

Tulsa Law Review

Volume 47
Issue 1 *Book Review Issue*

Summer 2011

Statues, Courts, and Democracy in America

Paul Frymer

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Paul Frymer, *Statues, Courts, and Democracy in America*, 47 *Tulsa L. Rev.* 229 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol47/iss1/22>

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in *Tulsa Law Review* by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

STATUTES, COURTS, AND DEMOCRACY IN AMERICA

Paul Frymer*

WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (Yale Univ. Press 2010). Pp. 592. Cloth. \$85.00.

LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* (Univ. of Chi. Press 2010). Pp. 304. Cloth. \$45.00.

American democracy has not been the site for much optimism in recent years. Fierce partisan polarization has led the nation's government to dysfunction; the gap between the richest and poorest Americans has reached a level unmatched since the roaring twenties; and a 24-7 media culture is dominated by ideological warfare and salacious scandals. The focus of politics in the summer of 2011 alone was on a near historic and catastrophic government default, a potential shutdown of the airline industry, rampant acts of political and individual violence, and a U.S. House member aptly armed with the last name, "Weiner." So, it is refreshing to read two new books about the democratic process that are so optimistic. In *The Language of Statutes*, Lawrence Solan argues that despite all the criticism judges receive for being obtrusive in democratic politics, they actually do quite a good job engaging with and interpreting government laws. In *A Republic of Statutes*, William Eskridge and John Ferrejohn argue that "We, the People," have done a wondrous job in transforming our Constitution to reflect expanding notions of human rights and dignity.

Both of these books are ambitious and carefully crafted engagements with the nuts and bolts of a dynamic constitutional democracy. Both books are interested in the relationship between courts and statutory democracy, by which they largely mean judicial interpretation of congressional laws but often extends to other groups interpreting the meaning of statutes, such as the executive branch, jurors, interest groups, social movements, and political activists. The authors of both books have been writing in this venue for years. Solan is a leading scholar in the area of statutory interpretation and the importance of language construction in deciphering meaning in a range of written documents, with his book, *The Language of Judges*, being a foremost account of the linguistic analysis of law and judicial interpretation.¹ William Eskridge has been called

1. LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993).

the “Erasmus” of a three-decade long revolution in statutory interpretation,² and John Ferejohn is an incredibly influential pioneer in the study of congressional decision-making and positive political theory in both political science and constitutional law.³

Together, these two books provide state of the art understandings of judicial interpretation of the statutory process. They also provide an opportunity to discuss future directions. I begin with Solan, turn to Eskridge and Ferejohn, and conclude with some brief thoughts about the importance of “popular constitutionalism” in current-day thinking about courts and constitutionalism.

I

As many scholars have argued over the years, statutory interpretation is not akin to a science or even an interpretive process involving easily definable rules of thumb. Textual meaning is ambiguous no matter how clearly the words seemingly appear. Because Congress is a “they” and not an “it,” it is often difficult to discover congressional intent regardless of whether it is to be determined by the votes of the whole body, the majority party, or key pivotal actors.⁴ Given such uncertainty, scholars and judges have argued widely and with little consensus about how to go forward. Some, notably Justice Antonin Scalia, argue for focusing on the plain language of the statute, whereas others argue for a need to uncover the broader purpose of the statute given the historical context at the time of the passage, whereas still others, notably William Eskridge, have argued for “dynamic” interpretations that respond to changing times.⁵

In Lawrence Solan’s clear, exhaustive, and sensible book, he argues first of all that some degree of creative statutory interpretation by judges is inevitable. “When the language of the law leaves uncertainty, and it predictably does leave uncertainty, then discretion is unavoidable”⁶ Judges also, he claims, do quite a good job with it. Given the inherent ambiguities in statutory intent and in a more specific debate over word choice and meaning, judges rely on a quite understandable set of rules to guide them. Although some of the most contested cases before the Supreme Court raise alarm bells for their seemingly arbitrary conclusions, Solan argues that a broader lens that incorporates all cases, even those that do not generate dispute, shows that the system actually works quite well.

As long as judges constrain themselves by staying within the range of reasonable interpretations that the language of the statute affords or, in unusual situations, by articulating a good reason for not doing so, . . . legislators really will be given primacy over judges in forming and

2. Erasmus is from R. Shep Melnick, *Statutory Reconstruction: The Politics of Eskridge’s Interpretation*, 84 GEO. L.J 91, 93 (1995) (reviewing WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994)).

