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Ackermania!: Who *Are* We the People?

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BOOK REVIEW

Ackermania!: Who *Are* We the People?

WE THE PEOPLE: FOUNDATIONS. By Bruce Ackerman.* Cambridge, Massachusetts; Harvard University Press. 1991. *pp.* 322.

*Reviewed by Thomas K. Landry***

I. INTRODUCTION

Is Bruce Ackerman a master legal theorist or a scheming politician? How about a third possibility: mad scientist? A reading of Professor Ackerman's latest book conjures up each of these images. *We the People: Foundations* is both a brilliant, descriptive theory and a menacing, prescriptive threat to accepted notions of constitutional change.

Foundations is the first of three volumes in which Ackerman seeks to excise popularly accepted discontinuities between the Constitution and constitutional law. Conventional legal wisdom views the Founding and Reconstruction eras (and the *Lochner* era) as uniquely tainted, and views the New Deal as constitutionally unoriginal.[1] *We the People* seeks to alter the status of each of these events, redeeming

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1. BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 41-43 (1991).

the tainted moments, and according the New Deal a more inventive place in our constitutional heritage. Ackerman attempts to embed these events deeper in that heritage than mere attachments to superficial legalities would permit. Specifically, Ackerman uses the federalist political science he terms "dualism" to explain these events. According to dualism, the citizenry wears two political hats. Constitutional law is higher law, created during moments when the citizenry sacrifices its private affairs to seriously deliberate on issues affecting the public welfare. By contrast, representatives perform the normal lawmaking function, while the citizenry attends to its private pursuits.[2]

The most significant implications of Ackerman's project flow from the premise that constitutional law is the product of dualism's higher lawmaking track. First, the background principles of popular sovereignty underlying dualism replace the formalities of constitutional lawmaking, such as the limits on the Philadelphia Convention of 1787[3] and the rules of amendment set forth in Article V.[4] Second, the practical result of the first point is to legitimize or at least explain constitutional changes occurring outside of the formal processes. Third, the instability raised by the second point calls for the redevelopment of formalities. Parts II and III provide an internal description and critique of *Foundations* and consider these implications in greater detail. Part IV offers an external critique focusing on issues of federalism marginalized by Ackerman's theory.

II. THE END OF FORMALITIES: GETTING A GRIP ON POLITICAL CHANGE

Determining what constitutes "law" requires a standard of measurement. Personal opinions are not law, and, without dissemination, are unlikely to become law. Widely held opinions may be law, and almost certainly will be law, if they satisfy accepted standards of polit-

2. *Id.* at 6-7. The people of the United States are thus "private citizens," with the emphasis sometimes on "private" and sometimes on "citizens." *Id.* at 243.

3. The Framers were commissioned to revise the Articles of Confederation, which forbade "any alteration at any time hereafter be made in any of [the Articles of Confederation]; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State." U.S. ARTICLES OF CONFEDERATION, art. XIII. Ackerman's analysis tends to undermine the awe-inspiring mystique surrounding the Framers and their role.

4. U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.").

ical agreement (for example, a majority vote of both Houses of Congress and signature by the President). Thus, different models of lawmaking exist on a spectrum from general theories of consensus to specific and rigorous procedural requirements.

Broad theories of political establishment, exemplified by political philosophers such as Antonio Gramsci, occupy the most general end of the spectrum. In this context, the gradual, hegemonic persuasion of the body politic to adopt a certain political ideology creates or forms the law.[5] The actual beliefs of real people predominate over formalities. For example, one can identify the establishment of a new legal regime in the former Soviet Union by the free market ethic, or softer version of socialism, now popularly accepted as the economic model. Practically speaking, however, vague descriptions of legal conception are unsatisfying. Taking the temperature of the body politic may amuse political scientists, but few consider it the appropriate yardstick by which judges should decide what constitutes law.

Quasi-technical equations that attempt to objectively define the conditions triggering lawmaking comprise the most specific standards for determining the formation of higher law. These include the conditions established by the Articles of Confederation for their amendment,[6] the constitutional amendment procedures of Article V,[7] and the supplemental procedure that Ackerman offers as a proposed amendment to Article V itself.[8] Interpretation of such "specific" and "objective" provisions has generated dispute,[9] but these disputes

5. ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 59 (Quintin Hoare & Geoffrey N. Smith eds. & trans., 1971) ("[T]here can, and indeed must, be hegemonic activity even before the rise to power, and . . . one should not count only on the material force which power gives in order to exercise an effective leadership."); *see also* JOHN ADAMS: A BIOGRAPHY IN HIS OWN WORDS 80 (James B. Peabody ed., 1973) (Adams wrote that "[t]he Revolution was effected before the war commenced. The Revolution was in the minds and hearts of the people . . . . [t]his radical change in the principles, opinions, sentiments, and affections of the people was the real American Revolution."); Michael Oakeshott, POLITICAL EDUCATION (1977), *reprinted in* LIBERALISM AND ITS CRITICS 219, 230 (Michael J. Sandel ed., 1984) ("In politics, . . . every enterprise is a consequential enterprise, the pursuit, not of a dream, or of a general principle, but of an intimation."); 1 ALEXIS DE TOCQUEVILE, DEMOCRACY IN AMERICA 436 (Phillips Bradley ed. & Francis Bower trans., Vintage Books 1945) (1835) ("[R]epublican notions insinuate themselves into all the ideas, opinions, and habits of the Americans and are formally recognized by the laws; and before the laws could be altered, the whole community must be revolutionized.").

6. *See supra* note 3.

7. *See supra* note 4.

8. *See infra* text accompanying note 66.

9. As with most constitutional provisions, legal commentators have built an entire cottage industry around the interpretation of Article V. *See, e.g.*, Walter E. Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623 (1979) (discussing the power of Congress to limit the scope of constitutional conventions under Article V); Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal*

remain narrow and legalistic in comparison to those arising in the context of less specific standards.

Ackerman's dualist theory occupies a middle range on the spectrum of lawmaking standards. By characterizing higher lawmaking as the product of a citizenry acting on rare occasions to define or redefine the basic principles of its association, Ackerman departs from the vagaries of political hegemony theories. He takes a further step toward specificity in defining four stages in the adoption of higher law. First, the proponents of change must signal their attempt to redefine fundamental principles by obtaining a threshold level of support. Second, some formal proposal must define the contours of the change. Third, mobilized popular deliberation must surround the proposal. Finally, when adopted, the decision must be codified, or made specific in its form and application.[10] These standards are far more specific than a political hegemony standard. Nevertheless, there is reason to question how effectively they constrain the formation of higher law. Part III demonstrates the reason for concern.

Ackerman's analysis challenges us to consider the possibility that "We the People" have already adopted higher law through his medium specificity standards, despite the likelihood that We did not consciously decide to set aside, as non-exclusive, the narrower, specific standards of Article V. Conventional legal wisdom informs us that Article V neatly prescribes the avenues by which to amend the Constitution, and that conversely, an act or decision not following from the existing Constitution or not sanctioned by an Article V amendment is constitutionally unsound. *Foundations* requires us to consider whether the conventional wisdom accurately describes our higher lawmaking principles, or perhaps more importantly, our higher lawmaking practices.

