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Review

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WE THE UNCONVENTIONAL AMERICAN PEOPLE

We the People: Transformations. Bruce Ackerman. Harvard, 1998. Pp vii, 515.

INTRODUCTION: UNCONVENTIONAL TRANSFORMATIONS OF THE CONSTITUTION

In his 1991 volume, *We the People: Foundations*, Bruce Ackerman urged us as Americans to declare our independence from European models of government and to “look inward” to rediscover our distinctive constitutional scheme--dualist democracy.¹ In his new volume, *We the People: Transformations*, he exhorts us as dualist democrats to break up the monopoly that Article V of the Constitution has held on our vision of constitutional amendment. He urges us to move “beyond Article V” and to embrace a pluralist understanding of the sources of higher lawmaking (pp 15-17). Only by doing so, he argues, will we be able to comprehend the processes of unconventional adaptation outside Article V whereby *We the People* have transformed the Constitution through the Founding, Reconstruction, and New Deal. Nothing less, Ackerman admonishes us, will preserve and realize both “the possibility of popular sovereignty” (p 119) and “the possibility of interpretation” under our Constitution.² Thus, if *Foundations* celebrated American exceptionalism from Europe--“*We the exceptional American People*”³--*Transformations* extols our unconventional adaptation and transformation of the Constitution outside Article V--“*We the unconventional American People*.”

***1514** In the introduction to *Transformations*, Ackerman writes: “There is lots of history in this book, some political science, a little philosophy--but these interdisciplinary excursions are in the service of a fundamentally legal enterprise: . . . If Americans of the 1990's wish to revise their Constitution, what are the legal alternatives they may legitimately pursue?” (p 28). His formulation is telling, because the strengths of this magnificent and important volume lie in its history, which is ingenious and fascinating, and its political science, which is sophisticated and insightful, but the shortcomings lie in its philosophy: its political, legal, and constitutional theory. As a matter of history and political science, Ackerman provides among the best analyses ever offered of the processes of constitutional transformation through the Founding and Reconstruction, and the best analogies ever drawn between those constitutional moments of higher lawmaking and the political transformation inaugurated by the New Deal. But as a matter of philosophy, he fails to sustain his argument that the model of transformation that he develops provides legal alternatives for legitimate amendment of the Constitution outside Article V. The “humanistic positivism” that he adumbrates to provide rules of recognition of higher lawmaking (as distinguished from ordinary lawmaking) (p 92) is not sufficient to establish that the New Deal, by analogy to the Founding and Reconstruction, rises to the level of a constitutional amendment.

After describing *Transformations*' theory of unconventional constitutional change, I critique it in light of Ackerman's larger project in the projected three volume *We the People*, focusing on three of his pervasive claims or themes. First, despite Ackerman's claim that his theory of dualist democracy entails his account of transformation through unconventional adaptation, he elaborates that account in a manner that practically levels or reduces his dualism to a form of monism. Second, notwithstanding his suggestion that “the possibility of popular sovereignty” under our Constitution depends upon our accepting his theory of transformation to supplement or even override Article V's formal amending procedures, he has not developed a theory of popular sovereignty that is adequate to underwrite his theory of transformation, much less the Constitution. Nor has

he shown the impossibility of a dualist constitutional theory that both gives due regard to popular sovereignty and views Article V as specifying the exclusive procedures for amending the Constitution. Third, despite Ackerman's claim that to preserve "the possibility of interpretation" of the Constitution we must accept his contention that the New Deal amended the Constitution, he has not put forward *1515 a theory of interpretation that can plausibly and elegantly justify our basic liberties and many of the leading cases since 1937 in terms of the New Deal republic. Moreover, his development of the model of transformation, which emphasizes the discontinuity between the republics constituted by the Founding, Reconstruction, and New Deal, may make it more difficult for him to provide interpretations that achieve "intergenerational synthesis" across republics in the projected third volume, *We the People: Interpretations*.⁴

Finally, in a concluding Section entitled "The Constitution Goes to Yale,"⁵ I reflect upon Ackerman's claims regarding "the possibility of popular sovereignty" and "the possibility of interpretation." I basically turn those claims on their heads by asking: How is it possible that Ackerman, who is Sterling Professor of Law and Political Science at Yale and is undoubtedly in the pantheon of constitutional theorists, could believe it necessary to develop his theory of constitutional amendment and transformation outside Article V in order to preserve and realize these possibilities? My speculation is that it must be because of something they put in the drinking water in New Haven.⁶ I suggest that the root difficulties in Ackerman's constitutional theory bear deep affinities to those in the work of his former Yale colleague, Alexander M. Bickel⁷ (as well as those in the work of his current Yale colleague, Akhil Reed Amar⁸). Bickel was haunted by the "counter-majoritarian difficulty" that he thought judicial review posed in a democracy because he held an impoverished conception of our constitutional scheme as majoritarian representative democracy. Similarly, Ackerman is hobbled by the quest for "the possibility of popular sovereignty" because he holds a richer, yet still reductive, conception of our constitutional scheme as popular sovereignty.

*1516 As against the Yale school theorists, I contend that our Constitution is "incorrigible"⁹ or "irreducible"¹⁰ in the sense that it resists being reduced to either majoritarianism or popular sovereignty. To do justice to our Constitution, we need a dualist constitutional theory that conceives it as securing the basic liberties that are preconditions for self-government in two senses: not only deliberative democracy, whereby citizens apply their capacity for a conception of justice to deliberating about the justice of basic institutions and social policies, as well as about the common good, but also deliberative autonomy, whereby citizens apply their capacity for a conception of the good to deliberating about and deciding how to live their own lives.¹¹ Such a theory, unlike Ackerman's, would not transform our Constitution into the mold of popular sovereignty.

I. Transformations of the Constitution Through Unconventional Higher Lawmaking

A. The Story Thus Far: Foundations

In *Foundations*, Ackerman mapped the terrain of American constitutional theory as being divided into monists ("Anglophiles"), rights foundationalists ("Germanophiles"), and dualists (red-blooded Americans).¹² Monism emphasizes popular sovereignty over and against fundamental rights, and thus tends to equate popular sovereignty with parliamentary supremacy on a British model. Rights foundationalism challenges the primacy of popular sovereignty, stressing constraints imposed by deeper commitments to fundamental rights on a German model. Ackerman presents dualism as an "accommodation" between monism and rights foundationalism. Dualism distinguishes between the constituent power of We the People, expressed in the higher law of the Constitution, and the ordinary power of officers of government, expressed in the ordinary law of legislation. Dualism preserves, against encroachment by ordinary law, the fundamental rights ordained and established by We the People in the higher *1517 law of the Constitution; to that extent, it is like rights foundationalism. But it preserves only those fundamental rights; beyond them, it is like monism in deferring to ordinary law.

Ackerman argued that our dualist democracy has undergone three great constitutional "moments" of higher lawmaking: the Founding, Reconstruction, and New Deal.¹³ These moments inaugurated three regimes or republics within our Constitution: the early republic of the Founding Federalists, the middle republic of the Reconstruction Republicans, and the modern republic of the New Deal Democrats. Ackerman sketched the processes of transformation through each moment and the substance of the higher law of the Constitution during each republic. He argued that, in a dualist democracy, judicial review is justified on the ground that (and to the extent that) it preserves the higher law of the Constitution against encroachment by the ordinary law

of legislation.¹⁴ Finally, in justifying dualist democracy, he analyzed its foundations in a political theory, grounded in popular sovereignty, that is a synthesis of the competing traditions of liberalism and republicanism.¹⁵

B. The Transformation of Dualist Democracy: Transformations

In Transformations, Ackerman elaborates upon the processes of transformation through the Founding, Reconstruction, and New Deal. He does not further develop the substance of the higher law of each republic; that presumably will follow in Interpretations. He begins by reframing the Founding (pp 32-68). He emphasizes that the Founding was a break with legality in the sense that it did not play by the rules of the system of higher lawmaking and amendment prescribed in the Articles of Confederation. The Continental Congress had authorized a constitutional convention to amend the Articles, not to draft a new Constitution, and the Articles had required that amendments be adopted by every state, whereas under the proposed new Constitution, adoption by nine states out of thirteen was sufficient for ratification. He conceives the Founding in terms of processes of unconventional adaptation whereby the Federalists used existing institutions in new ways to earn the authority to speak for the People, distinguishing five stages of unconventional activity: signaling, proposing, triggering, ratifying, and consolidating. He argues that this model of transformation, not compliance with prescribed *1518 rules for amendment, accounts for the legitimacy of the constitutional change brought about through the Founding.