3. See, e.g., John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT’L REV. L. & ECON. 263 (1992).

4. Kenneth A. Shepsle, *Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

5. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

6. LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* 3 (2010).

applying statutory law. And judges typically do so.⁷

Statutes, he argues, work well when they are written by lawmakers with an eye for addressing recurring situations. But sometimes Congress writes bad—meaning indecipherable—laws, and Solan argues that courts have been effective at pushing lawmakers to write more clearly, with greater vision, and more specifics of intentionality. Problems inevitably arise as the situations become uncertain, whether because of a lack of vision by Congress, changing circumstances, or surprising outcomes that force the interpreters of the law to engage in unforeseen matters. Once we start trying to decipher the meaning of individual words in contexts that are beyond the environs of the initial statute, problems begin. It is extremely difficult to attain a common meaning of a word, no matter how much some might try or declare it to be possible. Part of the problem is inherent in individual psychology: “[o]ur cognitive capacities are not structured to enable us to produce laws that are, in all situations, both flexible enough to absorb new situations and precise enough so that one’s rights and obligations are always clear.”⁸ Despite this uncertainty, judges tend to be fairly successful interpreters. Indeed, they often help stabilize further interpretation by laying down a set of precedents defining key terms previously left ambiguous by law makers. Judges are least successful, Solan argues, when they let political values impede their decision-making process.⁹ But this, he claims — with evidence from a number of legal researchers — is quite rare.¹⁰

This emphasis that there is a “best,” if not “perfect,” answer to the judges’ interpretive role is reflective of a scholar more broadly interested in interpreting a range of forms of written documents, from contracts to laws, more than one interested in sorting out the politics that envelope congressional-judicial interactions. Solan’s examples in this book are occasionally on matters of heated political debate but often go quite far afield to direct questions of interpretation of language and clauses.¹¹ Even chapter four’s discussion of legislative intent has little emphasis on congressional dynamics and focuses much of its attention on the psychological understandings of mind reading, as well as interpretive questions about how to read different phrases.¹² As a political scientist, I find this attempt to find a “true” meaning of a document — even as he recognizes the inability to achieve it — both fascinating and a bit unsatisfying. Although courts are sometimes political actors, Solan argues, there are unbiased processes that can enable judges to make better interpretations than others.¹³ He is not overly sanguine about discovering truth — that is beyond any form of cognitive capacity — but he does think there is a better, non-politicized answer to interpreting congressional statutes that judges of any background can come to.¹⁴ One might wonder

7. *Id.* at 4.

8. *Id.* at 223.

9. *Id.* at 157.

10. *Id.* at 157-58.

11. *See generally id.* at 23-28, 62-66.

12. *See generally id.* at 98-102.

13. *Id.* at 159.

14. *Id.* at 158.

whether judges can avoid politicized contestations in an age of hyper contested politics, both in Congress and in the judiciary. Even in less politically polarized times, for that matter, are judges able to remove themselves from political considerations? Should they? But these questions are for a different book. Here, Solan wishes to remind judges to stay within the confines of what they do best and push politicians to do better in their own realms by writing clear laws.¹⁵

II

Unlike Solan, who states that his book “is about the relationship between lawmakers and judges,” Eskridge and Ferejohn begin their book with the ambitious claim that they present “a nontraditional framework for thinking about American constitutionalism.”¹⁶ Although, like Solan, they are also interested in how courts should interpret statutes, their sights are on bigger theoretical questions about democratic politics in shaping judicial interpretation of the Constitution.¹⁷ Unlike Solan, Eskridge and Ferejohn are deeply invested in the politics involving both legislative and executive statutory making and development, and judicial efforts at statutory interpretation.¹⁸ Their goal is to show that much of the most important work in determining statutory intent occurs outside the courtroom through an array of political processes.¹⁹ In so doing, they join other legal and political scholars in recent years who have differently emphasized the important role that electoral, legislative, and interest group democracy has on the evolution of our laws and Constitution.²⁰

Eskridge and Ferejohn want to expand our view of what ought to be considered constitutional, by introducing the notion of certain “superstatutes” that , because of the degree and weight of public mobilization behind them, ought to be accorded the kind of deference from the judiciary in a manner more akin to that reserved for the Constitution itself.²¹ Following in the footsteps of Bruce Ackerman, Eskridge and Ferejohn take up the difficult challenge to come up with a theory as to why some moments of statutory democracy ought to be included in the constitutional canon, and why others should not.²² Like Ackerman, their arguments derive from the fact that Article V of the Constitution, its formal amendment process, is an unrealistic way to change the Constitution with the proper dynamism and respect to human progress that “We, the People” deserve.²³ It is much too difficult to accomplish the passage of a constitutional amendment. Article V, they write, “has done virtually no work for an enduring Constitutionalism since 1920.”²⁴ As a result, changing the Constitution has come largely from judges, something they see as problematic because “the Court does not have the legitimacy, the wisdom and

15. *Id.* at 229.

