, three counties in New York City, several counties in California, as well as Alaska and several counties in the Southwest currently fall under preclearance.
a remarkable success story that altered the political climate of the old Confederacy and made black political participation a reality. Moreover, the preclearance material is a tour de force, demonstrating an encyclopedic grasp of theory and practice. It is, however, essentially a digression from the overriding issues of democratic theory posed by the casebook. As an important piece of history, and as an example of an ingenious remedial tool, material on preclearance has an important place in any casebook on democracy. But it does not deserve pride of place.

Inserted between the one-person, one-vote material in Chapter Three and the vote dilution/gerrymandering coverage in Chapters Six, Seven, and Eight, is a curious and only partially successful Chapter on access to the ballot, entitled the "Role of Political Parties." The authors apparently view political parties as intrinsic guardians and gatekeepers of the ballot. Thus, the chapter attempts to do two things at once. It rigorously explores the limits of autonomy enjoyed by political parties and investigates the limits placed on access to the ballot.

There is an important insight in linking political parties to ballot access, because the two major parties often act as a cartel to prevent competition from third parties. Timmons v. Twin Cities Area New Party is only the most recent example. The effort to conflate political parties and ballot access, however, obscures as much as it reveals. Deciding who should be allowed to run for office and what kinds of ballot choices should be available to the electorate is not necessarily the same thing as deciding how much autonomy political parties should enjoy. And it certainly is not a decision that should be left to political parties. A more conventional approach that explores the ballot access cases beginning with Williams v. Rhodes and critiques the ballot choice issues raised by Burdick v. Takushi and Timmons from the perspective of what it means to cast a meaningful vote, should be an important stand-alone chapter. This presentation should be followed by an exploration of the role major and minor political parties play in the democratic process and a critique of the legal matrix in which parties operate. Until some attention is given to the normative role of political parties, both major and minor, I find it hard to evaluate existing law.

Chapters Six, Seven, and Eight explore the many ways that ideal representation patterns can be compromised. Chapter Eight, concentrating on partisan and racial gerrymanders, is particularly well structured and provides an excellent framework for discussion of the inherent limitations of any system of geographically defined

33. 393 U.S. 23 (1968).
representation. Once again, though, just as the chapter gets really interesting, it ends. The thread is not picked up until Chapter Eleven, a unique and provocative discussion of potential alternatives to our pattern of single-member, first-past-the-post, majority districting, including cumulative voting, preference voting, limited voting, at-large districting, and proportional representation.

Chapter Nine is a bare-bones treatment of money and politics that provides a basic introduction to issues posed by efforts to regulate campaign financing, but that falls substantially short of the comprehensive coverage given to other areas of democracy law. The chapter reproduces only three Supreme Court opinions — Colorado Republican Federal Campaign Committee v. FEC, First National Bank of Boston v. Bellotti, and Austin v. Michigan State Chamber of Commerce — none of which deal with contribution limits. If this was a chapter in a Constitutional Law casebook, the coverage would be adequate, especially since the authors’ notes consistently pose thoughtful questions; but in a casebook devoted to the law of democracy, the coverage of money and politics is distinctly thin.

In part, my dissatisfaction with the scope of the chapter on money and politics reflects a personal concern that disparity of wealth is among the most important issues facing American democracy. That massive inequalities tied to wealth exist in our political system is beyond dispute. The most obvious tilt towards wealth is our constitutional commitment to a laissez-faire campaign financing system that maximizes the political power of extremely wealthy individuals and corporations. Under our existing campaign financing system, American political campaigns are predominantly funded by the top of the economic tree, with dramatic consequences for skewing the political agenda, selecting the candidates, affecting the outcome of elections, changing the course of legislative debate, and altering patterns of access to public officials. Despite heroic efforts to control the size and source of campaign contributions, massive loopholes have evolved that permit corporations and extremely wealthy individuals to pour unlimited sums into the electoral process. Incumbents regularly out-

39. The two most egregious loopholes: (1) allowing unlimited “soft-money” contributions from any source, including corporations and labor unions, to political parties, as long as the money is not used directly in a federal candidate's campaign; and (2) allowing unlimited
raise and outspend challengers by as much as sixty-to-one. Indeed, fully twenty-five percent of House seats, and an even greater number of state legislative seats, are uncontested in part because no challenger can raise enough money to wage a credible campaign. Access to the mass media is beyond the financial means of most candidates challenging the reigning party duopoly and beyond the means of many major party challengers seeking to unseat an entrenched figure.

