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Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program

ABSTRACT. The very title of Bruce Ackerman's now three-volume masterwork, *We the People*, signifies his commitment to popular sovereignty and, beyond that, to the embrace of democratic inclusion as the leitmotif of American constitutionalism. But "popular sovereignty," not to mention "democracy," has many conceptions, and there is a tension within Ackerman's overall project as to which of the varieties he is most comfortable with. The United States Constitution, though written (and ratified) in the name of "We the People," nonetheless adopts a theory of "representative democracy" that is purposely designed to minimize to the vanishing point the ability of "the people" to have any direct role in making national-level political decisions. They are restricted to electing purported representatives, who will make decisions in their name, with or without genuine consultation. One can contrast this to American *state* constitutions, almost all of which include at least some aspect of direct democracy and many of which, with California being the most prominent example, allow vigorous popular participation in governance through initiative and referendum. So an obvious question is whether Ackerman simply feels constrained by the undoubted limits of the national Constitution—one lives with the Constitution one has, not the Constitution one might wish to have—or, on the contrary, whether he affirmatively embraces the particular crabbed form of popular sovereignty instantiated in the United States Constitution and rejects the more robust forms that are available not only in theory but also in the practices of many states (and foreign countries).

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INTRODUCTION: IMPLICATIONS OF POPULAR SOVEREIGNTY

Central to Bruce Ackerman's remarkable examination of the transformations in basic understandings of our constitutional project has been his embrace of the mantra of popular sovereignty. Quite obviously, this is captured in the overall title of his ambitious project, *We the People*. As with his colleague Akhil Reed Amar,¹ these words almost literally sing out with the image of an aroused public fully capable of the majestic dream of self-government. Ackerman opens his essay on "Higher Lawmaking" speaking in a self-described "[p]rophetic [v]oice," proclaiming that "[t]he People must retake control of their government."² The verb carries with it the unmistakable suggestion that there is precedent for "taking control" that could be drawn on for inspiration. He is not a utopian aspiring to go where no one has traveled before, but, rather, a quasi-therapist attempting to remind us of what we were capable of in the past and could return to today if only we freed ourselves of our depressed sense of our own possibilities. To be sure, he has a complex notion of how precisely "the People" have manifested their rule in the past—or could do so in the future, about which I will have much more to say below. The central challenge is to determine whether "popular sovereignty" is anything more than a "glittering generality," useful, perhaps, as a trope in political mobilization but otherwise of little, if any, utility as a genuine analytical concept.³

There is nothing "innocent" about a commitment to popular sovereignty, especially if one believes there is a connection between such "sovereignty" and the actual exercise of decisionmaking within a polity. As Eric Nelson emphasizes in a brilliant forthcoming book, *The Royalist Revolution: Themes in*

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1. See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 5 (2005) ("With simple words placed in the document's most prominent location, the Preamble laid the foundation for all that followed.").
 2. Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 63 (Sanford Levinson ed., 1995) [hereinafter *RESPONDING TO IMPERFECTION*].
 3. I was greatly stimulated by Ben Tolman's *Sovereignty and Power*, written for a seminar that Larry Lessig and I taught at the Harvard Law School during Fall 2013 on theoretical and practical issues presented by the prospect of an Article V constitutional convention. He argues that "while the rhetoric of popular sovereignty might be strong, it ultimately amounts to a 'glittering generality' that possesses little practical strength on its own." Ben Tolman, *Sovereignty and Power* 2 (2013) (unpublished manuscript) (on file with author).

American Political Thought, 1766-1789,⁴ it does not violate the logic of “popular sovereignty” for that sovereign to authorize some small group of individuals, perhaps even a king, to make actual decisions in the name of the *res publica*. The greatest of all theorists making just this point is Thomas Hobbes.⁵ But for most partisans of the term, such “sovereignty” is manifested in a more direct linkage between the members of a given political order and the decisions made in their name. This, of course, is the basis of all “democratic” political theory, whether it takes the form of “direct” choice by the populace⁶ or the “representative democracy” most notably defended by James Madison.⁷

Ackerman has been insistent since the publication of the first volume in what has now become his trilogy that he himself is a member of what might be termed the “party of democracy” as against those he labels as “rights fundamentalists” who would place ultimately fatal impediments in the way of the *demos*.⁸ This is especially telling in Ackerman’s case because, as a gifted political theorist, he had earlier demonstrated his philosophical commitment to political liberalism and the inevitable limits that it must place on government.⁹ And there can be no doubt that the heroes of his epic history of American constitutional development are political leaders with capaciously liberal understandings of the American constitutional project. But that is a contingent, not a necessary, truth. There is a difference between the enterprise of political theory and that of constitutional theory, and when engaging in the latter, Ackerman privileges the self-determining possibilities of popular sovereignty, in contrast to post-World War II European critics of national constitutional projects who posit anodyne notions of “constitutional patriotism” that translate basically into commitment to versions of Kant, Rawls, or Habermas.¹⁰ Not for them are the inevitably flawed projects of flesh-and-blood human beings. To this extent he is truly the colleague of his fellow Yale professor Jed

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4. ERIC NELSON, *THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING, 1766-1789* (forthcoming 2014).
 5. See THOMAS HOBBS, *LEVIATHAN* 121, 155-65 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).
 6. See, e.g., PAUL WOODRUFF, *FIRST DEMOCRACY: THE CHALLENGE OF AN ANCIENT IDEA* (2005) (discussing and defending Athenian democracy).
 7. See, e.g., *THE FEDERALIST NO. 10* (James Madison).
 8. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 11 (1991) [hereinafter ACKERMAN, *FOUNDATIONS*].
 9. See BRUCE ACKERMAN, *SOCIAL JUSTICE AND THE LIBERAL STATE* (1980).
 10. See, e.g., JAN-WERNER MULLER, *CONSTITUTIONAL PATRIOTISM* (2007).