Ackerman then applies the precedent of the Founding to examine Reconstruction (pp 99-252). He argues that, in adopting the Thirteenth, Fourteenth, and Fifteenth Amendments, Reconstruction also broke with legality by not following the rules of the system of higher lawmaking and amendment specified in Article V. For example, Congress overrode southern states' rejections of the proposed Fourteenth Amendment, and conditioned each state's representation in Congress upon: (1) its adoption of that amendment, and (2) adoption of the amendment by the three-fourths of the states required for it to become a part of the Constitution. Again, Ackerman uses the five-stage model of transformation to illuminate the processes of unconventional adaptation whereby Reconstruction Republicans earned the authority to transform the Constitution in the name of the People.

Finally, in rethinking the New Deal, Ackerman argues that it, by analogy to the Founding and Reconstruction, rises to the level of a constitutional amendment and transformation (pp 279-311). He acknowledges that the New Deal did not satisfy the formal rules for amending the Constitution specified in Article V, but for him that fact is no more dispositive than is the fact that the Founding Federalists and Reconstruction Republicans did not play by the rules. On his view, the Founding and Reconstruction brought about legitimate constitutional change because they satisfied the criteria for revision developed in his five-stage model of transformation; for the same reason, so, too, did the New Deal. Ackerman concedes that, however unconventional the Founding and Reconstruction were when measured against the prescribed rules for higher lawmaking, both of those transformations did culminate in amendments to the text of the higher law. The New Deal, however, was unconventional not only in its processes but also in its outcome. It did not result in any amendments to the text of the Constitution, and so to gather the content of the New Deal transformation we must look to "transformative judicial opinions" (pp 26, 359-77). These opinions provide a text-analogue or the functional equivalent of a formal constitutional amendment. They established the constitutional permissibility of activist government in the regulatory and welfare state.

If the foils for dualism in Foundations were monism and rights foundationalism, the foil for unconventional adaptation in Transformations is Article V formalism or positivism: the view that Article V prescribes the exclusive procedures for amending the Constitution (pp 15-17, 28-31). As against Article V positivists, *1519 Ackerman adumbrates a "humanistic positivism," which entails a pluralistic conception of the procedures for and sources of higher lawmaking (p 92). On his view, the "rules of recognition" for higher lawmaking, or criteria for legitimate constitutional revision, are not limited to the formal rules prescribed in Article V, but include the criteria elaborated in his five-stage model of transformation. And the sources of higher lawmaking include not only the rules of Article V but also our principles, practices, and precedents (most importantly, the great precedents of higher lawmaking, the Founding and Reconstruction); in effect, he proposes a common law of higher lawmaking (pp 232, 383-84). And so, as against Article V formalism, which presumes that Article V channels all legitimate constitutional amendment through its rules, Ackerman advances an understanding of unconventional adaptation and transformation according to which legitimate constitutional amendment occurs outside Article V.

Ackerman argues that Article V positivists cannot account for the legitimacy of the constitutional change brought about through either the Founding or Reconstruction, because neither played by the formal rules laid down for amending the higher law. Only

his model of transformation can do so. He also argues that Article V positivists cannot plausibly account for the legitimacy of the constitutional change during the New Deal. Having gained a foothold for his model of transformation in justifying the Founding and Reconstruction, he argues that it is also necessary to account for the New Deal. He contends that the same criteria for revision that establish the Founding and Reconstruction as constitutional transformations also establish the New Deal as one.

Article V positivists, Ackerman contends, do not merely deny that the New Deal brought about a constitutional amendment and transformation. Worse yet, they cloak its constitutional creativity in the “myth of rediscovery”—the myth that the Supreme Court in 1937 and afterward rediscovered the original understanding of the Constitution as contemplated by Founding Federalists, most notably James Madison and John Marshall (pp 8-10, 259, 279). This myth of rediscovery is troublesome not only because it obscures the foundations of the modern activist regulatory and welfare state inaugurated by the New Deal, but also because it denigrates the constitutional creativity of We the People, thus undermining the possibility of popular sovereignty in America. As against this view, Ackerman exhorts us to rediscover or reclaim the Constitution and to preserve the possibility of *1520 popular sovereignty through unconventional adaptation and transformation (pp 383-420).¹⁶

II. The Transformation, and Leveling, of Dualism

As described above, Ackerman argued in *Foundations* that dualism offers a better account of our constitutional scheme than monism or rights foundationalism. Nonetheless, in the closing pages of that volume he called for moving “beyond dualism” to a rights foundationalist scheme that would entrench inalienable rights into our Constitution against subsequent amendment,¹⁷ prompting some critics to wonder whether he was really a rights foundationalist.¹⁸ I shall take the opposite tack in criticizing *Transformations*, suggesting instead that Ackerman's theory of transformation itself transforms his theory of dualist democracy into a form of monism.

A. Reclaiming or Reconstructing the Classical, Interpretive Justification of Judicial Review

Constitutional theorists since Bickel—and Ackerman is no exception—have been troubled by the “counter-majoritarian difficulty” said to be posed by judicial review in a democracy.¹⁹ The classical, interpretive justification of judicial review, put forward in *The Federalist* 78 and *Marbury v Madison*, purports to resolve this difficulty.²⁰ On this view, courts are obligated to interpret the higher law of We the People embodied in the Constitution and to preserve it against encroachment by the ordinary law of officers of government embodied in legislation. Therefore, judicial review implies constitutional, not judicial, supremacy, or the supremacy of the People over their agents, the officers of government.

In recent years, narrow originalists like Robert Bork and Justice Antonin Scalia have claimed a monopoly on the classical, interpretive justification of judicial review.²¹ But Ackerman, *1521 through his theory of dualism, has sought to reclaim that justification and to reconstruct it.²² He has done so by arguing that higher lawmaking by We the People includes not only amendments to the Constitution adopted through the formal procedures of Article V but also unconventional adaptation and transformation of the Constitution outside Article V. He reconstructs the classical, interpretive justification in the sense that judicial review under his theory is likewise justified as preserving the higher law of We the People (as he conceives it) against encroachment by the ordinary law of officers of government.

It is important to note that a constitutional theory can be dualist in a general sense without being dualist in Ackerman's specific sense. That is, a theory can insist upon maintaining the distinction between the constituent power of We the People and the ordinary power of officers of government without endorsing his complex apparatus of higher lawmaking outside Article V. For example, Ronald Dworkin's constitutional theory is dualist in this general sense and indeed Dworkin, like Ackerman, seeks to reclaim and reconstruct the classical, interpretive justification of judicial review.²³ Dworkin does so by putting forward a theory of constitutional interpretation—both a conception of What the Constitution is and a conception of How it should be interpreted²⁴—that is an alternative to that of the narrow originalists. As for What, he argues that the Constitution embodies abstract moral principles, rather than enacting relatively concrete rules. As for How, he argues that interpreting and applying

those principles requires fresh judgments of political theory, rather than historical research to discover relatively specific original understanding or original meaning. He now calls this interpretive strategy the “moral reading” of the Constitution.²⁵

***1522** The basic shortcoming of Ackerman's attempt to reclaim the classical, interpretive justification of judicial review is that, unlike Dworkin, he attempts to do so without advancing a theory of constitutional interpretation as an alternative to that of the narrow originalists. To be sure, Ackerman develops an alternative conception of What the Constitution is-- it includes not only higher law adopted through the formal amending procedures of Article V but also that ratified through unconventional adaptations and transformations outside Article V. But he does not advance an alternative understanding of How the Constitution should be interpreted. What Volume II, Transformations, provides is not a theory of interpretation--we must hope for that in the projected Volume III, Interpretations--but a model of transformation whereby political figures and movements earn the authority to speak in the name of We the People. In fact, Ackerman has not written anything in either Volume I or Volume II about interpretation as a general theoretical matter. He promises to develop concrete interpretations in Volume III.²⁶ I return to this matter below, in assessing Ackerman's claim that the “possibility of interpretation” depends upon our accepting his theory.

B. The Leveling of Ackerman's Dualism

In Transformations, Ackerman does not make good on the claim that his theory of dualist democracy reclaims or reconstructs the classical, interpretive justification of judicial review. Instead, he develops that theory in a manner that may forfeit that justification and along with it his claim to be a dualist. For in Transformations, he practically levels his dualism to a form of monism (or perhaps super-monism).