Moreover, an equally potent, if less obvious, wealth advantage flows from U.S. laws governing registration and voting that, alone among the world's developed democracies, place the inertial obligation on the prospective voter to register in advance of the election, and force working people to vote on a workday. Burdening voting with significant transaction costs does more than diminish voter participation; it skews the voting electorate towards wealthy and educated voters who are more likely to overcome multiple transaction costs in order to vote. Not surprisingly, our actual pattern of voter participation reflects the predicted shift toward low voter turnouts.

(and undisclosed) spending on so-called "issue ads" that do everything but use the "magic words" "vote for" or "vote against" in an obvious effort to cause the election or defeat of a particular candidate. The resulting practice de jour is to make huge soft money contributions from corporate treasuries to political parties for use in funding issue ads to run in connection with specific elections. The Republican Party has gone so far as to argue that the soft money issue ads can be coordinated with the candidate and still remain beyond the scope of the FEC. See Republican Natl. Comm. v. Federal Election Commn., No. 98-5263, 1998 WL 794896 (D.C. Cir. Nov. 6, 1998).

40. Gerrymandering to favor incumbents does not hurt either. In the most recent election, The State of New York managed to achieve a 100% incumbency reelection rate in both houses of the legislature. It must be because New Yorkers are so pleased with the career politicians who govern us.

41. That we have a formal duopoly is indicated by Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) (upholding ban on multiple-party or fusion candidacies for elected office); see also Burdick v. Takushi, 504 U.S. 428 (1992) (upholding ban on write-in voting).

42. Ballot access rules in connection with primary challenges can be so restrictive that only an enormously wealthy challenger can achieve ballot status. See Rockefeller v. Powers, 78 F.3d 44 (2d Cir. 1996), cert. denied, 517 U.S. 1203 (1996) (invalidating New York's ballot access laws governing Republican Presidential primaries, thus permitting the first Republican Presidential primary in New York State's history).


44. See Frances Fox Piven & Richard A. Cloward, Why Americans Don't Vote (1988); see generally Raymond E. Wolfinger & Steven J. Rosenstone, Who Votes? (1980).

with disproportionately high participation by wealthy, well-educated voters, and disproportionately low participation by the poor and less well educated.\footnote{66}

Why is our political system so rigged in favor of wealth? The story we usually tell ourselves is that wealth-driven political inequality is a necessary consequence of our liberal constitutional system. We can’t cut back on the ability of the wealthy to dominate electoral politics because it would be a violation of our First Amendment commitment to political autonomy.\footnote{47} At least that’s what\textit{ Buckley} tells us. And we cannot prevent skewing the voting rolls in the direction of the wealthy because the idea of a legal duty (as opposed to a formal right) to vote is a constitutional nonstarter as a violation of political autonomy, despite the fact that we tolerate compulsory jury service,\footnote{48} compulsory education,\footnote{49} compulsory military service,\footnote{50} compulsory taxation,\footnote{51} and

and 1924. Turnouts in Europe average between 75 and 80% and approach nearly 95% in Australia. See Polsby \& Wildavsky, supra note 43, at 9 (citations omitted).

\footnote{46} See supra note 24. A third tilt toward the wealthy in our system is the use of a winner-take-all, single member districting that often submerges the political interests of the poor within a larger, more middle-class constituency. The relationship between apportionment and the fair representation of the poor is beyond the scope of this paper, though very much within its spirit.

Finally, restrictive ballot access laws and substantial candidate filing fees can have the effect of limiting candidates to economically comfortable contestants. Even if an underfinanced group achieves ballot status, it often has been forced to spend its campaign treasury on satisfying restrictive ballot access rules.