16. *Id.* at 1; WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 1 (2010).

17. ESKRIDGE & FEREJOHN, *supra* note 16, at 1-2.

18. *See id.* at 4.

19. *Id.* at 1.

20. *Id.* at 19.

21. *Id.* at 17-18.

22. *See generally* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

23. *Id.* at 16; *see* U.S. CONST. art. V.

24. *Id.* at 4.

expertise, or the enforcement resources to generate important changes in the Constitution.”²⁵

But even if it does not always happen through judges or the amendment process of Articles III and V, the broader sense of re-creating and developing a living constitutionalism has continued through the statutory process, with the actions and interactions of Congress, the Executive Branch, and a range of mobilized interests in society continually deliberating and remaking American democracy.²⁶ Since the statutory process produces laws big and small, important and symbolic, as well as lasting and fleeting, Eskridge and Ferejohn set out to theorize which superstatutes ought to rise above normal lawmaking and attain a level of constitutional protection.²⁷ They argue that superstatutes have three qualities. First, these statutes “transform [c]onstitutional baselines” in that they fill constitutional holes and fundamentally change legal understandings.²⁸ Second, these statutes become sufficiently entrenched over a long period of time in government structures and policies through a process of ongoing and wide-ranging legislative, administrative, and public deliberation.²⁹ Third, these statutes should then guide judicial interpretation of the Constitution as judges should give greater deference to superstatutes that have a legitimacy that is closer to that of the Constitution than ordinary lawmaking.³⁰

“[S]uperstatutes resemble Constitutional rules in the following ways. They reflect foundational principles that influence law and policy beyond their formal authority. They are durable, adaptable, and dynamic as applied across decades. They spawn both legal chains . . . and legal webs They exercise normative gravitational force Indeed, superstatutes sometimes rival Constitutional rules, bending an ambiguous or even hostile Constitutional tradition to acquiesce in superstatutory innovations.”³¹

For a statute to become super, Eskridge and Ferejohn posit a causal sequence: a political entrepreneur puts a problem on the public agenda in many cases by mobilizing a popular movement that grabs the attention of incumbent politicians.³² Opponents then predict disastrous consequences or condemn the proposal as inconsistent with “core national commitments.”³³ A process of political argument unfolds with deliberation, eventually producing a statute whose supporters are temporarily provided with

25. *Id.*

26. *See* U.S. CONST. arts. III, V. It is interesting to note that Eskridge and Ferejohn spell the words “constitutional” and “constitutionalism” with a capital “c” throughout the book, perhaps to invoke further the sense that the process of development ought to be on equal accord with the capital “c” document itself. *See* ESKRIDGE & FEREJOHN, *supra* note 16, at 1.

27. *See* ESKRIDGE & FEREJOHN, *supra* note 16, at 16.

28. *Id.* at 6.

29. *Id.* at 7-8.

30. *Id.* at 8-9.

31. ESKRIDGE & FEREJOHN, *supra* note 16, at 27.

32. *Id.* at 16-17.

33. *Id.* at 17.

legitimation and authority.³⁴ But the statute becomes super only over the course of subsequent years if confirmed and expanded by further rounds of political action.³⁵ New legislation that reaffirms the statute's central principles, or (even more likely) administrative interpretation monitored by judges and congressional committees, may effectively cement the statute in the working Constitution.³⁶ Once meaningfully entrenched, the statutes become standardized and formalized, and actors within the institutions see them as part of the conventional operating procedure.³⁷ Superstatutes, then, are those laws passed by legislative actors that “establish a new normative or institutional framework for state policy,” after a “process of implementation” testing whether they maintain societal support, superstatutes become institutionally and popularly entrenched.³⁸