As stated above, dualists in a general sense maintain a basic distinction between the higher law of We the People embodied in the Constitution and the ordinary law of officers of government embodied in legislation. On first sight, it might seem that almost every constitutional scholar in America is a dualist in this sense. Yet, to recall a term that Ackerman used in Discovering the Constitution, before he coined the term “monism,” some constitutional scholars in effect “level” the higher law to the level of ordinary law.²⁷ There are several ways that they do this. One approach is ***1523** to propose that judicial review should be extremely deferential to legislatures and executives, indeed so deferential that it levels the Constitution in the sense that for all practical purposes it does not limit legislation. James Bradley Thayer and Justice Felix Frankfurter are such levelers.²⁸ Another way to level the higher law is to argue that it is exclusively or overwhelmingly concerned with securing procedural rights that are preconditions for the legitimacy of ordinary law as opposed to securing substantive rights that limit what government may do through ordinary law. Ackerman characterizes John Hart Ely as such a leveler.²⁹

A third way to level the higher law of the Constitution is to suggest that higher lawmaking is not as fundamentally different from ordinary lawmaking as it initially appeared to be (when we characterized dualism as distinguishing two tracks of lawmaking). Ackerman proves to be a leveler in this sense. He does not make the general dualist argument that there are two distinct tracks of lawmaking--higher lawmaking through the procedures prescribed in Article V and ordinary lawmaking through the procedures prescribed in Article I. Instead, he makes the argument that we have two routes of higher lawmaking--one through following the procedures of Article V and another through engaging in political activity that proceeds through the five stages of his model of transformation. The latter route looks like an intermediate track of lawmaking, perhaps super-ordinary lawmaking through sustained, deep, and broad success in the electoral and legislative processes; hence my suggestion that Ackerman “levels” his dualism to a form of super-monism.³⁰

***1524** The driving force behind Ackerman's leveling of dualism is his notion of popular sovereignty, which bristles at Article V's pretensions to rein it in. This point is nowhere more clear than in Ackerman's claim that, to realize the possibility of popular sovereignty, we must move beyond theories that stringently maintain the distinction between the two tracks of lawmaking to embrace a theory that acknowledges the unruly, unconventional ways in which the forces of popular sovereignty have transformed our higher law along with our higher lawmaking system. I take up this claim below.

Furthermore, Ackerman's theory of transformations practically levels popular sovereignty from constituent power to ordinary power (albeit ordinary power exercised in extraordinary circumstances or moments). The notion of popular sovereignty is

notoriously ambiguous, mysterious, and vague,³¹ although it is not always acknowledged to be so in constitutional theory. Monists and dualists have very different conceptions of the notion of popular sovereignty. As conceived by monists, it refers basically to parliamentary supremacy on a British model, and it amounts to the ordinary power of officers of government engaged in passing the ordinary law of legislation in a majoritarian representative democracy. But popular sovereignty as conceived by dualists refers in the first instance to the constituent power engaged in deliberating about and adopting the higher law of the Constitution.³²

When Ackerman initially sketches the foundations of dualist democracy, he seems to contemplate popular sovereignty in the latter sense. But by the time he elaborates upon the transformation to the New Deal, at the behest of popular sovereignty outside Article V, he seems practically to contemplate popular sovereignty *1525 in the former sense. Admittedly, the popular sovereignty that he envisions is more sustained, deeper, and broader than that of the monist notion of popular sovereignty as parliamentary supremacy or majoritarian representative democracy. And it is popular sovereignty that expresses itself in extraordinary moments. But it is popular sovereignty that can exert itself unconventionally through elections rather than ratifying bodies, and through statutes and even judicial opinions rather than formal amendments. Therein lies the proof that Ackerman has leveled dualism. Indeed, for Ackerman, the People can even purport formally to amend the Constitution through a statute (pp 414-16).³³ As compared with Ackerman, dualists who more rigorously maintain the distinction between higher lawmaking and ordinary lawmaking, along with that between constituent power and ordinary power, may have a superior claim to be dualists and may be in a better position to reclaim and reconstruct the classical, interpretive justification of judicial review.

C. From Positivism Without Law to Judicial Lawmaking Through Transformative Judicial Opinions

That is not all. Ackerman also may forfeit his claim to be invoking the classical, interpretive justification of judicial review. Again, dualists resolve the “counter-majoritarian difficulty” by arguing that judicial review interpreting and preserving the higher law of the Constitution against encroachment by the ordinary law of legislation entails constitutional, not judicial, supremacy. Some critics of Foundations argued that Ackerman’s dualism, and in particular his theory that the New Deal was a constitutional amendment, was an ironic instance of “legal positivism without positive law.”³⁴ That is, Ackerman claimed to be *1526 developing a positivist theory that could establish that the New Deal was a constitutional amendment, but his theory did not provide any higher law--a constitutional text or text-analogue--that constituted the amendment and that therefore could be interpreted and preserved against encroachment by ordinary law.

In Transformations, Ackerman puts forward the idea of “transformative judicial opinions” to fill in the content of the New Deal amendment (pp 26, 359-77). These opinions, written mostly between 1937 and 1942 by FDR’s new appointees to the Supreme Court--the “transformative judicial appointees”--gave content to the New Deal transformation’s general commitment to activist government in the regulatory and welfare state (or, more properly, established the constitutional permissibility of such government). They rendered the considered political judgments of We the People, or popular sovereignty, expressed through the electoral and political processes, into the vernacular of constitutional law. And in Ackerman’s theory, these transformative judicial opinions supplied the deficiency of positivism without law, for they provided the law--the text-analogue--needed to specify the New Deal amendment to the Constitution. These opinions, as Ackerman puts it, are “the functional equivalent of formal constitutional amendments” (pp 26, 361).

Not so fast. This move may be available to some constitutional scholars, such as realists who believe that courts to some extent operate as a continually sitting constitutional convention. But it would seem not to be available to Ackerman, so long as he claims to be reclaiming or reconstructing the classical, interpretive justification of judicial review. For this move all but concedes that when judges engage in judicial review during constitutional moments, they are literally making, rather than interpreting, the higher law ordained and established by the Constitution. Constitutional scholars who are haunted by the “counter-majoritarian difficulty” dread the nightmare of judges functioning as the equivalent of a continually sitting constitutional convention.³⁵ The classical, interpretive justification’s response to the charge of judicial supremacy with the claim of constitutional supremacy--that it is not the judges, but the Constitution in the name of We the People, who did it--can allay that dread only if in principle the content of the Constitution is something other than judicial *1527 opinions. By advancing the notion that transformative judicial opinions provide the content of the higher law of the Constitution, Ackerman aggravates rather than allays that dread.

Ackerman no doubt would respond that the justices issuing transformative judicial opinions did so in the name of the higher law of the Constitution, as established through the New Deal amendment, which itself was ratified by We the People through the five-stage model of transformation. Thus, the justices spoke in those opinions in the name of the People after all, and they can put on the mantle of constitutional supremacy as distinguished from judicial supremacy. But this response loses plausibility when justices are interpreting election returns and political mandates, and writing a constitutional text-analogue to codify them, rather than interpreting a text given to them (even if the text has an unconventional pedigree, as on Ackerman's account the Fourteenth Amendment does (pp 99-119)). For justices have no special competence in interpreting election returns and political mandates, and in any event such political phenomena are unavoidably majoritarian.

D. The Thinness of Ackerman's Dualism

Our constitutional scheme is dualist not only in the general sense just analyzed but also in the substantive sense that it is a synthesis of the conflicting traditions of civic republicanism and liberalism. This conflict is encapsulated in Benjamin Constant's famous contrast between the tradition associated with Jean-Jacques Rousseau, which gives primacy to the liberties of the ancients, such as the equal political liberties and the values of public life, and the tradition associated with John Locke, which gives greater weight to the liberties of the moderns, such as liberty of conscience, certain basic rights of the person and of property, and the rule of law.³⁶ Many constitutional theorists, including Ackerman, have offered their theories as syntheses of these two traditions. I have suggested elsewhere that certain liberals have co-opted the revival of the republican tradition by constructing syntheses that have yielded thinner accounts of republicanism than one might have expected and than republicans might have hoped for.³⁷ Frank Michelman and Cass Sunstein are the most obvious cases in point.³⁸ But Ackerman too is a liberal who has gotten on this bandwagon, calling his theory a "liberal republicanism,"³⁹ and his synthesis is thinner still.

For one thing, Ackerman's version of a liberal republicanism is more a "cycle" or rotation between liberalism and republicanism than a synthesis of them. During periods of ordinary politics, we have liberalism (as Ackerman puts it, we are private citizens), and during moments of constitutional politics and periods of transformation, we turn to republicanism (as he puts it, we are private citizens),⁴⁰ rather than having a synthesis of liberalism and republicanism both in ordinary politics and in constitutional politics. For another, the liberalism in play in Ackerman's dualism is quite thin. It is basically liberalism as conceived by interest-group pluralists like Robert Dahl⁴¹ rather than liberalism as conceived by liberal republicans or deliberative democrats like Michelman and Sunstein. Unlike the latter theorists, Ackerman does not advance a conception of deliberative democracy that requires government to provide public-regarding reasons concerning the common good for its actions, even in ordinary politics, and that forbids government from acting solely on the basis of the self-interested preferences of well-organized private groups or individuals. What is more, the republicanism in play in his theory is also quite thin. He seems to conceive republican self-government entirely in terms of deliberation about the content of the higher law rather than in terms of deliberation about the common good in adopting ordinary law.⁴²

A richer and better synthesis of these competing traditions--or substantive dualism--would conceive both ordinary politics and the content of the higher law of the Constitution as syntheses of liberalism and republicanism. Elsewhere, I have argued for a constitutional theory within which both ordinary politics and constitutional politics are such syntheses. It combines a "republican" theme of securing the basic liberties that are preconditions for deliberative democracy (or the liberties of the ancients), with a "liberal" theme of securing the basic liberties that are preconditions for deliberative autonomy (or the liberties of the moderns).⁴³ Such a theory provides the basis for a richer form of dualism than Ackerman's.