III. THE OPENING OF THE FLOODGATES

Ackerman's ideas form part of a burgeoning legal scholarship devoted to theories of constitutional amendment, and in particular a part of that scholarship that views the highest American political principles as stemming from popular sovereignty, not the Constitu-

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Rights Amendment Extension, 58 TEX. L. REV. 875 (1980) (questioning Congress' "plenary" power to regulate the amendment process by simple majority); Laurence H. Tribe, Comment, *A Constitution We Are Amending: In Defense of A Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983) (arguing for the development of principles of balanced judicial restraint in reviewing the amendment process); John R. Vile, *Limitations on the Constitutional Amending Process*, 2 CONST. COMMENTARY 373, 373-74 (1985) (suggesting a conservative approach to the amendment process).

10. ACKERMAN, *supra* note 1, at 266-67.

tion. The ever-burning embers of the inalienable "Right of the People to alter or to abolish"[11] their government inform and channel these theories of amendment.

Principal among populist amendment theories is the work of Professor Akhil Reed Amar. Like Ackerman, Amar finds principles of constitutional formation and transformation in federalist political science.[12] Amar's project, however, does not culminate in the development of sophisticated stages through which every amendment must pass. Instead, Amar closely adheres to the notion of popular sovereignty and views the test for higher lawmaking as purely majoritarian.[13] National referenda become a plausible amendment mechanism.[14]

Needless to say, boldly majoritarian schemes like Amar's do not square with the formalistic, supermajoritarian modes of higher lawmaking in Article V. Ackerman's ideas also depart from Article V's strictures, and *Foundations* raises two important constitutional issues. First, leaving aside the text of Article V, what do we really do in practice? Can we account for every constitutional change with a corresponding constitutional amendment? If not, what principles, if any, describe the real process? Second, if Article V does not adequately account for our constitutional practices, then perhaps we should align our practices with Article V, or amend Article V to accommodate our practices.

A. *Our Heretical Past?*

Sanford Levinson posed the intriguing question of how many times we have amended the Constitution.[15] It is not mere sophistry to say that counting to twenty-six or twenty-seven leaves something to be desired. Three examples illustrate the truly baffling difficulties

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11. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Although the Declaration is the most familiar incarnation of the idea, American history is rife with other examples. For compendia, see Scales v. United States, 367 U.S. 203, 275-78 (1961) (Douglas, J., dissenting); American Communications Ass'n, C.I.O. v. Douds, 339 U.S. 382, 440 n.12 (1950) (Jackson, J., concurring in part and dissenting in part).

12. *See* Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1049-50 (1988) ("Federalist supporters of the Constitution had a knock-down rejoinder [to the Anti-Federalist charge of illegality], a rejoinder that we have all but forgotten today . . . . [This was s]imply that the People were sovereign . . . .").

13. *Id.* at 1103.

14. Amar realizes that the need to assure deliberation may limit the usage of referenda. *Id.* at 1066 ("My own tentative view is that, since the amending majority must be deliberative, a convention may well be necessary for both the proposing and ratification stages.").

15. Sanford Levinson, *Accounting for Constitutional Change (Or, How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) >26; (D) all of the above)*, 8 CONST. COMMENTARY 409 (1991).

with that simple answer. First, one can characterize some amendments as unnecessary or superfluous in light of the scope of the federal legislative power. Thus, the Thirteenth Amendment may have been rendered unnecessary by the fact that federal legislation could have accomplished the same result,[16] just as limited legislative power may have rendered the Bill of Rights superfluous.[17] Second, extratextual changes may eclipse textual amendments in significance. Without question, the twentieth century shift in the federal commerce power and the erection of the welfare state apparatus outstrip quartering of soldiers[18] in constitutional significance. Third, the assumption that all twenty-six numbered amendments actually satisfied Article V is subject to doubt. Powerful arguments suggest that we have adopted constitutional amendments without adhering to the formalities of Article V, either by utterly ignoring the Article V process[19] or by certifying amendments under Article V that in fact failed.[20] This carries serious implications for the legitimacy of the Constitution.

If indeed we have spurned Article V, we may face a difficult choice between repenting for our violation of Article V and continuing to politicize the Constitution. Ackerman permits us a third choice, allowing us to continue our practices without guilt: Article V does not provide the exclusive avenue by which the People express themselves in higher lawmaking. In this manner, We the People achieve a constitutional catharsis.

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16. *Id.* at 426.

17. *Id.* at 423-26.

18. *See* U.S. CONST. amend. III.

19. This is an identifying feature of Ackerman's theory of amendment, which accords legitimacy to the New Deal and to the Thirteenth and Fourteenth Amendments through processes based on the separation of powers, rather than Article V. ACKERMAN, *supra* note 1, at 45-47.

20. Those who agree with Ackerman's skepticism about the procedural regularity of the Thirteenth and Fourteenth Amendments, but disagree with his redemptive theory, would prefer this characterization. *See infra* note 77.

Less compelling, but somewhat entertaining, is the challenge to the Sixteenth Amendment (granting Congress the power to tax income), mounted in the mid-1980s on a number of technical grounds. *See* Sisk v. Commissioner, 791 F.2d 58, 61 (6th Cir. 1986) (argument for invalidity based on typographical errors in ratifying resolutions of states, and fraudulent certification by Secretary of State); United States v. Foster, 789 F.2d 457, 462-63 (7th Cir. 1986) (argument for invalidity based on inconsistencies in wording ratified by states), *cert. denied*, 479 U.S. 883 (1986); Knoblauch v. Commissionr, 749 F.2d 200, 201 (5th Cir. 1984) (argument that Sixteenth Amendment was a " 'nullity' " because "Ohio was not a state when it ratified the amendment, that William Howard Taft, being from Ohio, was thus not legally president at the time, and that all laws enacted during Taft's administration are therefore void"), *cert. denied*, 474 U.S. 830 (1985). The timing of these challenges, and their geographical locations, suggests they are connected with the publication in Illinois of a two-volume manifesto on the subject. BILL BENSON & M.J. "RED" BECKMAN, THE LAW THAT NEVER WAS: THE FRAUD OF THE 16TH AMENDMENT AND PERSONAL INCOME TAX (1985).

This spirit of redemption applies to Ackerman's analysis of the Founding and Reconstruction eras, and even the *Lochner* era. It also applies to his analysis of the New Deal, which he regards as one of three moments of higher lawmaking in our constitutional history.[21] Ironically, Ackerman believes that the conventional narrative interprets the New Deal as a constitutional reaction rather than a constitutional revolution.[22] For this reason, Ackerman must destroy the New Deal's legitimacy in order to resurrect it. In other words, his theory only applies if the changes of the New Deal amount to amendments, of which there were none in the formal sense.[23] Nevertheless, he confidently proclaims the sins of the New Deal in order to recast it in sainthood.