Rubinfeld¹¹—and perhaps even of Justice Antonin Scalia—in taking seriously the notion that the United States Constitution, as created by “We the People,” is the instantiation of *our* particular (and particularistic) national project, warts and all.

Thus in Ackerman’s schema, there is no immanent constitutional barrier, so to speak, to the promulgation of decidedly unattractive transformative constitutional amendments, whatever their particular provenance. The easiest case, of course, would involve the use of Article V itself, however much the central thrust of his work is to suggest the near-irrelevance of Article V in explaining American constitutional change. But consider the possibility that Congress proposes—and three-quarters of the states ratify—a new amendment announcing that “Christianity is established as the state religion of the American people, and the public worship of other gods is hereby forbidden.” Ackerman writes that it would be his duty as a judge to “uphold it as a fundamental part of the American Constitution.”¹² There is nothing in Ackerman’s work that suggests a desire to import into American constitutional theory notions of transcendent “constitutional identity” that can be found, for example, in German or Indian constitutional theory.¹³ Ackerman would not (and, with regard to the realities of American society and history, almost certainly *could* not) argue that America’s constitutional secularism is so deeply rooted—so “essential” to American identity—that it would require a revolution, rather than merely a constitutional amendment, to overcome it and adopt a more sectarian identity.

Popular sovereignty, unlike rights fundamentalism, does not assure what I have elsewhere called “happy endings” to constitutional conflicts.¹⁴ One may hope for the best, but one must also recognize that any given sovereign can be

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11. See Jed Rubinfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004) (emphasizing the U.S. Constitution as the collective project of the American people and not a simple reflection of natural law or international human rights); see also Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT’L L.J. 353 (2004) (same).
 12. ACKERMAN, FOUNDATIONS, *supra* note 8, at 14.
 13. See GARY JEFFREY JACOBSON, CONSTITUTIONAL IDENTITY 18, 58-60 (2010) (discussing German conceptions of the “unconstitutional constitution”); *id.* at 37, 49-58 (discussing India); see also Walter F. Murphy, *Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity*, in RESPONDING TO IMPERFECTION, *supra* note 2, at 163, 175-79 (noting German limitations on constitutional change). *But see* ACKERMAN, FOUNDATIONS, *supra* note 8, at 320-21 (flirting with the idea of a fully entrenched Bill of Rights, so long as it gained “deep and decisive popular support”).
 14. See SANFORD LEVINSON, CONSTITUTIONAL FAITH 249 (2d ed. 2011).

quite horrendous. Should the sovereign's command violate the judge's individual conscience, the proper response is presumably resignation rather than lying as to what the constitution tolerates; there may be legal regimes for which no honorable person should accept judicial office,¹⁵ but if one does accept office, it is dishonorable to reject the duty of fidelity even to unjust or tyrannical law. Indeed, Ackerman's insistence on the particular "transformations" of American legal reality that he has elaborated entails the proposition that the *ex ante* (non-transformed) legal system was *properly* interpreted to include rank injustice. That, after all, is what required transformation (and even the blood sacrifice of 750,000 lives). To deny the possibility of "constitutional evil,"¹⁶ which is fully "legitimate," at least legally speaking, even if undoubtedly "evil," is to turn the narrative of American constitutional development from a tragedy into a comedy, thereby trivializing the reality of the American experience. It is the equivalent of allowing Cordelia to live because otherwise *King Lear* is just too depressing.

So one obvious problem presented by popular sovereignty, though one could equally say that it is presented by *any* theory of sovereignty, including divine sovereignty, is the uncertain relationship between the claimed power to make authoritative decisions—which are ultimately based on the "argument" "because I say so" or, in the immortal words of Ring Lardner, "[s]hut up he explained"¹⁷—and substantive justice. To the extent that popular sovereignty is

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15. Some people might have argued this was true of South Africa during the apartheid era or of the antebellum United States and the necessity to recognize the rights of slaveholders. Or, it might be argued, honorable people *could* sit on such courts and, by rejecting wooden forms of positivism, ameliorate some of the worst aspects of the regimes. See, e.g., ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975) (analyzing the situation of judges faced with slavery cases within the United States); DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: PATHOLOGIES OF LEGALITY* (2010). Not at all coincidentally, Dyzenhaus originally comes from South Africa, though he now teaches at the University of Toronto and New York University.
 16. See, e.g., MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 1-2 (2006). To a significant degree, Ackerman has deferred a full analysis of "constitutional interpretation" of the pre-transformed Constitution. It is not clear, for example, to what extent he would agree with the jurisprudential approach set out by his late colleague in COVER, *supra* note 15. It is telling that another prominent legal process philosopher, Ronald Dworkin, also systematically evaded examining the extent to which even the most Herculean American judge could avoid collaboration with slavery prior to the transformative events of 1861-1865. See Sanford Levinson, *Hercules, Abraham Lincoln, the United States Constitution, and the Problem of Slavery*, in RONALD DWORKIN 136 (Arthur Ripstein ed., 2007).
 17. RING W. LARDNER, JR., *THE YOUNG IMMIGRUNTS* 77 (1920).

sometimes compared to divine sovereignty, we are reminded of medieval debates about the extent to which God is unusually skilled, to the point of perfection, in ascertaining the good, even if we poor humans truly living behind a veil of ignorance cannot always discern the actuality of divine justice. A more ominous possibility, however, is that God is the great Humpty Dumpty, able to determine what counts as good (or evil) simply by virtue of the power to say so. In the latter view, the fact that God commands something is no evidence at all for the proposition that it fits any ascertainable notion of justice or goodness. See, for example, the *Book of Job*.¹⁸ So, after all, could it be the case with the *demos*. Does an unjust (or even merely incompetent) popular “sovereign” merit respect and obedience?