III. The Possibility of Popular Sovereignty

Is Article V of the Constitution a fixed point--or foundational text-- that any constitutional theory, including those grounded in popular sovereignty, must be able acceptably to fit and justify? Or is Article V a pox upon the Constitution that any theory of popular sovereignty worthy of invoking the name We the People should seek to limit and contain, if possible, by supplementing or even overriding it?⁴⁴ Is it possible to articulate a constitutional theory that gives due regard to popular sovereignty but that also takes Article V seriously as prescribing the exclusive procedures for amending the Constitution?

Ackerman contends that “the possibility of popular sovereignty” under our Constitution depends upon our accepting his theory of unconventional adaptation and transformation outside Article V (p 119).⁴⁵ What does he mean by this claim? He seems to be making both a justificatory claim and a hortatory claim. The justificatory claim is that our Constitution--notwithstanding the text of Article V in the Constitution itself--presupposes a theory of popular sovereignty in light of which Article V is incomplete, a compromise, or even a mistake (if it purports to prescribe the exclusive procedures for making higher law). Therefore, in order for the Constitution to be able to realize its commitment to popular sovereignty, and indeed for it to be legitimate, We the People must be free to amend and transform it outside the formal procedures of Article V, including through the model of transformation that Ackerman develops. Otherwise, we are not a properly self-governing People.

***1530** The hortatory claim is that We the People are more likely to live up to the rights and responsibilities of self-government if we believe that the People, as recently as the New Deal, rose to the occasion of transforming the higher law of the Constitution. After all, if We the People have done so only once (or perhaps twice) in American history, and not since the Founding (or possibly Reconstruction) at that, what is the hope of the People accomplishing anything great by way of higher lawmaking in our time? Other theories, including those of Article V exclusivity, denigrate the constitutional creativity of We the People, and thus may demoralize or debilitate the People, undermining the possibility of popular sovereignty.

To these claims, I offer three responses. First, through advancing the idea that “the possibility of popular sovereignty” requires us to supplement or even override Article V, Ackerman proves in *Transformations* to be a popular sovereignty-perfecting theorist. That is, he is arguing that the Constitution presupposes a theory of popular sovereignty in light of which Article V-- evidently a fixed point or foundational text--can be seen to be incomplete, a compromise, or even a mistake. And he is arguing for interpreting the Constitution so as to perfect it from the standpoint of his theory of popular sovereignty, even to the point of supplementing or overriding provisions of its text. In terms of Dworkin's well-known formulations, Ackerman is calling for interpreting the Constitution so as to make it the best it can be and putting forward a “moral reading” of the Constitution.⁴⁶

To suggest that Ackerman's theory, notwithstanding his strenuous and strained efforts in *Foundations* to differentiate it from theories like Dworkin's,⁴⁷ reflects a moral reading of the Constitution is certainly not to say that it is wrong or incoherent. Indeed, elsewhere I have advanced what I call a “Constitution-perfecting theory,”⁴⁸ which reflects a moral reading. Rather, it is ***1531** to suggest that Ackerman's own development of his theory shows that we should assess it on different grounds than he initially offered it. Applying Dworkin's distinction between two dimensions of best interpretation, fit and justification,⁴⁹ he had asserted that “fit is everything”⁵⁰ and thus had implied that there was no need to resort to the dimension of justification in deciding which of the available competing theories provides the best account of our constitutional scheme. He had submitted that only his theory of dualist democracy and popular sovereignty--as against theories like Dworkin's--could fit the text of the Constitution and our constitutional experience.⁵¹ Admittedly, Ackerman would respond that his theory provides the best interpretation of our constitutional scheme--as a matter of justification as well as fit--but to sustain that claim he would need to offer a fuller justification for dualist democracy and popular sovereignty than he has provided thus far.

Second, Ackerman does not show the impossibility of--or give sufficient attention to the possibility of--a constitutional theory that both gives due regard to the claims of popular sovereignty and takes Article V seriously as a fixed point of the Constitution that any constitutional theory must be able acceptably to fit and justify. Here, I sketch a dualist constitutional theory that does so. The claims of popular sovereignty certainly have a place, and carry great weight, in constitutional theory, but not the place or the weight that Ackerman gives them. Our Constitution's commitment to popular sovereignty is not incompatible with Article V exclusivity. Our constitutional scheme is dualist in a general sense--it prescribes distinct tracks for higher lawmaking and for ordinary lawmaking--and our commitment to popular sovereignty is expressed through and limited by Article V's procedures for higher lawmaking. On this view, We the People ordained and established the Constitution, and from time to time have amended it, and thus the Constitution manifests popular sovereignty. But the Constitution also constitutes a scheme of government and a charter of principles that seek to establish justice and to express the fundamental commitments and highest ***1532** aspirations of a people.⁵² Once a workable Constitution of principle is in place, living under it, and interpreting it with integrity so as to make it the best it can be, carry their own imperatives. We should interpret the Constitution, both inside and outside the courts, so as to secure the basic liberties that are the preconditions for the legitimacy and trustworthiness of political decisions in our constitutional democracy. In justifying interpretations of it, we need not always make recourse to the fount of popular

sovereignty. For our Constitution expresses commitments and aspirations besides popular sovereignty, and it may be legitimate and trustworthy for reasons other than conformity to popular sovereignty.

Ackerman is in the grip of an assumption or premise that the fundamental value or point of our Constitution and our democracy is a commitment to popular sovereignty.⁵³ This premise undergirds a popular sovereignty conception of democracy that is not true to our scheme of government and that indeed obscures the true character and importance of our system. Instead, our Constitution reflects and presupposes a constitutional conception of democracy (or constitutional democracy) that conceives the fundamental point or value of our democracy to be concern for securing for everyone the status of free and equal citizenship.⁵⁴ Within such a dualist constitutional democracy, securing the preconditions for self-government requires not merely preserving the possibility of popular sovereignty. It requires securing the basic liberties that are preconditions for self-government in two senses: not only deliberative democracy but also deliberative autonomy.⁵⁵

***1533** From the standpoint of a dualist theory of constitutional democracy, it would be inapt to criticize Article V (or the Constitution generally) for its failure to conform to a deeper, richer, or more thoroughgoing commitment to popular sovereignty. Only a leveler who was in the grip of a different theory of popular sovereignty than that which the Constitution reflects and presupposes would make such a criticism. A dualist who understood the character of the higher law of our Constitution and the commitments of our constitutional democracy would not reduce our constitutional scheme into a manifestation of popular sovereignty, or transform it in the image of popular sovereignty.

In support of Article V exclusivity in such a dualist scheme, I would say two things. For one thing, I would give two cheers for Article V in a defensive sense, for it has protected the Constitution and its citizens against the recent rash of “amendmentitis.”⁵⁶ Numerous illiberal and ill-conceived amendments that would erode basic liberties or limit important powers have been introduced in Congress in recent years: the Flag Burning Amendment, the Balanced Budget Amendment, the Parental Rights Amendment, the Religious Freedom Amendment, and the Human Life Amendment, to name a few. Despite the claims of representatives and senators in Congress to have a mandate from the People, all of the measures that have come up for a vote have failed to secure the two-thirds vote of both houses required by Article V to propose an amendment for ratification by the states. Article V's requirements have protected the Constitution and its citizens from such measures.⁵⁷

For another, there is much to be said for Article V in an affirmative sense. As Lawrence Sager has cogently argued, the obduracy of Article V to ready and easy amendment of the Constitution has encouraged and fostered broad interpretation of the Constitution's rights-protecting and power-conferring provisions.⁵⁸ It ***1534** has underscored the character of the Constitution as a charter of majestic generalities and abstract principles as opposed to a code of relatively specific original understandings. Thus, Article V has underwritten approaches to constitutional interpretation like those of Dworkin's moral reading, Sager's justice-seeking constitutionalism, and my own Constitution-perfecting theory. And such approaches to interpretation are appropriate in a dualist scheme of constitutional democracy of the sort sketched above. Unfortunately, Ackerman does not seriously engage such arguments.⁵⁹ Worse yet, his theory of amendment and transformation seems to presuppose a remarkably (and uncharacteristically⁶⁰) narrow view of interpretation: that interpretation does not countenance change, and therefore that change may occur only through amendment. I return to this issue below.

Third, Ackerman's theory of popular sovereignty and transformation meets with difficulty in fitting and justifying our dualist constitutional scheme. Our constitutional order cannot be reduced to a scheme of popular sovereignty, nor can our basic liberties (and leading cases interpreting them since 1937) be reduced to the structure of the modern republic brought about by the transformation to New Deal Democracy.