B. *"In the Corner to my Left — Franklin . . . Delano . . . Roooosevelt . . . . . And in the Corner to my Right — Ronald . . . 'the Gipper' . . .* Reaaaga*n*nnn . . . . "

As an illustration of how Ackerman's informal, higher lawmaking process works, and as an opportunity to level a few criticisms, consider how Ackerman characterizes the New Deal and the Reagan Revolution. According to Ackerman, the New Deal provides a prime example of a successful extra-textual amendment; the Reagan Revolution, a prime example of a failure.[24] Ackerman measures success and failure by whether the push for change clears the hurdles of signaling, proposal, deliberation, and codification.[25]

With respect to the New Deal, President Roosevelt's call to Congress to pass transformative legislation breaking sharply with prevailing constitutional doctrine constituted signaling. Proposal occurred when Congress acted on Roosevelt's call and the Supreme Court rejected the new legislation. Deliberation followed the Supreme Court's rejection of those laws, when the public decided whether to re-elect the renegade President and Congress. Finally, codification proceeded once the Supreme Court gave up its opposition to the other branches, after rejuvenating electoral victories confirmed popular sup-

21. The *Lochner* family of cases is treated as a plausible exposition of the existing Constitution, rather than a departure from it amounting to an amendment. ACKERMAN, *supra* note 1, at 43, 63-66.

22. *Id.* at 42-44.

23. *See* Levinson, *supra* note 15, at 430 ("[U]nless one believes that the New Deal cases *do* signify amendments, there is literally no need for the complex apparatus of Ackerman's argument.").

24. ACKERMAN, *supra* note 1, at 47-53.

25. *See supra* note 10 and accompanying text.

port for the proposals.[26]

The Reagan administration similarly attempted to rely on a popular mandate for constitutional reinterpretation. Ackerman believes this attempt failed because it lacked a sufficient level of popular support. Thus, in contrast to the New Deal, the Reagan Revolution, at best, reached the deliberation stage before rejection.[27]

Is Ackerman correct, or has he merely constructed a new myth to replace his perception of the popular one? Several reasons warrant skepticism of the manner in which Ackerman constitutionally contextualizes political change in the 1930s and 1980s. The remainder of this Part is devoted to explaining these doubts. Three basic objections come to mind. First, one questions whether New Deal political events even satisfy Ackerman's own criteria for extra-textual amendment. Second, if New Deal changes lacked constitutional legitimacy in the 1930s, one wonders whether long-term acquiescence should rectify the defect. Third, Ackerman arguably mischaracterizes the degree to which the Reagan Revolution attempted and failed to achieve constitutional change.

1. SHADY DEAL-INGS

Ackerman himself is uncomfortable with the loose procedure he believes created the New Deal amendments, although it fits his general theory. The New Deal procedure relied heavily on transformative appointments to the Supreme Court. Ackerman identifies three corresponding deficiencies. First, debate over Supreme Court appointments is poorly focused, compared to debate over constitutional amendments.[28] Second, reliance on transformative Supreme Court appointments shifts power too far toward the executive.[29] Third, such reliance also shifts power too far away from the States and into the federal government.[30] Despite these deficiencies, Ackerman exempts the New Deal from constitutional instability because he believes that it had the requisite popular support.[31]

Even under Ackerman's terms, it is far from clear whether the New Deal really had the requisite support. A truly satisfying answer would require a rather detailed historical analysis, and may in fact be unattainable, but a few brief concerns can be raised here. Of the four stages comprising Ackerman's general theory, the signaling, proposal,

26. ACKERMAN, *supra* note 1, at 47-53.
27. *Id.* at 51.
28. *Id* at 52-53.
29. *Id.* at 53-54.
30. *Id.* at 54.
31. *See id.* at 53.

and codification stages present real obstacles to the constitutional legitimacy—in Ackerman's terms—of the New Deal.[32]

Signaling performs two functions. First, it ensures that only movements having a threshold level of support receive recognition as contenders for constitutional change. Second, signaling presumes that a movement openly claims to "come in the name of the People to demand a fundamental revision of our higher law,"[33] and thus ensures an admission or announcement of the movement's purpose. Constitutional amendments should not be effected by stealth.[34]

Ackerman explains signaling in terms of the breadth, depth, and decisiveness of a movement's support. Decisiveness is the most particular of these requirements: "a proposal . . . should be in a position to decisively defeat *all* the plausible alternatives in a series of pairwise comparisons—in the terms of the trade, it should be a Condorcet-winner."[35] The question is whether the proposals of the New Deal were "Condorcet-winners." We might expect some detailed support for an affirmative answer in *Transformations* (Volume Two of *We the People*), but the task is daunting. Ackerman must prove that electoral support for victorious 1930s politicians amounted to support for their unconstitutional proposals—not for their constitutionally unproblematic proposals *or* those essentially unrelated to the New Deal (such as the nation's policy toward Nazi Germany). That is a full plate.

Assuming the New Deal's specific proposals were Condorcet-winners, it remains uncertain whether the proposals satisfied the

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32. The New Deal political climate arguably could satisfy the popular deliberation requirement. Possible solutions to the Great Depression and the expanded federal powers of the New Deal bureaucracy undoubtedly generated a great deal of popular deliberation and controversy. Even if this might have satisfied the deliberation requirement, a nagging concern remains over equating statutory and constitutional deliberation. The *quality* of debate ought to affect satisfaction of the requirement.

33. ACKERMAN, *supra* note 1, at 272 (footnote omitted).

34. It is unclear whether the signaling stage is meant to assure public announcement of would-be Framers' motives, or whether it just limits access to the amending process by requiring a threshold of support for a political proposal, without regard to how that proposal is presented. *See id.* at 272-80. Ackerman does not explicitly say, but his support for the New Deal suggests that proposals can satisfy the signaling requirement while couched as normal legislation. Yet it seems only fair to require candor of would-be Framers. Moreover, the term "signaling" itself implies the announcement function. So if Ackerman intends otherwise, he deserves criticism for using an Orwellian appellation.

35. *Id.* at 277. Marquis de Condorcet, an eighteenth century mathematician and philosopher, recognized a paradoxical problem in any voting situation involving three or more voters, and three or more options: "for any option under consideration some majority exists that would prefer one of the other options." Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2129 (1990).

announcement function of the signaling stage. Proper announcement would have depended on whether the People of the 1930s realized and considered the allegedly constitutional proportions of their regular election choices (perhaps another subject to be addressed in *Transformations*). More specifically, the question is whether the public ever appreciated that repeatedly voting for officials intent on getting their program of legislation past the Supreme Court amounted to a process of constitutional amendment. As its most fundamental prerequisite, a proposal ought to identify itself as a constitutional amendment, even if it simultaneously announces that it will attempt to use a method other than Article V.[36] Ackerman correctly notes the importance of signaling to a legitimate amendment procedure, yet his own exemplar for extra-textual amendment arguably fails to pass the first stage of his theory.