That being said, it is hard to read the Ackerman trilogy without believing that we Americans especially should be inspired not only by the words “We the People” but also by the majestic deeds of those who took them seriously by refusing to accept an inadequate status quo as determinative of their own lives and possibilities. Though it is always perilous to identify a certain point as the “beginning,” one can surely point to the revolutionary secessionism of the American Revolution itself and its triumphant assertion of the basic right of “the People” to re-establish their decidedly new forms of government rather than accept whatever had been handed down to them by the English constitutional and political traditions. Perhaps the most eloquent defense of this version of American popular sovereignty is found in the great conclusion of *Federalist* 14, written (under the name Publius, of course) by James Madison:

Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?¹⁹

Ackerman’s earlier work especially has gone almost out of its way to emphasize elements of “illegality” by those engaging in the actuality of popular sovereignty.²⁰ Though I am aware that he doesn’t like the comparison, there is

18. See, e.g., Joan Acocella, *Is There Justice in the Book of Job?*, NEW YORKER, Dec. 16, 2013, http://www.newyorker.com/arts/critics/books/2013/12/16/131216crbo_books_acocella (reviewing MARK LARRIMORE, *THE BOOK OF JOB: A BIOGRAPHY* (2013)).

19. THE FEDERALIST NO. 14 (James Madison).

20. See, e.g., 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 12 (1998) [hereinafter

an undoubtedly Schmittian strain in Ackerman, for it is *always* possible that the sovereign people will determine that a given circumstance constitutes the state of exception that justifies putting law in its place, so to speak, and returning to whatever the sovereign might deem first principles.²¹ “It is,” Carl Schmitt wrote, “part of the directness of this people’s will that it can be expressed independently of every prescribed procedure and every prescribed process.”²² To be sure, as Andreas Kalyvas notes, there are all-important differences between Schmitt’s full-scale antagonism to liberalism and Ackerman’s own liberal commitments,²³ but these differences do not negate the existence of similarities as well. And, as already noted, those liberal commitments, for the constitutional theorist, take second place to an illiberal *demos* that can be said to exercise its sovereignty.

Quite obviously, questions about popular sovereignty involve not only abstract debates about the nature of sovereignty, but also assessments about the *capacity* of the *demos* to make, more often than not, wise decisions. Why would we assign sovereignty to any entity whose abilities in this respect we doubt, unless we indeed define wisdom entirely by reference to the putative sovereign? Among other things, though, this disqualifies us from ever saying that the sovereign made a mistake, for the sovereign itself gets to define what counts as wisdom or a mistake.²⁴ One must ask why anyone should even respect popular judgments – let alone embrace “popular sovereignty” – if one is not persuaded that such judgments are likely to be better, by some measurable metric, than decisionmaking by the few or, for that matter, than flipping a coin when faced with binary choices. A very important strain of contemporary

ACKERMAN, TRANSFORMATIONS] (noting the willingness of transformative movements, beginning with the Founders in the 1780s, to manifest a “lack of respect [for] established norms for revision”). For further discussion, see *infra* Part III.

21. On Schmitt, see CARL SCHMITT, *POLITICAL THEOLOGY* 13 (George Schwab trans., 2005); and, almost certainly more importantly, CARL SCHMITT, *CONSTITUTIONAL THEORY* (Jeffrey Seitzer trans., 2008) [hereinafter SCHMITT, *CONSTITUTIONAL THEORY*]. Andreas Kalyvas elaborates this aspect of Ackerman’s thought in his brilliant *DEMOCRACY AND THE POLITICS OF THE EXTRAORDINARY: MAX WEBER, CARL SCHMITT, AND HANNAH ARENDT* (2008).
22. SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 21, at 131. See *THE FEDERALIST NO. 40* (James Madison) for the Madisonian instantiation of a similar argument.
23. KALYVAS, *supra* note 21, at 167.
24. No one who has ever taken seriously the slogan “Question Authority” can be entirely comfortable with any theory of sovereignty (save, perhaps for radical notions of “individual sovereignty” which, if taken seriously, eventuate in rank—and unacceptable— anarchy). For an expression of this latter view, see Randy Barnett’s contribution to this symposium, Randy E. Barnett, *We the People: Each and Every One*, 123 *YALE L.J.* 2576 (2014).

democratic theory addresses whether there are good “epistemic” grounds to support democratic decisionmaking.²⁵

So among the many questions raised by Ackerman’s overall project is the particular nature of his commitment to “popular sovereignty.” The obvious point is that “popular sovereignty,” like most important notions in political theory—or, for that matter, almost all of what is taught as “constitutional law” in American law schools—is an “essentially contested concept,”²⁶ capable, by definition, of multiple, often conflicting, legitimate interpretations.²⁷ This means that one may find out relatively little by discovering that everyone is making use of a given concept, especially if that concept has a decidedly positive valence in public discourse.²⁸ The devil inevitably is in the details of particular conceptions of what some may well feel are terminally vague overarching concepts. What follows, then, is an attempt to limn some of the details of Ackerman’s very particular conception of “popular sovereignty.” As