Ackerman's popular sovereignty-perfecting approach to interpreting the Constitution bears a family resemblance to representation-reinforcing or process-perfecting theories such as those of Ely and Sunstein.⁶¹ Elsewhere, I have criticized the architecture of the latter theories, which attempt to frame or recast all of our basic liberties, both substantive and procedural, as preconditions ***1535** for representative or deliberative democracy.⁶² I have argued instead for a Constitution-perfecting theory with two fundamental themes, which would reinforce not only the procedural liberties (those associated with deliberative democracy), but also the substantive liberties (those related to deliberative autonomy) embodied in our Constitution.

My critique of the architecture of theories like Ely's and Sunstein's applies with some force to the architecture of Ackerman's theory, which reduces our Constitution to a manifestation of popular sovereignty, and recasts its provisions so as to secure the preconditions for popular sovereignty. For example, whereas Ely and Sunstein reject the substantive liberties like privacy or autonomy at issue in cases like *Griswold v Connecticut*⁶³ and *Roe v Wade*,⁶⁴ or recast them in procedural terms, Ackerman attempts to justify such liberties and cases in terms of We the People's transformation of the Constitution through the New Deal.⁶⁵ In particular, I would emphasize two reasons for the superiority of a Constitution-perfecting theory with the foregoing two themes. The first reason is architectonic: presenting our basic liberties in terms of deliberative democracy and deliberative autonomy illustrates that these two fundamental themes are co-original and of equal weight, and that neither is foundational.⁶⁶ For both themes derive from a common substrate: a conception of citizens as free and equal persons (with two moral powers corresponding to the two themes) and a conception of society as a fair system of social cooperation. Both themes are constitutive of and articulate preconditions for the legitimacy and trustworthiness of political decisions in our constitutional democracy. Our Constitution resists being reduced to an expression of popular sovereignty, just as it resists being recast into the mold of representative or deliberative democracy.

The second reason is elegance: the importance of being elegant (though not too reductive) in constructing a constitutional theory. Ackerman's theory, ironically, is not only reductive in the way just discussed but also inelegant. By his own self-deprecating characterization, it may appear to be an "unworkable Rube Goldberg contraption."⁶⁷ To be sure, our constitutional scheme is complex, *1536 and may require complex theories to account for it. But a Constitution-perfecting theory, with the two fundamental themes of deliberative democracy and deliberative autonomy, can more elegantly, straightforwardly, and plausibly account for our dualist constitutional scheme than can Ackerman's theory. Furthermore, the fact that the apparatus of Ackerman's theory is quite unwieldy is troublesome given his hortatory claims for it. It may be more effective to advance a hortatory constitutionalism that can appeal directly to our aspirational principles of liberty, equality, and justice in addition to democracy, rather than to deploy a framework that may garble the exhortations because it always has to reconceive them in terms of the touchstone of popular sovereignty. Because Dworkin's moral reading of the Constitution, Sager's justice-seeking constitutionalism, and my own Constitution-perfecting theory can appeal directly to such aspirational principles, they may be more effective in supporting a comprehensible hortatory constitutionalism than is Ackerman's theory.

Finally, our basic liberties (and leading cases interpreting them since 1937) cannot be reduced to a manifestation of popular sovereignty or justified in terms of the structure of the modern New Deal republic. We might concede to Ackerman that the New Deal was the last fundamental transformation of the Constitution (in a general sense, not in Ackerman's specific sense of amending the Constitution) and also grant that he is right that the purported Reagan Revolution failed to bring about a transformation (pp 389-403), yet still be unable to justify much of contemporary constitutional law in terms of the transformation to New Deal Democracy and the fundamental commitments of the modern New Deal republic. (I return to this point in assessing Ackerman's claim about "the possibility of interpretation.") This is not to say that we do not need an account of the political transformation wrought by the New Deal to get us to where we are today. Rather, it is to say that we need more than the New Deal transformation to do so. We need a theoretical structure that will go beyond that transformation and beyond popular sovereignty to provide a substantive account of our scheme of basic liberties. In short, we need a dualist constitutional theory of the sort I have sketched.

IV. The Possibility of Interpretation

Ackerman also suggests that to preserve or realize "the possibility of interpretation" of our Constitution--as opposed to a realist vision of judicial lawmaking--we must accept his theory of *1537 amendment and transformation outside Article V. He stated this claim in *Foundations*,⁶⁸ alludes to it in *Transformations* (p 419), and promises to elaborate upon it in *Interpretations*.⁶⁹ But the claim should be assessed here, because it exposes a fundamental shortcoming in Ackerman's theory: He does not put forward a theory of interpretation!

I daresay that Ackerman's failure to develop a theory of interpretation may help to explain why he develops a theory of amendment outside Article V. That is, if Ackerman had a broad conception of interpretation, he would not need such a theory of amendment. Along similar lines, some critics have suggested that Ackerman's project reflects a remarkably narrow view

of interpretation:⁷⁰ that interpretation does not countenance change; therefore, change may occur only through amendment; hence, for the Constitution to be interpretable after the change brought about during the New Deal, it must have been amended through the New Deal.

Furthermore, despite Ackerman's claim about "the possibility of interpretation," it is impossible, plausibly and elegantly, to justify our basic liberties and many of the leading constitutional law decisions since 1937 in terms of popular sovereignty and the New Deal transformation. In fact, the cases that Ackerman analyzes in *Foundations* in connection with "the possibility of interpretation"⁷¹ --*Brown v Board of Education* and *Griswold v Connecticut*--are difficult to justify in these terms. It is more straightforward to justify those decisions in terms of equal citizenship and privacy than in terms of the transformation to the activist regulatory and welfare state. The point is not simply that those cases--and many others that follow, including *Planned Parenthood v Casey*⁷²--seem far afield from the transformation to the New Deal, but also that the accounts Ackerman offers of them are far less elegant and apt than other available accounts.

*1538 Ackerman presumably will say more about interpretation, if not put forward a theory of interpretation, in the projected Volume III, *Interpretations*. Here I want to suggest that Ackerman's presuppositions about interpretation in *Transformations* may pose or aggravate difficulties for his development of a theory of interpretation and advancement of concrete interpretations in *Interpretations*. For Volume II's model of transformations-- and the underlying conception of three republics constituted by the Founding, Reconstruction, and the New Deal--emphasizes the discontinuity between each republic, and presumably the discontinuity between the substance of the higher law of the Constitution for each republic. Yet in Volume III, Ackerman will quest for fidelity as "intergenerational synthesis,"⁷³ or synthesis across generations or republics, notwithstanding the discontinuity that he himself has emphasized. (Ackerman is sometimes viewed as a "broad originalist,"⁷⁴ and so presumably the notion of intergenerational synthesis will have a broad originalist cast to it.) Thus, Ackerman's account of transformations, to the extent that it overstates discontinuity, may make it more difficult for him credibly to develop interpretations that achieve such synthesis than if he had a theory of interpretation that could acknowledge change without casting it as amendment or transformation.

Ackerman criticizes constitutional theories that, instead of seeing the New Deal as an amendment or transformation, cloak its creativity in the "myth of rediscovery"--the myth that the Supreme Court in 1937 and afterward rediscovered the original understanding of the Constitution as contemplated by the Founding Federalists (pp 10, 259, 279). And he presents such myths as efforts to deny constitutional creativity. Yet Ackerman overlooks the fact that what generate myths of rediscovery are theories of originalism, including broad originalist theories like his own. For originalists, both narrow and broad, believe that the only way to be faithful to the Constitution is to follow or translate original *1539 meaning or original understanding,⁷⁵ and to that extent to deny creativity in interpreting it.

As long as Ackerman conceives interpretation in terms of some form of broad originalism, he is likely, when he attempts to develop interpretations that attain intergenerational syntheses, to provide some of his own myths of rediscovery. The proof of this suggestion lies in the fact that some of Ackerman's acolytes, notably Lawrence Lessig, have been driven by their quests for forms of broad originalism to develop accounts of fidelity as translation, as opposed to accounts of constitutional transformation: Lessig's account of the New Deal deradicalizes Ackerman's account of the creativity of transformation in favor of a quest for fidelity in translation of original meaning, which amounts to a sophisticated myth of rediscovery.⁷⁶ The best way to avoid the tendency to propagate myths of rediscovery is to eschew originalism, both narrow and broad, in favor of a theory of interpretation that conceives fidelity to the Constitution as integrity with the moral reading of the Constitution. Such a theory can acknowledge change in interpretation without needing to dress it up in the garb of translations of original meaning or transformations of popular sovereignty.