The proposal stage is equally troublesome. "Even if a movement appropriately gains access to a credible signal, it must still define *what* it wants to propose in the name of the American people."[37] What exactly did President Roosevelt and his Congresses propose? In retrospect, was it anything less than plenary federal power over the economy? Was it more than that?[38]

At a logical minimum, the proposals must have consisted of every statute passed by the New Deal Congresses and signed by the President. Realistically, the proposals should have been understood as much broader, based on an expectation that the Supreme Court would develop a theory concerning the general principles reflected by the specific statutes.[39] However, the general constitutional principles that the statutes would eventually represent as a result of judicial interpretation could not clearly be understood at the proposal stage. One would expect that such uncertainty would present an epistemic barrier, preventing the public from forming an opinion on the ultimate significance of a nonexistent, hypothetical amendment. Even if the public knew that a constitutional amendment hung in the balance,

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36. Stated in response to a slightly different argument, "[w]ithout disclosure there can be no ratification." Raoul Berger, *Federalism: The Founders' Design—A Response to Michael McConnell*, 57 GEO. WASH. L. REV. 51, 67 (1988) (responding to the argument justifying changed interpretations on the basis of informal popular approval).

37. ACKERMAN, *supra* note 1, at 280-81.

38. Apparently so. After the New Deal, "the federal government would operate as a truly national government, speaking for the People on all matters that sufficiently attracted the interest of lawmakers in Washington, D.C." *Id.* at 105.

39. Ackerman explains that while Article V amendments begin with broad textual principles and are winnowed into specific results through litigation, extra-textual amendments begin with specific statutes and are stretched into broad principles through litigation. *See id.* at 283.

it would be unreasonable to argue that the public would vote to adopt the amendment without knowing its content or its application.[40]

The function of the judiciary in the codification stage raises similar questions. Codification occurs when the courts issue a series of landmark opinions defining the meaning of the constitutional transformation.[41] Because several New Deal statutes met immediate challenges, transformative judicial opinions were issued during the period of popular deliberation.[42] This idea of codification makes extra-textual amendments look rather odd, because "amendments" not challenged and brought before courts would never appear to assume the status of higher law. Ackerman assures us that "the dynamic of judicial synthesis as it emerges over time" would clarify the "amendment" adopted.[43] But we might wish to distinguish between different sources of judicial exposition. The uncertainty we abide in our traditionally broad constitutional text does not translate into acceptance of the far greater uncertainty in having judges draft the new Constitution as they go along.[44]

Ackerman recognizes that "there is danger involved in the infor-

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40. *Cf.* 14 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1987, at 249 (Roy M. Mersky & J. Myron Jacobstein eds., 1990) (testimony of Robert Bork). Bork likened the Ninth Amendment to "an amendment that says 'Congress shall make no' and then there is an ink blot and you cannot read the rest of it and that is the only copy you have," and explained that he did "not think [a] court can make up what might be under the ink blot."

41. ACKERMAN, *supra* note 1, at 289-90.

42. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). The deliberation and codification stages may blend together or may be separated by a period of legal inactivity. For the New Deal, "this process of codification did not end until Roosevelt's third term, when a reconstituted Court *unanimously* repudiated central premises of the middle [i.e., Reconstruction to New Deal] republican regime in a concluding series of transformative opinions." ACKERMAN, *supra* note 1, at 120 n.*.

43. ACKERMAN, *supra* note 1, at 290.

44. There are obvious parallels between the judicial exposition described by Ackerman and the English tradition of an unwritten constitution, underscoring the tension between his description and our politics.

Another parallel is even more intriguing. Reflective construction of constitutional amendments by the judiciary is oddly similar to the practice of hypothetical claim construction that has arisen in patent law. Enumerated claims appearing at the end of a patent define the scope of patent protection. Claim drafting is an act of textual precision, because it involves using words to define intangible intellectual property in technical subject matter. Despite the emphasis on careful word choice, courts use the equitable doctrine of equivalents effectively to give claims some scope beyond their literal meaning. Graver Tank & Mfg. Co. Inc. v. Linde Air Prods. Co., 339 U.S. 605, 607-09 (1950). A judge cannot, however, read a claim so broadly as to encompass prior art—things already known to the public before the patentee's contribution. Wilson Sporting Goods Co. v. David Geoffrey & Assoc., 904 F.2d 677, 684 (Fed. Cir. 1990) ("The doctrine of equivalents exists to prevent a fraud on a patent, *not* to give

mality of the process by which the New Deal translated constitutional politics into constitutional law."[45] Nevertheless, the central presumption in *Foundations*—national popular sovereignty—leads him to conclude that the New Deal's popular mandate compensated for its lack of formality.[46]

2. POST-HOC LEGITIMATION

In contrast to his view of the New Deal, Ackerman easily dismisses the Reagan Revolution as a failed constitutional moment. Specifically, he claims that the Reagan administration was rebuffed in its attempt to revise the constitutional changes effected during the New Deal.[47] Moreover, he claims that Reagan's failure bolstered the legitimacy of the New Deal: "the Reagan Republicans only succeeded in confirming the vitality of the higher lawmaking precedents created by the Roosevelt Democrats."[48] Unconstitutional governmental practices, however, are not necessarily constitutional just because they do not meet with rejection fifty years after their illegitimate adoption.[49]

A concept used by Ackerman to describe the broadening levels of generality with which constitutional provisions are interpreted illustrates the difficulty of asserting the constitutional legitimacy of the New Deal by condemning modern attempts to dismantle it. In perhaps the most poetic moment of *Foundations*, Ackerman explains that judges interpret a constitutional event narrowly if they live contempo-

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a patentee something which he could not lawfully have obtained from the [Patent and Trademark Office] had he tried."), *cert. denied*, 111 S. Ct. 537 (1990).

A judge will define the scope of patent protection to which a patentee is entitled by using the prior art to limit the range of equitable equivalents attributable to the words of a patent claim. A "hypothetical claim" results—a reflective construction and award by the judge, on behalf of the patentee, of the greatest amount of protection that the patentee might have gotten if the patent had been more skillfully drafted. *Id.* at 684-85. Under Ackerman's amendment theory, judges similarly award to transformations like the New Deal a scope of constitutionalization that they would have successfully gained had they only bothered to follow the usual procedure. Such judicial practices are questionable even in patent law. *See* Michael L. Keller & Kenneth J. Nunnenkamp, *Patent Law Developments in the United States Court of Appeals for the Federal Circuit During 1990*, 40 AM. U. L. REV. 1157, 1206-08 (1991); Henrik D. Parker, *Doctrine of Equivalents Analysis After* Wilson Sporting Goods: The Hypothetical Claim Hydra, 18 AM. INTELL. PROP. L. ASS'N Q.J. 262, 288 (1990). Positing such practices as norms of constitutional lawmaking should cause at least as much concern.