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25. See DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* (2008) (defending theories of “epistemic proceduralism”); HÉLÈNE LANDEMORE, *DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY* (2013) (same). For critiques of such confidence, see JAMIE TERENCE KELLEY, *FRAMING DEMOCRACY: A BEHAVIORAL APPROACH TO DEMOCRATIC THEORY* 90-92 (2012); ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* (2013).
 26. See W.B. Gallie, *Essentially Contested Concepts*, 56 *PROC. ARISTOTELIAN SOC’Y* 167 (1956).
 27. Think, of course, of almost any aspect of what I have taken to calling the “Constitution of Conversation.” See SANFORD LEVINSON, *FRAMED: AMERICA’S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 19 (2012).
 28. My favorite example of this point is DOUGLAS RAE ET AL., *EQUALITIES* 133 (1981), which demonstrates that there are 108 logically defensible notions of the concept of “equality.” This helps to account, I believe, for the bitterness of debates surrounding, say, “affirmative action,” inasmuch as they feature committed proponents of two antagonistic, but tenable, notions of equality who almost literally cannot comprehend why their adversaries do not accept a given notion as the one true meaning. For an example of such bitterness at the level of the United States Supreme Court, see the opinions of Chief Justice Roberts and Justice Breyer in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). The Chief Justice, for example, accuses Justice Breyer’s dissent of “fail[ing] to ground the result it would reach in law,” *id.* at 735, suggesting, perhaps, that Justice Breyer is either simply incompetent at understanding what “law” requires or is mendaciously rejecting the duty of legal fidelity in favor of other commitments. Surely it is more likely that Chief Justice Roberts and Justice Breyer have a good-faith disagreement about the complicated and controversial meaning of “equal protection.” See also Sanford Levinson, *Contribution to Has the Supreme Court Gone Too Far?: A Symposium*, COMMENTARY, Oct. 2003, <http://commentarymagazine.com/article/has-the-supreme-court-gone-too-far> (suggesting that liberals and conservatives should recognize that Justices can have good-faith disagreements without traducing their legal duties in favor of a rankly ideological vision).

we shall see, Ackerman's principal interest is in decisionmaking by political leaders (and, necessarily, elites) who make decisions in the name of the People rather than in such decisionmaking by the People themselves (assuming, of course, we know what that might mean). In this, he is a worthy descendant of James Madison, who firmly rejected any notion of "direct democracy" in favor of an exclusive reliance on "representative democracy."²⁹

I. "POPULAR SOVEREIGNTY" AS "MAKE-BELIEVE"

Any discussion of "popular sovereignty" necessarily entails recognition of the extent to which, like its cousin the "social contract," it might be termed a "constitutive fiction" rather than anything whose existence can be demonstrated to a disbelieving skeptic. A former colleague of Ackerman's at Yale, the great colonial historian Edmund Morgan, in his book tellingly titled *Inventing the People: The Rise of Popular Sovereignty in England and America*, emphasized the thoroughly fictive nature of this "invented"³⁰ notion. "Government," wrote Morgan, "requires make-believe."³¹ It is the "fiction" of popular sovereignty that in actuality "enable[s] the few to govern the many."³² An earlier generation didn't need that fiction; it was enough to proclaim that authority was given by God, perhaps quoting Romans 13:1 in support.³³ But the "divine right of kings" and other magistrates did not survive the seventeenth century. Instead, Hobbes and Locke emerged with brand new theories of legitimate authority in which "the people," at least rhetorically, played the crucial role. So for several centuries, at least in the West, the claim to rule has required some linkage to *vox populi*. To be sure, there are all sorts of ways of establishing (or claiming) such linkages, and, as suggested by Morgan's mordant comment about the relationship between "the few" and "the many," they do not necessarily require much, if anything, by way of active involvement of the citizenry in the actual making of decisions. As Nelson emphasizes, defenders of British kings—and critics of the idea of "parliamentary sovereignty," including most American "patriots" up to the

29. See THE FEDERALIST NO. 10 (James Madison).

30. Were he a post-modernist, perhaps he would have used the term "socially constructed."

31. EDMUND MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 13 (1988).

32. *Id.* at 14.

33. "Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God." *Romans* 13:1 (King James).

moment of the American Revolution—acknowledged the monarchical claim that they were “authorized” to rule unilaterally, including, importantly, the exercise of “prerogative” powers, by the people themselves.³⁴ Or, from a different end of the political spectrum, one may be a Leninist claiming a privilege to speak in the name of a “people” whose false consciousness may deprive them of the present ability to recognize what is *really* in their own interest—though they will gratefully accept the new dispensation at some later time. At the other end may be a Quaker-like endless deliberation that comes to an end only when genuine consensus—presumably manifesting a truly general will—is reached. In between, of course, are a plethora of other possibilities, united only by the felt belief, at least in the “modern” world, whatever its various “disenchantments”³⁵ about the philosophical or theological foundations of political life, that those wishing to exercise political power are well advised to claim that they are in fact the vessels through which some kind of “popular sovereignty” or democratic authority speaks.

In any event, one certainly cannot understand American history without paying adequate attention to the discourse of popular sovereignty. Consider the pronouncement in the Declaration of Independence that “the people” possess a fundamental right “to alter or to abolish [any Form of Government], and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”³⁶ The Declaration, of course, also included reference to a “long train of abuses” that no doubt helped to create the proper sympathy for revolutionary violence in “the opinions of mankind” that were the audience for the Declaration.³⁷ The Revolution, of course, was succeeded by what Ackerman himself emphasizes was the legally dicey casting aside of America’s first constitution, the Articles of Confederation. No one was arguing that the Articles constituted a “[t]yrann[ical]” or even particularly “unjust” political order; no “long train of abuses” could be laid at the door of the six-year-old system of government established in 1781. Instead, it was deemed by those who supported the new Constitution to be remarkably counter-

34. NELSON, *supra* note 4.

35. See Max Weber, *Science as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 129, 155 (H.H. Gerth & C. Wright Mills, eds. and trans., 2d ed. 1991) (“The fate of our times is characterized by rationalization and intellectualization and, above all, by the ‘disenchantment of the world.’”).

36. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

37. *Id.* paras. 2-3.

productive with regard to achieving the “Safety and Happiness” of the newly independent Americans. That was more than enough to justify scrapping it, which entailed, of course, simply ignoring the requirement that any amendments receive the approval of each and every one of the thirteen existing state legislatures.³⁸ As Madison argued forthrightly in *Federalist* 40, an adequate response to political “exigencies” may take precedence over “a rigid adherence” to legal forms; such rigidity would in fact “render nominal and nugatory the transcendent and precious right of the people to ‘abolish or alter their governments as to them shall seem most likely to effect their safety and happiness.’”³⁹

This is the “founding heritage” that is truly most important to Ackerman, and *not* the particular forms established in Philadelphia or afterward. I share his view. That does not, however, really allow us to identify the full meaning of Ackerman’s (or, for that matter, my) commitment to “popular sovereignty” or, even more, “democracy.” Hélène Landemore begins her important new book *Democratic Reason* by writing that “[d]emocracy is generally hailed, in the West at least, as the only legitimate form of government.”⁴⁰ One rarely finds in the contemporary United States the public rejection by would-be political leaders of popular rule, even if relatively few of these “leaders” would unabashedly define themselves as “populists.” It is this latter point that gives bite to Richard Parker’s subtitled his own book *Here, the People Rule* a “Populist Manifesto.”⁴¹ Even more infrequent, one might suggest, is the presence of a full-throated populist sensibility like Parker’s on the campuses of elite universities (though, of course, he himself teaches at the Harvard Law School). So it is worth asking where along the spectrum of possibilities Ackerman should be placed. This question takes on a special resonance with regard to the justification for ignoring established legal rules.

II. ACKERMAN AND CREATIVE ILLEGALITY

Consider the difference between transformative movements that cast themselves, on the one hand, as resisting ostensible oppression, and those, on the other hand, that claim instead only that a higher horizon of Madisonian

38. See ARTICLES OF CONFEDERATION of 1781, art. XIII.

39. THE FEDERALIST NO. 40 (James Madison).

40. LANDEMORE, *supra* note 25, at 1 (footnote omitted).

41. RICHARD PARKER, *HERE, THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO* (1994).

“safety and happiness” could be achieved with the requisite changes. Transformation is easier to justify, certainly rhetorically and perhaps even morally, if the status quo is linked with “abuses,” whether they are evidenced by overt oppression or the weakness of an existing framework of government that makes effective governance impossible, as was alleged to be the case with the Articles of Confederation. If proponents of the new Constitution were entitled to ignore restraints imposed by Congress and the Articles because of the “exigencies” of the circumstances facing the new American nation, all the more was this the case regarding the second of Ackerman’s “constitutional moments.” Reconstruction, of course, depended on first maintaining the Union by force of arms between 1861 to 1865 and then attempting to achieve genuine “regime change” in the defeated states that had attempted to secede and form a new Confederate States of America. After all, we are necessarily confronting the most elemental injustice in American constitutional history and a pre-transformationist constitutional tyranny that could be overcome by the inventive (and again only semi-legal, at best) creativity of a new group of de-facto “founders” of a new regime. Such creativity can be found as well with regard to the third great “moment,” the New Deal, and this is surely true as well of what now becomes perhaps the fourth great such “moment,” the civil rights revolution.

It is worth mentioning, though, that Ackerman mutes the theme of “illegality,” especially if that involves significant public disorder—as against the decisions of political leaders to reject certain constitutional boundaries—as we move closer to the present. With regard to the New Deal, there was always the specter of FDR’s refusing to obey a decision invalidating the suspension of the Gold Clause, though perhaps some would mention as far more significant the invention of the modern administrative state and its embrace of often full-throated discretionary decisionmaking that left traditional notions of rule of law in shambles.⁴² But, to put it mildly, there was nothing at all analogous to the refusal by Congress in 1865 to seat representatives and senators who had

42. See WILLIAM E. SCHEUERMAN, *BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW* (1994) (emphasizing the centrality to Weimar legal theory of the development of the modern administrative state); see also Sanford Levinson & Jack M. Balkin, *Morton Horwitz Wrestles with the Rule of Law*, in *TRANSFORMATIONS IN AMERICAN LEGAL HISTORY* 483 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010). Surely one might believe that the administrative state does indeed represent “delegation running riot,” *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring), even if one also comes to the conclusion that there is no practical alternative with regard to the complexities of the modern state and modern society. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2011).

been elected by state governments whose legitimacy had been recognized by the President of the United States (and who had, of course, notably been counted as part of the numerator of states required to give legal vitality to the Thirteenth Amendment abolishing slavery), let alone reinstating military occupation of a number of would-be “states” and quite literal “reconstruction” of their governments in an effort to achieve genuine what we today would call “regime change.” It is difficult to find in the latest volume in Ackerman’s monumental project, *The Civil Rights Revolution*, any mention of genuinely creative illegality even if he praises the creativity of new conceptions of administrative regulation that were engendered by the prohibition of employment discrimination.⁴³ The great episodes of civil disobedience—or, on occasion, decidedly non-civil rioting—all occur offstage; Martin Luther King, Jr., appears primarily as a co-equal political negotiator with President Lyndon Johnson rather than a (and certainly not *the*) leader of a fractious movement that often took to the streets in an ill-disguised effort to provoke violence on the part of white segregationist officials that might generate a backlash of sympathy for the Civil Rights Movement.⁴⁴ And even the various pushes by political leaders on the constitutional envelope seem milder than what FDR generated, even if one readily grants the greatness of the Civil Rights Movement and its constitutive importance.