Conclusion: The Constitution Goes to Yale

In concluding, I return to the puzzle that I posed in the introduction: How is it possible that Ackerman could believe it necessary to develop his theory of constitutional amendment and transformation outside Article V in order to realize "the possibility of popular sovereignty" and "the possibility of interpretation"? The difficulties with Ackerman's dualism-- which underlie the

problems with these two claims--are difficulties in his conceptions of democracy and interpretation, respectively. The root difficulties in Ackerman's conceptions bear deep affinities to those in the ideas of his former Yale colleague, Bickel (not to mention those in the work of his current Yale colleague, Amar⁷⁷).

***1540** In recent years, some constitutional scholars have noted the emergence of a "Yale school" of constitutional theory, by which they refer to Ackerman's and Amar's theories of amending the Constitution outside Article V.⁷⁸ But these theories are simply the latest symptom or manifestation of deeper difficulties in conceptions of democracy and interpretation that have plagued Yale constitutional theorists since Bickel. By the formulation "the Constitution goes to Yale," I mean to suggest that Yale seems to foster or generate constitutional theories that are haunted or hobbled by the root difficulties of Bickel's theory, which were reflected in his formulation of and response to the "counter-majoritarian difficulty." The first difficulty was that Bickel held an impoverished conception of democracy as majoritarian representative democracy, within which not only judicial review but even fundamental rights were deviant and anomalous rather than integral.⁷⁹ The second was that Bickel held an impoverished conception of interpretation. He rejected the classical, interpretive justification of judicial review, and sought to develop a "noninterpretive" justification grounded in preserving fundamental values.⁸⁰ Yet he proved incapable of articulating a post-realist conception of interpretation that could withstand skeptical and democratic objections to every conceivable source of fundamental values.⁸¹ Thus, his quest for a source of fundamental values--which Ely aptly called the "odyssey of Alexander Bickel"--became a nightmarish free-fall.⁸²

***1541** Ackerman began *Discovering the Constitution*--which launched the *We the People* project in 1984--by claiming that he would "rediscover the Constitution" and dissolve the "counter-majoritarian difficulty" that haunted Bickel by reclaiming or reconstructing the classical, interpretive justification of judicial review.⁸³ That certainly was a promising beginning. And one might well have believed that Ackerman had the tools to rescue constitutional theory from the difficulties in, and brought on by, Bickel's work. For one thing, Ackerman's understanding of democracy as dualist is richer than Bickel's. For another, Ackerman's understanding of interpretation as "constructive" is more sophisticated than Bickel's, and it is staunchly post-realist.⁸⁴ All in all, Ackerman is far more sophisticated than Bickel in what the latter called "the method of reason familiar to the discourse of moral philosophy."⁸⁵

But Ackerman is hobbled by the quest for "the possibility of popular sovereignty," just as Bickel was haunted by the "counter-majoritarian difficulty." Accordingly, Ackerman develops a theory of democracy that reduces or recasts our Constitution and constitutional democracy into the mold of popular sovereignty, just as Bickel rejected as deviant any feature of our constitutional scheme that did not conform to a theory of majoritarian representative democracy. (Amar is either the synthetic culmination or the *reductio ad absurdum* of the Yale school, for he fundamentally conceives popular sovereignty as majoritarian representative democracy.) And Ackerman pursues "the possibility of interpretation," whereas Bickel searched for a "noninterpretive" justification of judicial review. This leads Ackerman to develop a pluralist conception of the sources of higher lawmaking outside Article V, just as Bickel searched for a source of fundamental values outside the Constitution altogether.

As against Ackerman's and Bickel's theories, we need a conception of constitutional democracy of the sort I sketched here to avoid the theoretical hankering to transform our "incurable," "irreducible" dualist Constitution into the molds of popular sovereignty and majoritarianism. And we need a conception of interpretation ***1542** like Dworkin's to reclaim the dualist justification of judicial review from Ackerman's reconstruction of it and to rescue the fundamental rights justification of judicial review from Bickel's "noninterpretive" defense of it. Such conceptions offer hope of preserving and realizing our exceptional, unconventional Constitution.



Footnotes

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- 1 Bruce Ackerman, *We the People: Foundations* 3-6, 32-33 (Harvard 1991).
- 2 *Id.* at 131-62.
- 3 See James E. Fleming, [We the Exceptional American People](#), 11 *Const Comm* 355 (1994) (analyzing Ackerman's constitutional theory in light of the tradition of “American exceptionalism” from European models).
- 4 In both Volume I and Volume II, Ackerman refers to the projected Volume III, to be titled *We the People: Interpretations*. Ackerman, *Foundations* at 99, 118, 162 (cited in note 1); Ackerman, *Transformations* (p 403).
- 5 In formulating the idea of “The Constitution Goes to Yale,” I have been inspired by the title of a previous article about Harvard constitutional theorists. Henry P. Monaghan, *The Constitution Goes to Harvard*, 13 *Harv CR-CL L Rev* 117 (1978).
- 6 See Akhil Reed Amar, [The Consent of the Governed: Constitutional Amendment Outside Article V](#), 94 *Colum L Rev* 457, 457 (1994) (stating, concerning responses to his theory of constitutional amendment outside Article V, that “I suspected my audience might well wonder if someone had been messing with the drinking water in New Haven”).
- 7 See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale 2d ed 1986).
- 8 See Amar, 94 *Colum L Rev* 457 (cited in note 6); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 *U Chi L Rev* 1043 (1988).
- 9 See Lawrence G. Sager, [The Incurable Constitution](#), 65 *NYU L Rev* 893 (1990) (arguing that our “incurable” justice-seeking Constitution resists being reduced to an expression of popular sovereignty).
- 10 See Abner S. Greene, [The Irreducible Constitution](#), 7 *J Contemp Legal Issues* 293 (1996) (arguing that our “irreducible” Constitution resists being reduced to either democracy or fundamental rights).
- 11 See James E. Fleming, [Securing Deliberative Autonomy](#), 48 *Stan L Rev* 1, 2-3, 17-29 (1995); James E. Fleming, [Constructing the Substantive Constitution](#), 72 *Tex L Rev* 211, 217-20, 280-97 (1993).
- 12 Ackerman, *Foundations* at 6-16, 32-33, 35-36 (cited in note 1).
- 13 *Id.* at 58-80.
- 14 *Id.* at 60-61, 72.

- 15 Id at 29-33.
- 16 Ackerman also calls for “reclaiming the Constitution” by reforming the higher lawmaking system through adopting a “Popular Sovereignty Initiative” by statute (pp 410-16). I discuss this matter in note 33.
- 17 Ackerman, *Foundations* at 319-22 (cited in note 1).
- 18 See, for example, Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 *Stan L Rev* 759, 763-64 n 37 (1992).
- 19 See Bickel, *The Least Dangerous Branch* at 16-23 (cited in note 7); Bruce Ackerman, *Discovering the Constitution*, 93 *Yale L J* 1013, 1013-16 (1984).
- 20 Federalist 78 (Hamilton), in Clinton Rossiter, ed, *The Federalist Papers* 467, 469 (Mentor 1961);  *Marbury v Madison*, 5 *US* (1 Cranch) 137, 177-78 (1803).
- 21 See Robert H. Bork, *The Tempting of America* (Free Press 1990); Antonin Scalia, *A Matter of Interpretation* (Princeton 1997).
- 22 See Ackerman, *Foundations* at 60-61, 72 (cited in note 1); Ackerman, 93 *Yale L J* at 1046-51 (cited in note 19).
- 23 See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 72-83 (Harvard 1996); Ronald Dworkin, *Life's Dominion* 118-47 (Knopf 1993); Ronald Dworkin, *Taking Rights Seriously* 131-49 (Harvard 1977); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *Fordham L Rev* 1249 (1997). For another powerful attempt to reclaim the classical, interpretive justification of judicial review from the narrow originalists, see Sotirios A. Barber, *The Constitution of Judicial Power* 157-58 (Johns Hopkins 1993) Sotirios A. Barber, *The Constitution of Judicial Power* 157-58 (Johns Hopkins 1993); Sotirios A. Barber, *Judicial Review and The Federalist*, 55 *U Chi L Rev* 836, 836-39 (1988).
- 24 These questions of What and How, along with the question of Who is to interpret?, are the basic interrogatives of constitutional interpretation. See Walter F. Murphy, James E. Fleming, and Sotirios A. Barber, *American Constitutional Interpretation* (Foundation 2d ed 1995).
- 25 Dworkin, *Freedom's Law* at 1-38 (cited in note 23).
- 26 Ackerman states that “(w)hile interpretivists (who take interpretation seriously) have launched a jurisprudential counteroffensive (against ‘realist banalities’) over the last decade,” citing Ronald Dworkin, *Law's Empire* (Harvard 1986), he has “been on a different mission,” that of “providing concrete interpretations of the constitutional past” (p 419).
- 27 Ackerman, 93 *Yale L J* at 1035-38 (cited in note 19).
- 28 Ackerman, *Foundations* at 7, 11 (cited in note 1) (characterizing Thayer and Frankfurter as “monists”). See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv L Rev* 129 (1893);

 [Minersville School District v Gobitis](#), 310 US 586 (1940) (Frankfurter, giving the opinion of the Court);  [West Virginia State Board of Education v Barnette](#), 319 US 624, 646 (1943) (Frankfurter dissenting) (objecting to the Court's overturning Minersville).