As mentioned above, in asserting the existence of superstatutes, Eskridge and Ferejohn want to make a bigger claim about the Constitution and constitutional theory.³⁹ Indeed, in an article from 2001, they laid out most of the major pieces of their theory for superstatutes;⁴⁰ what is motivating them more chiefly here in the writing of a manuscript, which is about five hundred pages longer than the initial article, is an effort to reimagine how we think about the relationship between popular democratic practices and an ongoing interpretation of the “Large ‘C’” Constitution.⁴¹ The Constitution of 1789 and its amendments, the authors write, are only a part of this nation's working Constitution, and a critical component of that constitutional firmament is the statutes that lie at the heart of administrative constitutionalism and become embedded in our constitutional structure.⁴²

This book is vast, ambitious, intellectually provocative, and declarative. The notion of a superstatute will rightly become a part of the constitutional lexicon. But there is more work to be done — terms to be explicated and other concepts, I would argue, that could be discarded.

First, there is a need for better explication of critical terms. After reading this book, I was more confused about what constitutes a superstatute than when I started. I am sure all of us could list a set of statutes that are in some sense “super,” in that they dramatically changed the range and function of government activism or fundamentally altered the incentive process and behavior of constitutional actors. These statutes may be linked to a major shift in public policy such as with the Environmental Protection Act, and they may alternatively be efforts to reshape government activity, such as with the Administrative Procedure Act. The list of superstatutes that Eskridge and Ferejohn provide is not meant to be exhaustive and the examples are all, on their own terms,

34. *Id.*

35. *Id.* at 17.

36. *Id.* at 17-18.

37. *Id.* at 18.

38. *Id.* at 17, 473 n.23.

39. *Id.* at 26.

40. See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

41. ESKRIDGE & FEREOHNS, *supra* note 16, at 1-2.

42. *Id.* at 4-6.

plausible enough.⁴³ But it is unclear what the analytic boundaries are. I'd like to have an example, for instance, of what is not a superstatute, or what is "almost" a superstatute but is not, or, if they exist, examples of superstatutes that lost their status and became merely regular statutes.

One problem with their ambiguous definition of superstatutes is that it is results-driven: it is hard to imagine an important statute that advanced policy and institutional arrangements the authors celebrate that would not fit into their definition.⁴⁴ Particularly glaring in this regard is that almost all of the superstatutes they engage derived initially from progressive movements on the left. Indeed, based on the book, a reader might reasonably reach the conclusion that "We, the People" are overwhelmingly progressive members of the Democratic Party. The form of progressivism of this book, which is more focused on individual rights for those disadvantaged by their race, gender, sexual-orientation or nationality, is somewhat different than that of Ackerman's choosing of statutory constitutional moments, which focused on New Deal rights for laborers and the middle class.⁴⁵ In contrast to Ackerman, it is the social movements of the 1960s — from civil rights to environmental rights — that are the primary passion of the authors. There is not much conservative democracy here, and when there is, it tends to be portrayed as a false, or at least an increasingly archaic, version of "We, the People." In fact, the conservative moments mentioned in the book are not moments of "We, the People," but are typically portrayed as efforts by elites acting without much public support, in direct opposition to public support, or at the least, driven by a last gasp of conservatism that is actively being replaced by progressive movements coming from the left.⁴⁶ Sarah Palin's interpretation of "We, the People," is not here.⁴⁷ Nor, arguably, are the "We, the People" who settled the west under the Homestead Act, who promote the rights of the unborn (because they, according to the authors, were repudiated by the presidential election of 1992),⁴⁸ or who promote the rights of crime victims and gun owners.

Their chapter on the National Security Constitution, which largely involves criticism of the Bush Administration era's post-9/11 efforts to eradicate the Geneva Convention and the Bill of Rights, is a case in point.⁴⁹ The Bush Administration was not acting on the part of the people, they argue, but against it. This is a fair enough proposition. But instead of providing systematic evidence that can provide an analytic determination of what constitutes the people's will, the book invokes and pieces together a range of generalities such as Americans broad but unspecified support for the Geneva Convention, similarly broad ranging but unspecified support for the right to a trial, and opposition to the use of torture. They also provide sporadic references of media controversy, Senate votes and hearings, and internal executive branch deliberation as examples of popular resistance; as Bush Administration policies became more out in the

43. *Id.* at 16.