III. ACKERMAN’S FAITH IN A FUNDAMENTALLY ANTI-DEMOCRATIC CONSTITUTION

The central dilemma, both for Ackerman and, practically speaking, the rest of us, is that he has constructed his paean to (some form of) popular sovereignty and political democracy on the foundations of a Constitution that

43. See 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 174-75 (2014) [hereinafter ACKERMAN, *CIVIL RIGHTS*].

44. See, for example, CYNTHIA LEVINSON, *WE’VE GOT A JOB: THE 1963 BIRMINGHAM CHILDREN’S MARCH* (2012), on the provocative use of children as marchers, about which King (and others) was profoundly ambivalent. *Id.* at 66-70. As it happened, the March was a stunning success, inasmuch as Birmingham police commissioner Eugene “Bull” Connor turned the firehoses on the children and confined somewhere between three and four thousand children, including a nine-year-old, Audrey Fay Hendricks, who spent a week in jail. *Id.* at 81-89. Fortunately, none of these children lost their lives, though that could not necessarily have been predicted in advance. But it was their willingness quite literally to put their lives on the line that led to John F. Kennedy’s belated endorsement of the Civil Rights Movement in May 1963 and the introduction of what became, under his successor Lyndon Johnson, the Civil Rights Act of 1964. See ACKERMAN, *CIVIL RIGHTS*, *supra* note 43, at 56, 348 n.25.

could not, in its own way, be more antagonistic to the enactment of such sovereignty by the mass of living and breathing citizens. Yes, the Preamble speaks in the name of “We the People,” and that is no small matter, at least ideologically. But one must put that within the context that James Madison and his friends in Philadelphia had little or no regard for popular judgment. They might well have endorsed government *of* the people, by rejecting the possibility of aristocracy in the Titles of Nobility Clauses,⁴⁵ and, even more certainly, *for* the people, inasmuch as Madison at least was obsessed with overcoming the problem of “faction” and its privileging of mere partiality and selfishness over the genuine good of the “the people.”⁴⁶ But no one should confuse government *of* or *for* the people with government *by* the people. Consider in this context a 1777 statement in *The Pennsylvania Journal*: “It has been said often, and I wish the saying was engraved over the doors of every State House on the continent, that ‘all power is derived from the people,’ but it has never yet been said that all power is seated in the people.”⁴⁷

Regard for popular judgment was certainly not an attribute of most of those who drafted our Constitution. Elbridge Gerry of Massachusetts forthrightly told his fellow delegates in Philadelphia that “[t]he evils we experience flow from the excess of democracy.”⁴⁸ Although the mass of the people do not necessarily lack civic virtue, he continued, they are, alas, prone to becoming “the dupes of pretended patriots,” such as those who initiated Shays’ Rebellion in Gerry’s home state.⁴⁹ One will look in vain through Hamilton’s or Madison’s speeches or contributions to *The Federalist* for any belief in the genuine merits of popular judgment. In his remarkable speech of June 18, 1787, which basically endorsed a modified British system of government, including a presidential monarch, Hamilton first referred to “the amazing violence & turbulence of the democratic spirit”⁵⁰ and went on to note that “evils operating in the States . . . must soon cure the people of their fondness for democracies.”⁵¹ Indeed, he appeared to take great pleasure in observing that “[t]he members most tenacious of republicanism . . . were as loud as any in

45. U.S. CONST. art. I, §§ 9-10.

46. THE FEDERALIST NO. 10 (James Madison).

47. NELSON, *supra* note 4 (quoting PA. J., June 4, 1777).

48. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48 (Max Farrand ed., 1937).

49. *Id.*

50. *Id.* at 289.

51. *Id.* at 291.

declaiming agst. the vices of democracy.”⁵² In case we have not sufficiently gotten the point, after noting that “[t]he voice of the people has been said to be the voice of God,” he dismissed it as “not true in fact. The people are turbulent and changing; they seldom judge or determine right.” No one could reasonably believe that “a democratic assembly” genuinely attentive to the views of “the mass of the people” could “be supposed steadily to pursue the public good.”⁵³ Hamilton can be said to be criticizing the *epistemic* merits of democracy.⁵⁴ It is impossible to imagine Hamilton responding to some argument about the merits and demerits of some public policy by suggesting, “let’s let the people decide, because they are more likely than not to get it right.” The *vox populi* is far more likely to be the *vox asini* than anything resembling the *vox Dei* (unless, of course, one has adopted a thoroughly nominalist view of Divine Sovereignty that exempts God from any duty to be either “rational” or “good”).

Gordon Wood describes the Madison who arrived in Philadelphia as thoroughly disillusioned with democracy, not least because of his service in the Virginia House of Delegates between 1784 and 1787. He had, says Wood, “found out what democracy in America might mean,”⁵⁵ and the news was not good. “The Virginia legislators seemed so parochial, so illiberal, so small-minded, and most of them seemed” not at all motivated by the aspiration to discover and then achieve the “public interest.”⁵⁶

Federalist 10 is in fact a ringing attack on the merits of local government because of the near certainty of capture by self-interested “factions” inimical to the public good. In that paper, Madison writes, “democracies have ever been spectacles of turbulence and contentions, have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.”⁵⁷ To be sure, he was referring to what we today call “direct democracy,” in contradistinction to the “representative democracy” he would go on to defend, but the mistrust of unmediated popular judgment by “We the People” is loud and clear. Madison expressed greater confidence in the filtered judgment that could be provided by a national Congress. One wonders what he might think about former Secretary of Defense Robert Gates’s recent expression of thoroughgoing contempt for

52. *Id.* at 288.