\footnote{48} Ironically, in\textit{ Taylor v. Louisiana,} 419 U.S. 522 (1975), the Supreme Court invalidated an effort to make jury service optional for women, holding that it violated the equal right of women to be subject to compulsory jury service. I have no quarrel with Taylor, but the case does illustrate the curious difference between our view of jury service and voting. Why should one be compulsory and the other not only purely voluntary, but subject to onerous transaction costs?

\footnote{49} See Pierce v. Society of Sisters, 268 U.S. 510 (1925) (permitting compulsory education to be satisfied by private school); but see Wisconsin v. Yoder, 406 U.S. 205 (1972) (exempting Amish from compulsory high school education on religious grounds).

\footnote{50} See Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding compulsory military service for men; rejecting the argument that women have a right to be drafted); Gillette v. United States, 401 U.S. 437 (1971) (rejecting conscientious objection to a particular war as relief from responsibility of military service); Welsh v. United States, 398 U.S. 333 (1970) (upholding conscientious objection when spurred by deeply held religious or moral beliefs); United States v. Seeger, 380 U.S. 163 (1965) (same).

compulsory cooperation with the census.\footnote{\textit{In Legislature of California v. United States House of Representatives}, the Supreme Court dismissed the appeal of a D.C. Circuit decision interpreting the Census Act to forbid statistical sampling techniques as a correctional device in the 1990 decennial census. \textit{See Department of Commerce v. United States House of Representatives, 11 F. Supp. 2d 76 (D.C. Cir. 1998), dismissed sub nom. Legislature of Cal. v. United States House of Representatives, 119 S. Ct. 1022 (1999).}} We even tell ourselves that we cannot eliminate the double transaction costs for registration and voting because it would risk electoral fraud and insert the government too directly into the political process, even though six states have either abolished voter registration or moved to same-day registration on Election Day.\footnote{\textit{North Dakota abolished voter registration in 1951. See N.D. CENT. CODE § 16.1-02 (1997) (repealing registration law via 1951 N.D. Laws, ch. 264 § 3). Idaho, Maine, Minnesota, New Hampshire, and Wisconsin have same day voter registration. \textit{See IDAHO CODE § 34-408A (Supp. 1998); ME. REV. STAT. ANN. tit. 21-A, § 122 (West Supp. 1998); MINN. STAT. ANN. § 201.061(3) (West Supp. 1999); N.H. REV. STAT. ANN. § 654: 7-a (Supp. 1998); WIS. STAT. ANN. § 6.29 (West 1996).}} The net result is a democratic process that is formally equal in theory, but dramatically unequal in practice. One hopes that future editions of \textit{The Law of Democracy} will focus more intensely on the role of wealth in American democracy.

\textit{The Law of Democracy} closes with an innovative and thoughtful chapter on direct democracy, contrasting direct and representative democracy. Curiously, the direct democracy chapter contains two of the richest democracy cases — \textit{Romer v. Evans}\footnote{54} and \textit{U.S. Term Limits, Inc. v. Thornton}.\footnote{\textit{U.S. Term Limits, Inc. v. Thornton}, 514 U.S. 779 (1995)(reprinted at pp. 695-705) (holding that states can not create term limits for Congress members and changes in qualifications for Congress can only be made through constitutional amendment).} While both cases involve controversial provisions enacted through direct democracy, I wonder whether the underlying issues of political discrimination against unpopular minorities in \textit{Romer} and efforts to deal with the built-in incumbent advantage in \textit{Thornton} are best treated as issues of direct democracy, or as much more pervasive issues of democratic governance.

III.

Thus far, the minor criticisms of \textit{The Law of Democracy} I have ventured are primarily cosmetic and border on the querulous. Disagreement over organization, emphasis, and pedagogy should not obscure my genuine admiration for the excellence of the materials, and my wholehearted endorsement of the casebook. There is, however, a real flaw in \textit{The Law of Democracy}, a flaw shared by the democracy jurisprudence the casebook so artfully reflects and critiques. Each purports to deal with the law of democracy without engaging in a normative inquiry as to what conception of democracy

the courts should seek to defend. I fear that any attempt to forge a
law of democracy without a normative conception of what democ-

racy should be cannot yield coherent results.