29 Ackerman, 93 *Yale L J* at 1047-49 (cited in note 19), criticizing John Hart Ely, *Democracy and Distrust* (Harvard 1980).

30 In characterizing Ackerman as a leveler, I do not mean to suggest that his theory of constitutional change invariably makes it easier to amend the higher law of the Constitution than does Article V. In fact, his theory is at once less and more demanding than Article V. For example, the New Deal amended the Constitution according to Ackerman's theory despite the fact that it did not satisfy the requirements of Article V. Yet many of the formal amendments to the Constitution that have satisfied Article V's requirements, such as the Twentieth Amendment (changing the date of the end of the President's and Vice President's terms from March 4 to January 20), and the Twenty-Third Amendment (providing for electors of the President and Vice President from the District of Columbia), would not be able to satisfy Ackerman's criteria for revision. This should come as no surprise because Ackerman is offering criteria for legitimate constitutional transformation, whereas Article V specifies rules for mere amendment: the former is about fundamental change, whereas the latter may be about revision of relatively insignificant administrative details.

31 See Wayne D. Moore, *Constitutional Rights and Powers of the People* 90-99 (Princeton 1996) (analyzing some of the ambiguities in the ideas of popular sovereignty and of “the people”); Frank I. Michelman, *Always Under Law?*, 12 *Const Comm* 227, 227 (1995) (characterizing the notion of popular sovereignty as having “an evocative or idealizing or quasi-mythical status”); Sager, 65 *NYU L Rev* at 902-09 (cited in note 9) (criticizing constitutional theories grounded in popular sovereignty). Ackerman claims to provide a “humanistic positivism” with “rules of recognition” for higher lawmaking by We the People, the popular sovereign, that is analogous to the sophisticated positivism developed by H.L.A. Hart in his classic work, *The Concept of Law* 70-76 (Oxford 1961). But Hart himself noted some of the difficulties and implausibilities of applying the notion of a “sovereign,” which in theory must be free from all legal limitations, to a legal system such as that of the United States, in which the Constitution places legal limitations on legislative powers. *Id.* at 71-78.

32 See John Rawls, *Political Liberalism* 231 (Columbia 1993).

33 Ackerman proposes reform of the Constitution's higher lawmaking system through adopting a “Popular Sovereignty Initiative” by statute (pp 410-16). The Popular Sovereignty Initiative would authorize the President, upon reelection to a second term, to propose amendments to the Constitution in the name of the People. When approved by Congress, such proposals would be placed on the ballot at the next two Presidential elections rather than sent to the states for ratification. If a proposal gained popular approval through such a national referendum, it would be added to the Constitution. Ackerman also argues that the provision for the Popular Sovereignty Initiative itself should be adopted by these same procedures rather than through the procedures of Article V requiring ratification by the states.

The Popular Sovereignty Initiative is in some senses more than an ordinary statute; Ackerman refers to it as a “special statute” (p 415). But it also illustrates a leveling of dualism in the sense that it provides for amendment of the Constitution in a manner that is more popular, and less removed from election returns and political mandates, than are the procedures of Article V.



34 Richard A. Posner, *Overcoming Law* 215-28 (Harvard 1995) (criticizing Ackerman's theory in *Foundations* in a chapter entitled “Legal Positivism without Positive Law”).

- 35 For the idea of the “nightmare” of judges never finding, but always only making, law, see H.L.A. Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* 123, 126 (Oxford 1983).
- 36 Rawls, *Political Liberalism* at 4-5, 299 (cited in note 32), referring to Benjamin Constant, *Liberty of the Ancients Compared with that of the Moderns* (1819), in Benjamin Constant, *Political Writings* 307 (Cambridge 1988) (Fontana trans). Locke's most significant work in this respect is John Locke, *Two Treatises of Government* (Cambridge 2d ed 1967) (Peter Laslett, ed), and Rousseau's is Jean-Jacques Rousseau, *On the Social Contract* (St Martin's 1978) (Roger D. Masters, ed, and Judith R. Masters, trans).
- 37 James E. Fleming and Linda C. McClain, In [Search of a Substantive Republic](#), 76 *Tex L Rev* 509, 548-49 (1997).
- 38 For Michelman's synthesis of these two traditions, see, for example, Frank I. Michelman, [Law's Republic](#), 97 *Yale L J* 1493, 1524-32 (1988); Frank I. Michelman, [The Supreme Court, 1985 Term--Foreword: Traces of Self-Government](#), 100 *Harv L Rev* 4, 36-47 (1986). For Sunstein's synthesis, see, for example, Cass R. Sunstein, [The Partial Constitution](#) 133-41 (Harvard 1993); Cass R. Sunstein, [Beyond the Republican Revival](#), 97 *Yale L J* 1539, 1566-71 (1988).
- 39 Ackerman, *Foundations* at 29-33 (cited in note 1).
- 40 *Id* at 31-32 (describing a “recurring cycle of normal, then constitutional, then normal politics” or “cyclical pattern” between liberal normal politics and republican constitutional politics).
- 41 See *id* at 230-65. Dahl has provided one of the classic accounts of American democracy in terms of interest-group pluralism. See Robert A. Dahl, *A Preface to Democratic Theory* (Chicago 1956). I concede that there are differences between Ackerman's vision of normal politics and Dahl's conception of interest-group pluralism.
- 42 Ackerman, *Foundations* at 266-94 (cited in note 1).
- 43 Fleming, 48 *Stan L Rev* at 25 (cited in note 11); Fleming, 72 *Tex L Rev* at 249-50, 252-53 (cited in note 11).
- 44 For the suggestion, in a Symposium on “Constitutional Stupidities,” that Article V is the stupidest provision in the Constitution, see Stephen M. Griffin, [The Nominee is . . . Article V](#), 12 *Const Comm* 171 (1995).
- 45 The particular formulation, “the possibility of popular sovereignty,” occurs on page 119, but the claim or theme is pervasive throughout the entire volume.
- 46 See Dworkin, *Freedom's Law* at 1-38 (cited in note 23) (proposing an interpretive strategy called the “moral reading” of the Constitution). See also Ronald Dworkin, [A Matter of Principle](#) 146-66 (Harvard 1985) (arguing for interpreting a legal text such as the Constitution so as to make it the best it can be); Dworkin, *Law's Empire* at 176-275 (cited in note 26) (same).
- 47 Ackerman, *Foundations* at 10-16, 32-33 (cited in note 1) (differentiating his own theory of dualist democracy from a theory of “rights foundationalism” that he attributes to Dworkin in such works as Dworkin, [Taking Rights Seriously](#) (cited in note 23), and Dworkin, *Law's Empire* (cited in note 26)). Elsewhere, I have analyzed Ackerman's attempt to

differentiate his theory from theories like Dworkin's. See James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *Fordham L Rev* 1335, 1336-38, 1344-55 (1997); Fleming, 11 *Const Comm* at 366-68 (cited in note 3).