45. ACKERMAN, *supra* note 1, at 284.

46. *Id.* at 105 ("[W]ith the New Deal, this Founding principle [of limited national powers] was decisively repudiated.").

47. *Id.* at 51 ("Reagan transparently failed to convince a decisive majority of Americans to support his radical critique of the welfare state premises inherited from the New Deal . . . [and] saw his constitutional ambitions rejected in the battle precipitated by his nomination of Robert Bork.").

48. *Id.* at 50.

49. *Cf.* Berger, *supra* note 36, at 67 ("Usurpation is not legitimated by repetition.").

raneously with it, and broadly if they have only second-hand knowledge of it. Ackerman uses the metaphor of a train passing through a mountain range, with each mountain representing a constitutional event. Judges seated in the caboose have a broad background picture of far-away events, and a more personal and specific view of nearby ones.[50] The very distance of the past, in this case the New Deal, means that judges know that past only by the settled assumptions that dominate the professional narrative of their training. Judges question neither the assumed illegitimacy of the *Lochner* era, nor the assumed legitimacy of the New Deal.

Should that interpretive status quo be accorded the same validity as the constitutional text itself?[51] Ackerman leaves judges, and the people in general, open to political temptation from an executive using the power of the pulpit to effect unconstitutional change. If the New Deal were unconstitutional in the 1930s, but legitimate today based on settled acceptance, usurpation of authority would be justified as long as adequate social acceptance followed at some point in the future. The underlying theory of political change would shift from one that focuses on textual authorities like the Constitution to one that focuses on political hegemony.[52] Under such a view, the effective adoption of the New Deal may have occurred sometime after the 1930s, at a point when Roosevelt's revolution became sufficiently entrenched to be considered constitutionally secure.

This notion is troubling. It is one thing to take a judicially conservative position regarding stare decisis, allowing incorrect constitutional judgments to stand, because of concern for stability and continuity.[53] It is quite another thing to leap to the conclusion that incorrect judgments can acquire the same force as correct judgments—and indeed the same status as textual amendments. The possibility of confining precedent may well provide the greatest respite that a conservative can find from the competing notions of originalism

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50. ACKERMAN, *supra* note 1, at 98-99.

51. For the "originalist" perspective, see Edwin Meese, III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987). The text is sacred to Meese, but of course the political right has an incentive to undermine post-New Deal decisional law, just as the left has an incentive to protect it.

52. *See supra* notes 5-10 and accompanying text.

53. *See, e.g.*, Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 760 (1988) (citing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921)). Robert Bork, another representative of the conservative position, maintains that the New Deal, and therefore the modern regulatory state, is unconstitutional as an original matter, but simultaneously refrains from invalidating it. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 158 (1990).

and precedent.[54] Ackerman eradicates even that possibility, by transforming precedent into the Constitution itself.

A contradiction inheres in the fact that Ackerman's theory is based on popular sovereignty, yet for purposes of constitutional amendment, relegates the People to a subordinate role. Amendments are proposed in Washington, D.C., and the People act as rejecters rather than ratifiers. The threat lies in the potential adoption of constitutional amendments by the *inaction* of an approving, apathetic, or perhaps ignorant People. Predictably, the Ackermanian counterargument states: "But the People are what generated the amendment in the first place—didn't you read the bit about signaling and proposal?" This argument, however, is unsatisfying in light of Ackerman's own criticism of "monistic democrats" like John Hart Ely.[55] Federal politicians are *not* the People,[56] and Ackerman provides no convincing reason for considering them so in lopsided federal election years. Avoiding this tangled web is one of the attractions of the modern professional narrative criticized by Ackerman.[57] By telling ourselves that *the* meaning, or even *a* meaning, of the Commerce Clause truly encompasses broad national power, we avoid the duty to explain why an abuse of that clause during the New Deal can become acceptable through the passage of time.

3. GRADING THE REAGAN REVOLUTION

Ackerman's assessment of the constitutional significance of the Reagan Revolution is doubtful as well. By relying on one failed appointment (that of Robert Bork), Ackerman may grossly underestimate the quality of the revolution he denies. The Reagan judiciary has already had a tremendous effect on constitutional law, although the crown jewels of the New Deal may well remain intact.[58] Ackerman's assertion that "rather than gaining the consent of the Senate to a series of transformative Supreme Court appointments, the President

54. According to Bork, judges have more leeway in confining the future effect of less well-settled precedents. BORK, *supra* note 53, at 158-59.

55. ACKERMAN, *supra* note 1, at 7-10.

56. *See id.* at 181-83 (treating politicians as the People would be a "naive synecdoche" and "misplaced . . . reification"); *id.* at 260 (politicians are "just stand-ins" for the People).

57. *See supra* note 22 and accompanying text.

58. Ackerman cites no serious Reaganite challenge to the constitutionality of the New Deal. The best account of Reaganite litigation strategy confirms the timidity of the threat posed to the New Deal by the "conservative revolution" of the 1980s. CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 158-60 (1991) (recounting the hesitance toward, and abandonment of, challenges to the constitutionality of independent agencies). The most explicit challenges by the Reagan administration to the national regulatory state remained a matter of normal politics and not constitutional law.

saw his constitutional ambitions rejected" with the failure of the Bork nomination simply does not jibe with reality.[59] By a series of transformative appointments, the conservative wing of the judiciary now dominates the Supreme Court (and the federal courts in general), regardless of the failed Bork nomination.

The foregoing criticisms illustrate that Ackerman's general theory better serves to explain or describe, rather than justify or prescribe. *Foundations* provides easy reading, if one accepts the argument as a new way of understanding constitutional changes in a politically general sense, as opposed to a legal sense. Ackerman, however, seems to want to write a better brief, as well as tell a better story. Yet it remains difficult to assess exactly what Ackerman intends for his theory—to provide an objective description of constitutional practice, or to "manipulate[ ] his criteria of higher lawmaking rules to validate those quasi-constitutional moments of which he approves (specifically, the New Deal), and to screen out others that he does not (such as the Reagan Revolution)."[60] If his general theory only describes how political change—as opposed to legitimate constitutional change—occurs, then the New Deal is no safer in 1991 than *Allgeyer v. Louisiana*[61] was in 1937. However, if his theory defines legitimate constitutional change—an extra-textual amendment process—then he must accept such change in the future. Can Ackerman reconcile the desire for certainty in constitutional moments with the apparent legitimacy with which he cloaks some extra-textual amendments?

4. A DEFENSE—AND COUNTERATTACK

The syllogistic argument against the constitutionality of the New Deal states that it amounts to a constitutional amendment; constitutional amendments must follow Article V; the New Deal failed to qualify as an Article V amendment; and therefore, the New Deal is unconstitutional. *Foundations* provides a thesis for refuting the second of these propositions. It is not necessarily a radical departure from Article V, though; the installment of the New Deal may have occurred through a course of events that, for all practical purposes, was equivalent to an Article V amendment process.