In his decision for the Court in Colegrove, and his dissent in

Baker, Justice Felix Frankfurter warned that American judges

have no business intervening in politics, even to correct massive

malapportionment. He warned that, lacking an explicit textual

mandate, federal judges seeking to defend democratic values would

necessarily function as amateur political scientists imposing per-

sonal views about the best way to organize a democracy. The out-

come of such a subjective and undisciplined process, he warned,

would be both flawed democracy and erosion of respect for the

judiciary.

Justice Frankfurter was profoundly wrong in arguing that fed-

eral judges have almost no role in preserving a fair democratic pro-

cess. Reinforcing democracy is among the judiciary's most

important tasks. Self-interested political majorities can hardly be

trusted to set fair democratic ground rules that risk sweeping them

from power. Our sorry history of selective disenfranchisement of

vulnerable minorities, ballot manipulation, electoral bribery, gerry-

mandering, and campaign dishonesty makes clear that unreview-

able majoritarian control of the machinery of democracy invites

erosion of underlying democratic values. In the end, Justice

Frankfurter's warning to judges to avoid the "political thicket" sim-

ply licenses entrenched majorities to manipulate the rules of the

game to keep themselves in power.

Justice Frankfurter was all too right, however, in predicting that

judges would fail to develop a coherent approach to protecting
democracy. In the thirty-seven years since Baker, American judges,

accepting Justice Frankfurter's injunction that the Constitution's
text does not authorize judicial development of a normative vision
of democracy, have failed to posit a coherent model of the democ-

racy they seek to protect. Lacking normative coherence, the
"democracy" cases betray precisely the rootless activism predicted
by Justice Frankfurter. Sadly, the judiciary has been overly timid
when protecting democracy called for boldness; and hyperactive
when the democratic process desperately needed a little judicial re-

straint. For example, judges have protected a narrowly defined,

(Frankfurter, J., dissenting).

57. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW
78 (1980).

58. Ironically, it was Justice Frankfurter, writing for the Court in Lane v. Wilson, who
argued that sophisticated stratagems aimed at disenfranchising blacks were subject to judicial
strictly formal right to vote, but have balked at developing a robust, affirmative right to vote that would confront the fact that the law currently skews American electoral participation radically toward the wealthy and well-educated, and denies voters a chance to use the ballot expressively. Judges have announced a watered-down version of a right to run for office; but have allowed the so-called right to be encumbered with so many restrictions that, in many jurisdictions, it is prohibitively difficult for anyone except a major party candidate to qualify for the ballot. Judges have imposed ground rules for campaign financing that distinguish between campaign contributions and campaign expenditures, erecting a disastrous system that no rational legislature would have enacted. Judges have enforced a purely formal right to equal representation, but have refused to measure substantive representational fairness. Judges have both protected and attacked political parties, but have not attempted to develop a theory of the roles of major and third parties in a vibrant democracy. Judges have celebrated the importance of political discussion, but have done little or nothing to assist in improving the quality of political discourse.

The pragmatic consequences of the democracy cases have also been very disappointing. Despite judicial efforts to protect the formal right to vote, voting participation is at an all-time low, varies dramatically by class and race, and is declining. Despite the enunciation of a formal right to run for office, the Court has acquiesced in legally enforced duopoly control of American politics by the two major parties, and has upheld restrictions that render it prohibitively expensive for third parties and independents to reach the ballot. Despite recognition that corrupt campaign contributions and massive wealth disparity pose a threat to the democratic process, the Court has placed campaign finance reform in a straight-

59. See, for example, the material at Chapter 2. Pp. 17-115.
60. See, for example, the material at Chapter 4.
64. Chapter 4. Pp. 186-263.
jacket that condemns us to a political process that looks more like an auction than an election. Despite formal adherence to a principle of representative fairness under the rubric “one-person, one-vote,” the Court has permitted massive reciprocal political gerrymandering that leaves much of the nation in noncompetitive election districts; has allowed incumbents to stack the deck in favor of re-election; and has forbidden efforts to enhance the representative power of racial minorities. Despite repeated recognition of the central role of political discussion in our democracy, the Court has declined to play a role in improving the quality of electoral discourse.