44. *Id.*

45. See ESKRIDGE & FEREJOHN, *supra* note 16, at 16. See generally ACKERMAN, *supra* note 45.

46. See ESKRIDGE & FEREJOHN, *supra* note 16, at 426.

47. SARAH PALIN, AMERICA BY HEART 1-34 (2010).

48. See ESKRIDGE & FEREJOHN, *supra* note 16, at 243.

49. *Id.* at 419.

open, the public became aware of what was going on, and subsequently more opposed.⁵⁰ In the end, they conclude that Bush and Vice President Cheney were following Carl Schmitt's enabling of sovereign exceptions, and not acting on behalf of the people; but "We, the People" resisted, and the Geneva Conventions and the Bill of Rights have thus remained stalwart.⁵¹ Missing from this story is an array of mobilized and institutionalized actors that opposed the Bush Administration but were representing themselves as much as a broader public good, whether these actors were lawyers, military officials, or personalities in the media. The point is not that "We, the People," were irrelevant in countering some of the acts of the Bush Administration. It is that there is analytically little to decipher in determining whether public will or privately mobilized interests are ultimately conclusive in the political battle. Such differences matter, as I will elaborate on later, in concluding whether democracy or something else is at work in explaining which statutes are stalwart and which are not.

Even progressives on the left will find the cast and characters representing "We, the People," a bit narrow. Too many of Eskridge and Ferejohn's heroes acting to promote the wishes of "We, the People" are not merely every day Americans (whomever that is)--they are fairly elite lawyers promoting their own interpretation of the public will. In their chapter on "The Constitution of Equality and Administrative Constitutionalism," for instance, they celebrate the process by which civil rights laws encompassed changing visions in society of the role of women, pregnancy, and work.⁵² This process of changing visions is not so much from newly transformed public perspectives or even social movements, but instead from lawyers who worked at the Equal Employment Opportunity Commission ("EEOC"). EEOC lawyers, Sonia Pressman and Susan Deller Ross, pushed forward an understanding of the Constitution influenced by their own understanding of America's public needs. From their own experiences and friendship networks, they understood that many women wanted careers and that pregnancy discrimination was a structural mechanism by which employers thwarted those careers.⁵³ Again, the point is not that these women did not reflect, "We, the People," it is that we really do not know based on the arguments provided here.⁵⁴ At the least, reading these pages reminds us of Derrick Bell's famous caution to lawyers who devise theories of a public good without meaningful engagement with those they represent.⁵⁵

It is also difficult to ascertain the definitional boundaries or the normative implications of the term "entrenchment." They define entrenchment as the "norms and practices that are accepted not just because of their Weberian authority to command but also because of the force of a Weberian constellation of interest, namely, a popular consensus that the

50. *Id.* at 421.

51. *Id.* at 429.

52. *Id.* at 29-30.

53. *Id.* at 32.

54. For an argument that much of the EEOC's behavior was occurring outside the realm of public opinion or social movements, see JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* 230-62 (2002).

55. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L. J.* 470 (1976).

norm or practice is a good thing to believe or do.”⁵⁶ This comes from a process of “republican deliberation” that is thoughtful and engages in a process of compromise and accountability.⁵⁷ This process leads supporters to implement the statute, avoid disasters, and be endorsed by an important part of the population. It needs to have longevity—a differently constituted Congress needs to reaffirm the original statute. This makes a certain amount of sense, and is fairly similar to the arguments that Ackerman invokes in his *We The People* series. But, this definition still makes it difficult to decipher one statute from others., particularly given not just the enormity of statutes in the universe, but the fact that statutes develop under different temporal logics, with different constituencies and dynamics. Rarely do new statutes erase or reverse old ones, and thus the statutory universe is full of laws, and even multiple superstatutes, that are overlapping, in tension, and often in direct contradiction with others.

That the statutory universe is full of contradictions is reflective not simply of a continuing republican deliberation, but of alternative forms of Weberian authority that emphasize institutionalized bureaucrats creating meaningful independence from the democratic process. Institutions once established are difficult to dislodge; they create a path dependent politics that reflect not just continuing deliberation by “We, the People,” but often independent and historically archaic sources of power that have a range of weapons at their disposal to resist current popular will. If the institutions that arose from the New Deal are sufficiently entrenched to resist current day popular efforts to destroy them, is this because “We, the People,” are on the side of the institutional entrenchment, as Eskridge and Ferejohn argue, or because these institutions are sufficiently resistant to public appeal, as Republicans from Ronald Reagan to Sarah Palin consistently argue?