To understand this assertion, consider that Ackerman's theory is based on an abstraction of basic ideas and categories already inherent in Article V. The requirements of Ackermanian amendment dutifully

59. ACKERMAN, *supra* note 1, at 51.
60. Amar, *supra* note 12, at 1093.
61. 165 U.S. 578 (1897).

encompass the formal amendment procedure of Article V: signaling occurs in the call for a congressional proposal or constitutional convention; proposals are made by Congress or a convention; deliberation takes place in State legislatures or conventions (and in the public that watches such proceedings carefully); and codification inheres in the specific text ratified and in judicial opinions defining the practical meaning of the text. Article V thus meets all of the criteria of his general theory.

The troubling aspect of the theory lies not in the fact that Article V satisfies the four stages, but that many other procedures do as well. By translating the standards for amendment from those of Article V to a set of abstract categories, Ackerman opens up a new world of extra-textual amendment possibilities. A strict constructionist might stop at this point, recalling the observation of Justice Black that "[o]ne of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning."[62]

Nevertheless, even Justice Black enlisted maxims accurately representing constitutional values.[63] Admittedly, abstraction of Article V values carries the danger of abuse, simply because abstractions are broader than specifics. However, the damage can be controlled by responsible application of the abstractions; no harm would be done if the broad theory were applied only in cases where an amendment would succeed under Article V anyway. The problem is that if Ackerman's theory fails to legitimate amendments with insufficient support to satisfy Article V, then it makes no difference.[64] If anything his theory subverts the written Constitution.

Perhaps his theory serves to avoid cluttering the Constitution with exceptions. More specifically, extraordinary popular support might justify an otherwise radical interpretation of the Constitution—sort of a popular incursion into constitutional interpretation that lays

62. Griswold v. Connecticut, 381 U.S. 479, 509 (1965) (Black, J., dissenting). In spite of the vagaries of Article V, *see supra* note 9, the procedures envisioned by Ackerman certainly stretch beyond its bounds.

63. *See, e.g.*, Zorach v. Clauson, 343 U.S. 306, 317-18 (1952) (Black, J., dissenting) ("Our insistence on 'a wall between Church and State which must be kept high and impregnable' has seemed to some a correct exposition of the philosophy and a true interpretation of the language of the First Amendment to which we should strictly adhere. . . . I mean . . . to reaffirm my faith in [that] fundamental philosophy . . . .") (footnote omitted); Everson v. Board of Education, 330 U.S. 1, 18 (1947) ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.").

64. *See supra* note 23 and accompanying text.

a foundation for subsequent judicial activism. Thus, if the New Deal constituted only a collection of discrete programs, we might want to exempt it from scrutiny because it received popular support equivalent to that of an Article V amendment. That is *not*, however, the nature of the beast. The New Deal was neither discrete nor exceptional, but pervasive and foundational. Recent examples of the limitless assertion of national authority over former state concerns include the death penalty and sports gambling[65]—matters that Ackerman can never depict as foremost in the minds of Depression-era voters.

B. *Prescription: A Dose of Certainty*

Ackerman recognizes the uncertainty of amendment according to his general theory, and offers his own more limited amendment procedure for the future. His procedure operates by presidential proposal, Congressional consent by a two-thirds vote, and popular ratification by a three-fifths vote at two consecutive presidential elections[66]—a procedure more definite than his general theory. In fact, Ackerman's procedure is even more specific than Article V, which has more decisional paths and actors.[67] This attention to the need for certainty undermines change by the generalized procedure he spends most of *Foundations* discussing.

Recalling the earlier discussion of law and political change,[68] determination of the law at any given moment requires identifying a change from an initial legal condition in the past to a subsequent legal condition in the present.[69] This requires a standard for recognizing a

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65. One bill introduced in the recent session of Congress provided a federal death penalty for killers using guns obtained or transported through interstate commerce. S. 1241, 102d Cong., 1st Sess. § 1211 (1991). The extremes of national power approach the comical in a recent law prohibiting sports gambling in any state not permitting it by August 31, 1990. Professional & Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992) (to be codified at 28 U.S.C. §§ 3701-04). No enumerated federal power is invoked by the law as enacted, but the original bill identified one longstanding federal concern: protection of the trademarks of professional sports teams. S. 474, 102d Cong., 1st Sess. (1991) § 2 ("Congress finds that sports gambling . . . threatens the integrity and character of, and public confidence in, professional and amateur sports, instills inappropriate values in the Nation's youth, misappropriates the goodwill and popularity of professional and amateur sports organizations, and dilutes and tarnishes the service marks of such organizations.").

66. ACKERMAN, *supra* note 1, at 54-55.

67. For analyses of some of the disputes that can arise under Article V, see *supra* note 9.

68. *See supra* part II.

69. Natural law, if it exists, may provide an exception to this rule. True nature-state conceptions of natural law presumably reach back at least as far as the existence of humanity, having no specific time of enactment and constituting eternal truth. Moralistic conceptions of natural law, on the other hand, may have a theoretical beginning at the time humanity acquired the capacity to appreciate moral ideas. For example, we do not apply moral standards to animals lacking such a capacity. Natural law, therefore, may have come into

new legal condition. Speaking in political terms, one could say that a new legal condition arises whenever there is a significant shift in sociopolitical attitudes. At the other end of the spectrum, formalistic views demand compliance with certain procedures before recognition of a legal condition as "law." The earlier discussion explained that the general Ackermanian amendment theory rests somewhere between these two extremes of the spectrum.[70] Accepting the general theory requires accepting the compromised degree of certainty that it demands of an act of constitutional creation.

Ackerman's general theory of change does not meet the standards of specificity that a constitutional amendment process warrants. First, permitting extra-textual amendments encourages textlessness. Although some do not find this troubling, many do. Hugo Black,[71] Robert Bork,[72] Sanford Levinson,[73] and countless others have accorded the text a pivotal place in constitutional deliberation. To even suggest that unwritten amendments exist evidences the linguistic gap that Ackerman must close if his theory is to take hold. We the People only think of amendments as pieces of text and therefore may find it hard to agree with Ackerman's fast and loose method of amendment.

Second, Ackerman ironically depends too much on principles of separation of powers and too little on those of popular sovereignty. He makes the insightful observation that process-based theories of constitutional law erroneously attribute the voice of the People to the legislature, whereas the system of separated powers really ensures that all three branches can claim to speak for Us while We register our approval or disapproval in occasional elections.[74] The problem with Ackerman's theory is that a single branch's claim to speak for the

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being only when humans became capable of living within that law. One might assert that morality consists of a historically growing and changing body of commands that cannot be "enacted" until they are conceived and that they are conceived by people over scattered times and circumstances. Thus, the existence of these moral commands and the capacity to appreciate them arise simultaneously because to know is to have responsibility. One could then understand a body of natural law as comprising numerous, temporally scattered enactments corresponding to advances in human morality.

70. *See supra* text accompanying notes 5-10.