Is this the best that law can do? I think not.

IV.

If the judiciary is to carry out the critical function of protecting democracy, it must be prepared to develop and defend the coherent normative model of democracy latent in the constitutional text. Otherwise, judicial protection of democracy will continue to resemble Justice Frankfurter’s derisive description of ad hoc amateur political science. Contrary to Justice Frankfurter’s assertion, I believe that the constitutional text reveals a normative vision of democracy that is amenable to coherent judicial articulation and enforcement.

Although it is not completely silent about the mechanics of democracy, a conventional reading of the body of the Constitution does not yield a normative theory of democracy. The constitutional text reveals a normative vision of democracy that is amenable to coherent judicial articulation and enforcement.

66. See Center for Voting and Democracy, Monopoly Politics (1997) (demonstrating that many elections are so uncompetitive that they are, for all intents and purposes, uncontested).

67. Article IV, Section 4 guarantees a republican form of government to the states. Article I, Section 2, Clause 1 requires periodic election of members of the House of Representatives and keys voting for the House of Representatives to the electorate for the most numerous house of the relevant state legislature. Article I, Section 2, Clause 2 establishes age, citizenship, and residence requirements for election to the House. Article I, Section 2, Clause 3 incorporates the infamous three-fifths compromise that counts each slave as three-fifths of a person for apportionment purposes; provides for decennial enumeration; and imposes a numerical minimum on the size of a House district. Article I, Section 2, Clause 4 authorizes state governors to provide for interim elections to fill House vacancies. Article I, Section 3, Clause 1 provides for two Senators from each state to be selected by the state legislatures. Article I, Section 3, Clause 3 establishes age, citizenship, and residence requirements for election to the Senate. Article I, Section 4, Clause 1 reserves to Congress the final power to regulate the “Time, Place and Manner” of Congressional elections, except for the place of electing Senators. Article I, Section 4, Clause 2 requires that Congress assemble at least once each year. Article I, Section 5, Clause 1 vests Congress with power to judge the “elections, returns, and qualifications of its own members.” Article I, Section 5, Clause 2 empowers each House of Congress to expel members on a two-thirds vote. Article I, Section 5, Clause 3 provides for publicly recorded votes and a public record of debates. Article I, Section 6, Clause 1 provides for protection against arrest during the legislative session and establishes the speech or debate privilege shielding legislators from liability for performing legislative functions. Article I, Section 6, Clause 2 prohibits members of Congress from holding other federal public office or from being appointed to a federal job created, or enhanced
tional text, however, contains not a word about the substantive right to vote or to run for office, nor about what constitutes fair representation. Indeed, the only explicit affirmative protection of democratic participation in the body of the Constitution is the prohibition in Article VI on the use of a “religious test” as a “qualification to any office or public trust under the United States.”

The virtual silence in the body of the Federal Constitution about the substantive aspects of democracy is not surprising. The idea of a national Bill of Rights had not yet been broached. The initial assumption of the Founders was that each state would develop its own model of democracy, with the federal institutions elected in accordance with the respective state visions. The only checks on the states were the republican guarantee clause, the religious test clause, and the negative pregnant contained in the qualifications clause.

Indeed, given the relatively undeveloped state of democratic political theory in 1787, it would have been miraculous to find a well-developed normative theory of democracy in the body of the Constitution. Conceptions of suffrage were extremely limited. Ideas of representation were in their infancy. Political parties were virtually unknown. Openly running for office was a new, and not altogether respectable, idea.