- 48 Fleming, 65 *Fordham L Rev* at 1338, 1344-55 (cited in note 47) (endorsing and defending the idea of the moral reading); Fleming, 48 *Stan L Rev* at 15-16 (cited in note 11) (arguing for a "Constitution-perfecting theory"); Fleming, 72 *Tex L Rev* at 214 & n 15 (cited in note 11) (same).
- 49 For examples of Dworkin's formulations of the two dimensions of best interpretation--fit and justification--see Dworkin, *Law's Empire* at 239 (cited in note 26); Dworkin, *A Matter of Principle* at 143-45 (cited in note 46); Dworkin, *Taking Rights Seriously* at 107 (cited in note 23).
- 50 Bruce Ackerman, *Remarks at the New York University School of Law Colloquium on Constitutional Theory* (Nov 16, 1993) (colloquy between Ackerman and Dworkin).
- 51 Ackerman, *Foundations* at 10-16, 32-33 (cited in note 1).
- 52 For conceptions of the Constitution along these lines, in terms of a "justice-seeking" account, as against conceptions of it in terms of popular sovereignty and backward-looking "instruction-taking," see, for example, Lawrence G. Sager, *The Betrayal of Judgment*, 65 *Fordham L Rev* 1545 (1997); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 *Nw U L Rev* 410 (1993); Sager, 65 *NYU L Rev* 893 (cited in note 9); Lawrence G. Sager, *Democracy and the Justice-Seeking Constitution*, paper presented at the New York University School of Law Colloquium on Constitutional Theory (Apr 24, 1997) (unpublished manuscript, on file with U Chi L Rev); Sotirios A. Barber, *Justice-Seeking Constitutionalism and Its Critics*, paper presented at the New York University School of Law Colloquium on Constitutional Theory (Apr 20, 1995) (unpublished manuscript, on file with U Chi L Rev).
- 53 For a similar critique of the "majoritarian premise" undergirding majoritarian conceptions of democracy, and an argument for a constitutional conception of democracy, see Dworkin, *Freedom's Law* at 15-18 (cited in note 23).
- 54 See Fleming, 48 *Stan L Rev* at 3, 20 (cited in note 11); Fleming, 72 *Tex L Rev* at 253, 296-97 (cited in note 11). I have noted that this conception of constitutional democracy is similar to what Dworkin calls a "constitutional conception of democracy." See Fleming, 65 *Fordham L Rev* at 1342 (cited in note 47), discussing Dworkin, *Freedom's Law* at 17 (cited in note 23).
- 55 See Fleming, 48 *Stan L Rev* at 2-3, 17-29 (cited in note 11); Fleming, 72 *Tex L Rev* at 217-20, 280-97 (cited in note 11).
- 56 See Kathleen M. Sullivan, *Constitutional Amendmentitis*, *Am Prospect* 20 (Fall 1995) (criticizing the recent rash of proposals to amend the Constitution).
- 57 I acknowledge that Article V's requirements also have made it difficult to secure adoption of amendments that would secure basic liberties, such as the Equal Rights Amendment. But the Equal Protection Clause of the Fourteenth Amendment should be interpreted to secure equal citizenship for women.
- 58 Sager, *Democracy and the Justice-Seeking Constitution* (cited in note 52); Lawrence G. Sager, *The Birth Logic of a Democratic Constitution*, paper presented at the New York University School of Law Colloquium on Constitutional Theory (Feb 9, 1995) (unpublished manuscript, on file with U Chi L Rev). I should make clear that although I would defend Article V affirmatively for its super-majority requirements for amending the Constitution, I would argue that

a provision for ratification of a proposed amendment by a super-majority of the people of the United States is more defensible than Article V's provisions regarding ratification by three-fourths of the states (an argument with which Ackerman would presumably agree, see pp 410-16).

- 59 Ackerman stated in colloquy with Sager at a recent symposium that Sager's article, [65 NYU L Rev 893 \(cited in note 9\)](#), posed a “great question”: “whether (Ackerman's) model is compatible with the abstract character of the constitutional enterprise.” He continued: “Larry (Sager), I read your article several times, I should assure you. But I have to think more about it.” [Fidelity as Synthesis: Colloquy, 65 Fordham L Rev 1581, 1582 \(1997\)](#) (colloquy between Ackerman and Sager). Yet in *Transformations*, Ackerman does not address Sager's arguments.
- 60 I say that Ackerman's theory of amendment seems to presuppose an “uncharacteristically” narrow view of interpretation in light of the fact that Ackerman is often characterized as a “broad originalist,” see note 74, and that he elsewhere has written about interpretation in terms of the Constitution's highly abstract provisions regarding rights and powers, or its “liberating abstraction.” Bruce Ackerman, [Liberating Abstraction, 59 U Chi L Rev 317 \(1992\)](#).
- 61 See Ely, *Democracy and Distrust* at 87-104 (cited in note 29) (advancing a “representation-reinforcing” theory of judicial review); Sunstein, *The Partial Constitution* at 142-44 (cited in note 38) (advancing a theory of judicial review whereby courts principally should secure the procedural preconditions for deliberative democracy).
- 62 See [Fleming, 48 Stan L Rev at 27-29 \(cited in note 11\)](#); [Fleming, 72 Tex L Rev at 233-38, 256-60 \(cited in note 11\)](#).
- 63 <cn>381 US 479 (1965).
- 64 <cn>410 US 113 (1973).
- 65 See Ackerman, *Foundations* at 150-59 (cited in note 1).
- 66 See [Fleming, 48 Stan L Rev at 28 \(cited in note 11\)](#).
- 67 Ackerman, *Foundations* at 61 (cited in note 1).
- 68 *Id* at 131-62. Ackerman had previewed this idea in Ackerman, [93 Yale L J at 1070-72 \(cited in note 19\)](#).
- 69 Ackerman, *Foundations* at 162 (cited in note 1) (referring to projected Volume III, *Interpretations*).
- 70 Sunstein also has charged that Ackerman's theory of amendment presupposes an “unduly rigid view of interpretation.” Cass R. Sunstein, *New Deals*, *New Republic* 32, 35 (Jan 20, 1992).
- 71 Ackerman, *Foundations* at 131-62 (cited in note 1), analyzing  [Brown v Board of Education, 347 US 483 \(1954\)](#), and  [Griswold v Connecticut, 381 US 479 \(1965\)](#).

- 72 <cn>505 US 833 (1992). Ackerman briefly analyzes Casey in Transformations (pp 397-402). He does not give a full account of that case, or the right to abortion, in relation to the New Deal transformation. Rather, he focuses on “Casey’s characterization of the situation in 1937” (p 399).
- 73 Ackerman, Foundations at 131-62 (cited in note 1) (advancing the idea of “intergenerational synthesis” and indicating that he will provide particular interpretations in these terms in the projected Volume III, Interpretations).
- 74 For examples of interpretations of Ackerman’s work as an attempt to develop a broad form of originalism, see Laura Kalman, Border Patrol: Reflections on the Turn to History in Legal Scholarship, 66 Fordham L Rev 87, 93-94, 97 (1997); Michael C. Dorf, Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning, 85 Georgetown L J 1765, 1774-83 (1997); Fleming, 65 Fordham L Rev at 1337-38, 1344-55 (cited in note 47); Martin S. Flaherty, History “Lite” in Modern American Constitutionalism, 95 Colum L Rev 523, 579-90 (1995); Fleming, 11 Const Comm at 369-70 (cited in note 3); Suzanna Sherry, The Ghost of Liberalism Past, 105 Harv L Rev 918, 933-34 (1992); Michelman, 97 Yale L J at 1521-23 (cited in note 38).
- 75 See Fleming, 65 Fordham L Rev at 1336-38 (cited in note 47) (criticizing both narrow originalist and broad originalist understandings of the idea of fidelity in constitutional interpretation).
- 76 See, for example, Lawrence Lessig, Fidelity and Constraint, 65 Fordham L Rev 1365 (1997); Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 Stan L Rev 395 (1995); Lawrence Lessig, Fidelity in Translation, 71 Tex L Rev 1165 (1993). Ackerman criticizes Lessig’s “legalist” account of the New Deal—which addresses the question in terms of translation rather than transformation—for playing into the “reigning professional narrative,” part of which is the “myth of rediscovery” (pp 290, 477 n 26).
- 77 Both Ackerman and Amar attempt either to dissolve or to resolve the “counter-majoritarian difficulty” through offering theories of democracy grounded in popular sovereignty whereby We the People may amend the Constitution outside Article V. In different ways, both Ackerman and Amar level the Constitution and along with it the idea of popular sovereignty. Ackerman’s conception of popular sovereignty leads him to supplement Article V with sustained supermajorism, whereby We the People must be free to amend the Constitution through sustained popular movements. Amar levels the Constitution further, by advancing a majoritarian conception of popular sovereignty that supplements Article V by allowing amendment of the Constitution through majoritarian national referenda. See Amar, 94 Colum L Rev 457 (cited in note 6); Amar, 55 U Chi L Rev 1043 (cited in note 8).
- 78 See, for example, Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv L Rev 1221, 1246 (1995).
- 79 See Bickel, The Least Dangerous Branch at 16-18 (cited in note 7).
- 80 Id at 1-28.
- 81 See Ely, Democracy and Distrust at 43-72 (cited in note 29) (criticizing “noninterpretivist” theories of “discovering fundamental values,” including Bickel’s theory, on the ground that they are vulnerable to skeptical and democratic objections). For an analysis of Bickel’s work in relation to the quest for a “post-realist Constitution,” see Edward A. Purcell, Jr., Alexander M. Bickel and the Post-Realist Constitution, 11 Harv CR-CL L Rev 521 (1976).

- 82 Ely, *Democracy and Distrust* at 71-72 (cited in note 29). In referring to Bickel's odyssey as “nightmarish,” I mean to echo Hart's notion of the “nightmare” of judges never finding, but always only making, law. See Hart, *The Nightmare and the Noble Dream* at 126 (cited in note 35).
- 83 Ackerman, 93 *Yale L J* at 1013-16 (cited in note 19).
- 84 See Bruce A. Ackerman, *Reconstructing American Law* (Harvard 1984). For example, he exhorts us to “have the strength to question the realist banalities of contemporary legal thought” and to move “beyond realism” (pp 417-19).
- 85 Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 87 (Yale 1978). The statement in the text is borne out not only by Ackerman's work in constitutional theory but also by his work in political theory. See, for example, Bruce A. Ackerman, *Social Justice in the Liberal State* (Yale 1980).

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