71. *See supra* notes 62-63 and accompanying text.

72. Bork advocates a strict construction of the Constitution which, of course, gives the text a fundamental position in decision-making.

73. SANFORD LEVINSON, CONSTITUTIONAL FAITH 29 (1988) (describing constitutional decision-making in terms of a Protestant ethic of textual authority combined with lay interpretation and a Catholic ethic of textual plus traditional authority combined with elite interpretation).

74. ACKERMAN, *supra* note 1, at 7-10, 261-63; *see also* Amar, *supra* note 12, at 1085 (criticizing "the unjustified assumptions of Ely and Bickel in equating the political branches with 'the People,' judges with Platonic guardians, and the Constitution with the dead hand. . . .

People is too easily inflated to constitutional proportions. Any interbranch conflict over constitutional law might become the subject of a referendum at the next election. What would Ackerman say if Robert Bork had been confirmed? That the New Deal had been overturned? Transforming interbranch conflicts (which occur with great frequency) into potential constitutional referenda effectively levels constitutional debate. The normal election becomes equivalent to ratification of a constitutional amendment. Ironically, Ackerman believes that his approach solves the problem of levelling,[75] yet it appears he is guilty of that sin himself.

Finally, despite the masterful recounting of federalist theory in *Foundations*, it is difficult to accept Ackerman's view that principles surrounding the making of the Constitution support his generalized amendment procedure. Ackerman makes much of the fact that the Philadelphia Convention ignored the amendment procedure of the Articles of Confederation[76] and that the Republican Reconstruction Congress manipulated the role of the States in ratifying the Fourteenth Amendment.[77] These actions, however, occurred only in conjunction with highly specific adoption or amendment procedures. The Philadelphia Convention declared, in what is now Article VII of the United States Constitution, that ratification by "Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."[78] The Reconstruction Congress went out of its way to mold the South into a condition whereby ratification *by Article V procedures* could take place.[79] They did *not* just invoke principles of dualism or popular sovereignty.

The New Deal, for its part, would have been interesting had it included a petition signed by a majority of American citizens stating

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No branch, or combination of branches, can uniquely claim to speak for the People themselves.").

75. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1035-36, 1038, 1071-72 (1984).

76. ACKERMAN, *supra* note 1, at 41.

77. *Id.* at 45. Specifically, the issue arises from Congress' inconsistent treatment of the southern States in passing the Thirteenth and Fourteenth Amendments. Congress counted the votes of Andrew Johnson's provisional governments in the southern States toward ratification of the Thirteenth Amendment. WILLIAM A. DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION 124 (1897). Those same governments, however, opposed the ratification of the Fourteenth Amendment. *Id.* at 120-21. To see its program through, the radical Republican Congress placed the South under military rule, *id.* at 123, and "readmitted" the States only as their reconstructed legislatures accepted, among other things, the Fourteenth Amendment. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 276 (1988).

78. U.S. CONST. art. VII.

79. *See supra* note 77.

that "We the People grant the federal government plenary economic regulatory authority, effective upon signature of this petition by a majority of American citizens." Of course, it did not. The point is that vague standards of amendment like Ackerman's are not needed to fulfill the promise of popular sovereignty, *except* for the purpose of legitimating changes like the New Deal. All other amendments proceeded according to technical formulae that happily were consistent with notions of popular sovereignty, but did not surrender specificity. Ackerman's general theory does surrender specificity and therefore is undesirable.

One cannot help joining Professor Amar's curiosity[80] about the parameters chosen by Ackerman for his amended Article V—presidential proposal, congressional consent by a two-thirds vote, and popular ratification by a three-fifths vote at two consecutive presidential elections. Has Ackerman calibrated his scale specifically as a post-hoc justification for the New Deal? Perhaps Volume Two, *Transformations*, will demonstrate that Democrats in the 1930s received over sixty percent of the vote, conveniently legitimizing the New Deal in retrospect. This is not necessarily unreasonable; we might think highly of the New Deal, and take its constitutional tribulations into account in designing a new amendment procedure. Ackerman, however, has yet to admit this as his motive.

III. UNITED OR STATES?

Bruce Ackerman's proposal for amending Article V not only features specificity, but also focuses dramatically upon nationalism and separation of national powers. By contrast, the Article V amendment process focuses on division of powers between nation and States. If Ackerman's proposal ever reaches the stage of mobilized popular deliberation, then questions of federalism will be at the center of the debate. His general theory of amendment, which also relies on conflict and resolution between branches of the federal government, must similarly face these questions. The following discussion considers the consequences of nationalizing the amendment process. The discussion raises two questions. First, what are the consequences of nationalization? Second, do We the People think those consequences desirable?

Article V guarantees the States a decisive role in all amendments to the federal Constitution. Generally, a national body, consisting of a convention or two-thirds of both Houses of Congress, proposes

80. *See supra* note 60 and accompanying text.

amendments under Article V. Ratification, however, is performed by "[t]he Legislatures of three fourths of the several States, or . . . Conventions in three fourths thereof."[81] By design, Article V mixes national and State authority as explained by James Madison in *The Federalist* No. 39:

> If we try the Constitution by . . . the authority by which amendments are to be made, we find it neither wholly *national* nor wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union .... Were it wholly federal, on the other hand, the concurrence of each State . . . would be essential to every alteration .... The mode provided by the plan of the convention is not founded on either of these principles. In requiring more than a majority, and particularly in computing the proportion by *States*, not by *citizens*, it departs from the national and advances toward the *federal* character; in rendering the concurrence of less than the whole number of States sufficient, it loses again the *federal* and partakes of the *national* character.[82]

The significance of Ackerman's proposal lies not in affording the power of decision to a supermajority of sixty percent rather than seventy-five percent. Instead, the significance lies in the shift in focus from States to a national people.[83] State control over the amendment

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81. U.S. CONST. art. V.

82. THE FEDERALIST No. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961). Article V is not idiosyncratic in this respect, but is a microcosm of the greater constitutional plan:

> The proposed Constitution . . . is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.

Id.

83. Even his descriptive account of judicial decisions such as Brown v. Board of Education, 347 U.S. 483 (1954), and Griswold v. Connecticut, 381 U.S. 479 (1965), smacks of hostility toward the States. In what I consider to be the weakest analytical section of the book—bordering on bizarre—Ackerman argues that *Brown* and *Griswold* were really the products of synthesizing, respectively, the Reconstruction with the New Deal on the one hand, and the Founding with the New Deal on the other. ACKERMAN, *supra* note 1, ch. 6. Ackerman asks us to believe that both *Brown* and *Griswold* owe their constitutional force to the New Deal, which, by an expansion of federal powers, somehow elevated the status of both public education and individual rights. If true, the amendatory fraud perpetrated on the People (and the States) during the New Deal is of immense and perhaps immeasurable proportions. I prefer to view *Brown* as a Reconstruction question and *Griswold* as a Founding/Reconstruction question. Call me hidebound.