It fell to the Article VI amendment process to flesh out a normative conception of democracy, beginning with the adoption of the First Amendment. The six textual ideas in Madison’s First Amendment — no establishment of religion; free exercise of religion; free speech; free press; free assembly; and the right to petition government for redress of grievances — are a meticulously drawn road map for a functioning democracy. The First Amendment is organized as a series of concentric circles proceeding in orderly steps from protection of the interior recesses of religious conscience to formal political interaction with government. It opens with Establishment Clause protection of conscience, moves to Free Exercise Clause protection of public displays of conscience, continues with Free Speech Protection Clause of expression of ideas by individuals, extends to institutional expression of ideas through a free press, then moves to protecting collective action through free as-

68. U.S. Const. art. VI, cl. 3.
and culminates in protecting formal interaction with the
government through petitions for redress of grievances. The rigors-
ous inside-out organization of the six ideas is no coincidence. It is a
democratic roadmap. Madison placed each essential element of the
democratic enterprise in its natural chronological setting. The First
Amendment mirrors the life cycle of a democratic idea, moving
from the interior recesses of individual conscience, to discussion
and collective action, and culminating in the formal give and take of
politics. Madison's vision of the vibrant democracy latent in the
unique organization of the First Amendment remains one of our
most valuable guides to the kind of democracy envisioned by the
Constitution.

Of the seventeen amendments adopted after the Bill of Rights,
eleven deal explicitly with the democratic process. The adoption
of the Fourteenth Amendment continued the development of a
normative conception of democracy in the Constitutional text. By
explicitly introducing the idea of equality before the law into the
Constitution for the first time, the Fourteenth Amendment's Equal
Protection Clause reinforced the picture of egalitarian democracy
painted by the First Amendment and imposed it directly on the
states. Moreover, the often overlooked Section Two of the
Fourteenth Amendment explicitly linked voting and fair represen-
tation for the first time. Finally, by providing the bridge by which
the Bill of Rights was transmitted to the states, the Fourteenth
Amendment's Due Process Clause made possible a national ideal
of democracy, supplanting the original invitation to each state to
develop a separate conception of democracy with a national mini-
mum. Read in conjunction with Madison's First Amendment, the
Fourteenth presents the outline of a powerful normative vision of
an egalitarian democracy.

The Fifteenth, Seventeenth, Nineteenth, Twenty-Third, Twenty-
Fourth, and Twenty-Sixth Amendments establish and implement
the principle of universal suffrage by banning voting discrimination
on the basis of race, gender, wealth, or age; and by providing for the
direct popular election of Senators, and the participation of the res-
idents of the District of Columbia in the election of the President.

69. At about this point, Justice Harlan dropped a seventh, non-textual idea into the First
(Harlan, J., dissenting); NAACP v. Alabama, 357 U.S. 449 (1958).

70. No other rights-bearing provision in our constitutional experience, or in the constitu-
tional experience of our sister democracies, bears a similar organizational pattern.

71. Of the six post-Bill of Rights amendments that do not deal with democracy, two, the
18th and 21st, deal with Prohibition; one, the 13th, abolishes slavery; one, the 11th, limits
federal jurisdiction over states; one, the 16th, authorizes the income tax; and one, the 27th,
limits Congress's power to raise its own pay.

72. U.S. CONST. amend. XIV.
The Twelfth, Twentieth, Twenty-Second, and Twenty-Fifth Amendments "democratize" the Presidency by providing for the separate election of the President and Vice-President, limiting the term of a lame duck President, imposing a two-term limit on the Presidency, and assuring orderly succession in time of Presidential disability. Thus, whatever the failings of the body of the 1787 Constitution, the complete modern text, as amended, is suffused with a normative vision of democracy that views every American as a member of a self-governing community of political equals and that guarantees all members of the polity the equal right to participate effectively in the processes of self-governance.

In *New York Times v. Sullivan*, the Supreme Court committed to a normative model of the First Amendment. For thirty-five years the Court has rigorously, some might say ruthlessly, enforced that model. The Court has never made a similar commitment to a normative model of democracy. Until that commitment takes place I fear that the law of democracy will continue to look like Hamlet without the ghost. *The Law of Democracy* displays extraordinary talent and commitment in revealing, clarifying, and critiquing what our law of democracy currently is. I look forward to future editions that grapple as vigorously with what our democracy should be.

73. 376 U.S. 254 (1964).