If key terms in the book were better defended, the ideological proclivities would not be a concern. But when hugely contested terms such as what constitutes a “public norm” are ambiguously raised with relatively little concrete evidence—few public opinion polls are cited, nor any real evidence of changing political behavior or cultural attitudes that might generate a more neutral understanding of what a public norm might look like—it becomes more glaring the degree to which the terms seemingly defend the politics of the authors.

III

Eskridge and Ferejohn are hardly the first, nor will they be the last, to use their analytic skills in defense of normative commitments, and there is great nobility and necessity in partisanship from the halls of the academy. But these normative commitments are very much grounded in a specific historical moment and are not (and should not be) confused with a universal theory of democracy and law making. And yet, liberal law professors have quite transparently shifted their constitutional theories in light of new political coalitions dominating American politics. In the shadow of the Warren Court and the rights revolution, liberal law scholars embraced the power of judges to

56. *Id.* at 13.

57. *Id.* at 15.

evoke broad principles of rights that could trump the acts of the people. The people were often equated with mass tyranny (as in the southern states that relied on states' rights to defend racial segregation) and, alternatively, the legislative process was equated with powerful special interests making their own deals and enforcing them through iron triangles and backroom deals. But then came the Rehnquist Court, and the role of the Supreme Court had quickly changed in the minds of these progressive law professors. Now the Court represented the gutting and narrowing of liberal laws--particularly those of the New Deal and Civil Rights Era. Some liberal law professors just criticized a changing Court; others entirely re-wrote their theories about judicial activism and revised their pre-existing historical recollections. In this way, Eskridge and Ferejohn join the likes of Mark Tushnet, Cass Sunstein, and other vanguard left wing progressives who once saw the Court as a place of justice, and now see it as a place to be largely avoided.⁵⁸

Their alternative, "popular constitutionalism," has dominated the legal academy's conversation about constitutional theory for the better part of two decades. Although it has been frequently criticized for its willingness to stretch the historical record, it is both normatively powerful and empirically right in many important ways. Its most significant corrective is to remind constitutional scholars that courts do not interpret laws and constitutions in a vacuum, and thus it is difficult to interpret the nation's Constitution independently from public activism. There are also certain statutes or statutory moments that are of more lasting value and political significance than others, in large part because of greater public mobilization.

But as we enter a fifth decade of conservative efforts to retrench the New Deal system of the thirties and the Warren Court of the fifties and sixties, we need to either come up with a more encompassing understanding of popular constitutionalism or simply abandon the concept altogether. A more encompassing understanding of "We, the People" needs to incorporate two specific pieces of democratic theory in America. First, it needs to include the conservative popular tradition: from the violent sides of nineteenth century frontier populists such as Andrew Jackson, Daniel Boone, Davy Crockett to imperialists Theodore Roosevelt, Woodrow Wilson, Harry Truman, John Kennedy, George Bush (choose your pick) to libertarians to grass roots movements by the Ku Klux Klan, to virulent racism and sexism in left wing movements, to McCarthyism, to current day elements of pro-life activism and the Tea Party. Our nation and our Constitution cannot be explained by ignoring the right wing any more than the likes of Sarah Palin and Michelle Bachman can ignore the dark sides of the founding fathers. Or, if it can, such an explanation needs to engage directly with why these people and movements are less true reflections of popular will.

Second, popular constitutionalism needs to go deeper in our understanding of how political and institutional dynamics structure public activism and group representation. Indeed, scholars such as Eskridge and Ferejohn, who have written for decades within different traditions of rational choice and the "new institutionalism," ought to be the first to note how difficult popular activism is to develop, maintain, and succeed. The new

58. *Id.* at 42.

institutionalism literature emphasizes how collective action problems and institutional incentives often deny popular voices from achieving political outcomes, and how our political system is designed to negate popular movements in favor of smaller interest group competition. By following other constitutional law professors in promoting a celebratory but thin politics of “We, the People,”—a politics that ignores any kind of structural impediments that make democratic work so difficult—their book unwittingly returns to a model of politics popular in the middle of the twentieth century and ascribed by the likes of Robert Dahl, who in his famous book *Who Governs?*, claimed that the answer to that question was that just about everyone governed, as long as they wanted it badly enough.⁵⁹ If we are to continue with the theme of popular constitutionalism, we need to take more seriously how democratic voices are represented in our governing structures.

59. See ROBERT A. DAHL, *WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY* (2d ed. 2005).