Ackerman also explains the abandonment of Lochner v. New York, 198 U.S. 45 (1905), in terms of the New Deal amendment procedure. Again, I find it much more satisfying to view

process is justified by the same parochial reasons underlying numerous other areas in which the Constitution takes cognizance of States instead of persons. Some of these areas are potentially meaningful, such as equal representation in the Senate. Some are potentially trivial, such as representation by population in the House of Representatives. Article V is one of the potentially meaningful recognitions of statehood.

Have we reached a point in American history at which the States are obsolete entities for purposes of establishing or amending the national Constitution? Despite its centrality to Ackerman's theory and proposal, *Foundations* hardly recognizes the question and does not attempt to defend its implicit affirmative answer. Such a critical omission is baffling, because the federalism question is the ultimate test for this latest incarnation of the national popular sovereignty principle. In light of world events favoring disunion as often as union, 1992 may be too early to argue for nationalization of sovereignty. Even without the bias of current events, the continued demand by People of the States for local sovereignty cannot be ignored.[84] The case for national popular sovereignty for amendments is hard to make

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this shift as a simple reevaluation of Reconstruction. *Lochner* was no more a constitutional amendment than Allgeyer v. Louisiana, 165 U.S. 578 (1897), was when it opened Act One of the substantive due process drama. GERALD GUNTHER, CONSTITUTIONAL LAW 448 (11th ed. 1985).

84. Akhil Amar insists that the original Constitution of 1787 eviscerated State sovereignty, resulting in our transubstantiation from numerous peoples in the States to a unitary national People. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426-27, 1519-20 (1987). His argument relies on the premise that sovereignty is indivisible. *Id.* at 1430, 1444-45. Because the United States is a sovereign nation, the individual States have no individual sovereignty. According to Amar, James Madison alone among the Framers entertained the idea of bifurcated sovereignty—shared sovereignty between States and nation. Amar, *supra* note 12, at 1063-64. There is some force to these philosophical underpinnings. In practical terms, however, Amar's argument is weak and academic. For instance, his "tempt[ation] . . . simply to invoke the Constitution's famous first seven words—'We the People of the United States'—and be done with it," Amar, *supra*, at 1450, demonstrates how a theoretical predisposition can obscure the facts. As originally accepted by the Philadelphia Convention, the text read "We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia . . . ." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 177 (Max Farrand ed., rev. ed. 1966). The States present in Convention unanimously passed this version on August 7, 1787. *Id.* at 193. The shift to "We the People of the United States" appeared in the September 12, 1787 report of the Committee of Style. *Id.* at 590. The Committee of Style was concerned with form and conciseness, not content. *See* Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 419, 420 (Morris, a member of the Committee of Style, wrote that "[h]aving rejected redundant and equivocal terms, I believed [the Constitution] to be as clear as our language would permit."); Letter from James Madison to Jared Sparks, *in id.* at 498, 499 ("The alterations made by the Committee [of Style] are not recollected. They were not such, as to

when we have not abandoned the principles of equal state representation in the Senate and limited national powers.[85]

Nationalization of the amendment process did not begin with Bruce Ackerman or Akhil Amar; it is an old idea, and there is no particular justification for its application in the early 1990s.[86] Perhaps idealistic advocates like Ackerman and Amar can more eloquently state their case than their erstwhile compatriots, but they will have to contend with continued popular suspicion toward concentration of power. As the merits and prospects of nationalized amendment processes are cabined by State power, so Ackerman's enterprise will likely remain confined to academia.

VI. CONCLUSION

In the final analysis, we must take some position on the status of

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impair the merit of the composition."). Although Amar resists his temptation to invoke the Preamble "and be done with it," Amar, *supra*, at 1450-51, his capitulation seems half-hearted.

Moreover, by repeating the mantra "sovereignty is indivisible" enough times, Amar conditions himself to read the constitutional text selectively. Although it may be that "Articles V and VI [are] logically inconsistent with the sovereignty of the people of each state," it does not follow that "therefore . . . sovereignty must logically be vested in the People of the United States as a whole," Amar, *supra* note 12, at 1063, except as assisted by the bootstraps of *imperium in imperio*. Textually, it is no less true that Article V and Article I, § 3 are logically inconsistent with the sovereignty of "the People of the United States as a whole." While admittedly there has been a trend toward concentration of power in the national government, the expanded reading of the Commerce Clause and the desuetude of the Tenth Amendment hardly show that States have conceded the sovereignty reflected by their equal representation in the Senate and in Article V. Even our most national act of sovereignty—the election of a President—follows procedures tempered by State sovereignty. *See* U.S. CONST. amend. XII. Most fundamentally, Amar's proposition flies in the face of reality. We are asked to believe that an agreement explicitly stating that acceptance and modification are to be measured by the assent of States actually embodies the principle of unitary national popular sovereignty. That takes a true believer.

85. These protections were of no mean importance to the People of the States. One of the Framers went so far as to say that "we would sooner submit to a foreign power, than to submit to be deprived of an equality of suffrage, in both branches of the legislature, and thereby be thrown under the domination of the large States." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 84, at 242 n.* (quoting John Dickinson, delegate from Delaware); *see also id.* at 322-25. Despite the vast expansion of federal powers during the New Deal, the principle of limited federal power lives on. Thus, for example, Congress still sees the need to condition its federal death penalty proposals on the involvement of a firearm that traveled in interstate commerce. *See supra* note 65.

86. *See* Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS 153, 155 (1987) ("[P]roposals to amend Article V by adding a national referendum procedure or a national initiative procedure, or both, have not received congressional approval."). May cites a 1942 book in which the author found that "a popular referendum on amendments proposed by Congress was the subject of more proposals than any other introduced in Congress to reform the national amending procedures during the period of his study." *Id.* at 155 n.9 (citing LESTER B. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 192 (1942)).

profound informal political shifts like the New Deal. If we keep our faith that the national government acted within the Constitution during Reconstruction and the New Deal, then Ackerman is of little use to us. But to the extent we have our doubts, Ackerman might provide a way to bridge the gap between constitutional theory and constitutional practice. The issue remains, however, whether his global rationalization of American constitutional history finally permits us to accept our sordid past, or whether he confirms that past without a convincing redemptive resolution. This challenge is well worth entertaining.

In any event, it is difficult to deny the descriptive force of Ackerman's presentation, for major changes have indeed taken place in the manner Ackerman posits. The natural response may be "so what?" We may just accept the fluidity of constitutional interpretation and the influence of ordinary politics, ignoring the issue of whether and when inventive interpretation can become illegitimate amendment. Ackerman would no doubt respond: Read the book, and decide for yourself which is the better description—the old dichotomy between legitimate interpretation and pernicious usurpation of political power, or instead a glorious constitutional capacity to absorb social change through extra-textual amendment, thus remaining true to principles of popular sovereignty. Whatever the conclusion, the striking constitutional discourse presented by Ackerman has already become an indispensable part of the constitutional scholar's library.