53. *Id.* at 299.

54. *See supra* note 25.

55. LEVINSON, *supra* note 27, at 78.

56. *Id.*

57. THE FEDERALIST NO. 10 (James Madison).

the United States Congress: “I saw most of Congress as uncivil, incompetent at fulfilling their basic constitutional responsibilities (such as timely appropriations), micromanagerial, parochial, hypocritical, egotistical, thin-skinned and prone to put self (and re-election) before country.”⁵⁸ Why *should* anyone have much regard for popular decisionmaking, even if ostensibly refined by the procedures of representative democracy?

In any event, as Morton Horwitz has written, “[d]emocracy was consistently a negative term for most of the Framers’ generation,”⁵⁹ especially if we modify this sentence to refer to the assumptions of the Framers themselves and not, for example, to those Americans, distinctly unrepresented in Philadelphia, who might have had more faith in popular judgment. Recall that Jefferson, almost certainly the most “democratic” of our Founders—at least if we bracket out the devastating embarrassment that he was a substantial slaveowner—suggested in his first Inaugural Address that “We are all Republicans, we are all Federalists,” not that “we are all ‘democrats.’”⁶⁰

So consider the crucial import of another key sentence in *The Federalist*, this one from *Federalist* 63, written by Madison. It was part of his defense of *representative* democracy, which he saw as the great intellectual breakthrough of the Constitution. Thus he emphasized—indeed italicized—that part of the genius of the new system is its “*total exclusion of the people, in their collective capacity.*”⁶¹ “We the People” would never, ever, be invited to make decisions as a sovereign entity. Each and every decision, from the most mundane statute or resolution to potentially transformative constitutional amendments, would be made by the *representatives* of the people. The formal political freedom of the American people would be expressed exclusively in elections for these representatives. True, they could petition their governors for redress of grievances or even engage in mass political movements,⁶² but, at the end of the day, every petition and every mass rally might be for naught if a sufficient number of representatives—including the President, of course—remained obdurate. We have a government with multiple formal veto points, beginning with formal bicameralism and a presidential veto that with some frequency

58. ROBERT M. GATES, *DUTY: MEMOIRS OF A SECRETARY AT WAR* 581 (2014).

59. Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 58 (1993).

60. Thomas Jefferson, Inauguration Address (Mar. 4, 1801), *reprinted in* 8 THE WRITINGS OF THOMAS JEFFERSON 1 (H.A. Washington ed., Washington, Taylor & Maury 1854).

61. THE FEDERALIST NO. 63 (James Madison).

62. U.S. CONST. amend. I.

turns us into a *tricameral* system, purposely designed to make legislation difficult.

It is useful to compare the United States Constitution with many American *state* constitutions, which offer potential “workarounds” of institutional stasis and the significant bias toward the status quo that is built into any anti-majoritarian political system.⁶³ Many American states allow popular initiatives and referenda that permit the people—or at least those claiming the ability to speak for them—to take matters into their own hands by means such as holding new constitutional conventions and supplanting existing constitutions when it is thought necessary and proper to do so.⁶⁴ Christian Fritz’s truly remarkable book, *American Sovereigns: The People and America’s Constitutional Tradition Before the Civil War*,⁶⁵ demonstrates that many Americans, at least when crafting their *state* institutions, took fully seriously the proclamation in the Declaration of Independence of “the Right of the People to alter or to abolish” their existing frameworks of government.⁶⁶ Indeed, it was none other than James Madison, while defending some of the legal irregularities of the Philadelphia Convention in *Federalist* 40, who wrote that “in all great changes of established governments, forms ought to give way to substance; that a rigid adherence in such cases to the former, would render nominal and nugatory” the great principle of popular sovereignty that Madison at least on occasion endorsed by virtue of supporting and citing the Declaration of Independence.⁶⁷ To be sure, he went on, “since it is impossible for the people spontaneously and universally to move in concert towards their object[,] . . . it is therefore essential that such changes be instituted by some *informal and unauthorized propositions*, made by some patriotic and respectable citizen or number of citizens,”⁶⁸ selected in some manner from the wider *hoi polloi* for whom Madison had little regard.

63. See Adrian Vermeule, *Social Choice in the Wild: Supermajorities and the Future of Democracy*, NEW REPUBLIC, Feb. 3, 2014, at 52 (reviewing MELISSA SCHWARTZBERG, *COUNTING THE MANY: THE ORIGINS AND LIMITS OF SUPERMAJORITY RULE* (2014)).

64. See ANTHONY KING, *THE FOUNDING FATHERS v. THE PEOPLE: PARADOXES OF AMERICAN DEMOCRACY* 7-8 (2012) (expressing near disbelief that the national political system includes none of the mechanisms for more robust direct democracy that can be found in most states).

65. CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* 21-22 (2008).

66. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

67. THE FEDERALIST NO. 40 (James Madison).

68. *Id.*

That Madison himself hardly embraced the full implications of his potentially incendiary arguments does not negate their importance, especially inasmuch as many other Americans, even if not necessarily national political elites, were indeed inspired by the models of popular sovereignty set for them by at least some of their revolutionary ancestors—many of whom, of course, were still alive. Perhaps most interesting in this respect was Thomas Wilson Dorr, the Harvard-educated lawyer who inspired “Dorr’s Rebellion,” which was actually the attempt to vindicate a new “People’s Constitution” drafted by a self-generated popular assembly and then supported by an overwhelming number of Rhode Island voters. This new “People’s Constitution” was meant to replace the politically illegitimate royal Charter of 1663 that continued to structure Rhode Island government (and to prevent most people from voting) a full half-century following the adoption of the federal Constitution and its purported guarantee to each state of a “Republican Form of Government.”⁶⁹

IV. ACKERMAN’S CRITIQUE OF OUR CURRENT “CANON”

A powerful theme of *The Civil Rights Revolution* is the deficient nature of the “canon” that we teach our students about the epic history of American constitutional development and the need to broaden it well beyond the almost entirely “juris-centric” focus on “great cases.” To the extent that one purpose of the “canon” is to produce a culturally literate caste of lawyer-leaders,⁷⁰ we in the legal academy should be ashamed at the “juris-centrism” of our syllabi and the concomitant ignorance of the great “framework statutes” that are of fundamental importance for anyone seeking to understand our working constitutional order.⁷¹ I could not agree more. But I would go on to condemn as well the near-illiteracy about state constitutional development that our present curriculum tends to produce. It is a true shame that most lawyers know nothing about the epic Rhode Island struggles of the 1840s, save perhaps for the unwillingness of the Supreme Court, in *Luther v. Borden*, to weigh in on the matter and its proclamation instead of the nonjusticiability of claims brought

69. The story is wonderfully told in ERIK J. CHAPUT, *THE PEOPLE’S MARTYR: THOMAS WILSON DORR AND HIS 1842 RHODE ISLAND REBELLION* (2013).

70. See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998).

71. See WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010).

under the Republican Form of Government Clause.⁷² Among other consequences of this decision is that law students are never encouraged to engage in any significant discussion about what actually constitutes a “Republican Form of Government.” The clause is almost as irrelevant as the clause authorizing Congress to issue letters of marque and reprisal. This may go beyond being a shame and be more aptly described as a disgrace.

The entirety of Part One of *The Civil Rights Revolution* is titled “Defining the Canon,” and one of Ackerman’s principal aims is to encourage those of us who teach constitutional law—and, one might add, especially those of us who embark on the creation of constitutional law casebooks—to escape the strictures of our present imagination and incorporate, for example, the fundamentally important “landmark statutes” that are the focus of his book.⁷³ “Will the legal profession grant,” he asks, “the landmark statutes a central place in the constitutional canon for the twenty-first century?”⁷⁴ Or will we continue to insist that “the Constitution” is found only in the text of an eighteenth century document, as formally amended, plus judicial decisions purporting to “interpret” that document? It should be clear that the importance of expanding the canon, for Ackerman, is not only to enable us better to understand the actualities of our constitutional order, but also to *inspire* us and future generations to emulate those who came before by engaging in similar ameliorative actions. But, we might ask, what examples of popular sovereignty should be “canonized” and, in turn, what precisely are they inspiring us to do in our own times?

V. ACKERMAN’S EMPHASIS ON “DUALIST DEMOCRACY”

Ackerman’s most famous theoretical notion involves “dualist democracy,” which is explicitly contrasted with what he regards as an inferior “monistic” version of democracy.⁷⁵ Both envision aroused publics, but for Ackerman the crucial difference is that “dualist democracy” requires channeling such arousals into an extraordinarily complex, even byzantine, political process. This process, just as importantly, eventuates in the actual decisions being made by elected political leaders—for Ackerman they are often Presidents—capable of breaking

72. 48 U.S. 1, 42-47 (1849).

73. ACKERMAN, *CIVIL RIGHTS*, *supra* note 43, at 12.

74. *Id.* at 81.

75. See ACKERMAN, *FOUNDATIONS*, *supra* note 8, at 3-33.

the congealed forms of the existing political order and bringing about a more acceptable transformed one.⁷⁶ No doubt some committed legal formalists may be frightened even by Ackerman's disdain for "strained legalisms"⁷⁷ or "legalistic discussions of prior case law,"⁷⁸ let alone his justifications of the presumptively illegal dimensions of earlier "constitutional moments."⁷⁹ But if one compares Ackerman, say, to Thomas Wilson Dorr or to some of the other thinkers and actors delineated in Fritz's work, it is difficult indeed to see much "radicalism"—or even "populism"—in his theory. How could it be, after all, when he announces that his principal aim is to "reinvigorate the *Founding tradition* of popular sovereignty,"⁸⁰ given the remarkably desiccated understanding of that concept held by the most prominent Founders?

And, tellingly, for all of the invocations of "We the People," *The Civil Rights Revolution* underscores the extent to which Ackerman's historical project, remarkably illuminating as it is, focuses on elite leaders and not really on the great unwashed who might have constituted the political base for at least some of these leaders. Ackerman's chief interest is in those "episodes" in American history "in which America's *greatest political leaders* managed to renew the country's constitutional tradition of popular sovereignty."⁸¹ The "popular sovereigns" may be like a Greek chorus or Shakespearean groundlings, but the focus is on the actions of the kings and their courts.

The Civil Rights Revolution, therefore, is a truly stunning study of several such political leaders, including two Presidents—Lyndon B. Johnson and, to the undoubted surprise of many politically liberal readers, Richard M. Nixon—and senators like Minnesota Democrat Hubert H. Humphrey and Illinois Republican Everett McKinley Dirksen. There is one unelected political leader, Martin Luther King, Jr., but, otherwise, what many of us over sixty remember as "the Civil Rights Movement" is very much at the margins of the narrative. The reader is led to believe that there were political giants in those days who truly rose to the heightened demands of citizenship during times of transformation. Part of the strength of the book is its copious quotations from

76. *Id.*

77. See, e.g., ACKERMAN, CIVIL RIGHTS, *supra* note 43, at 122-23 (discussing Everett Dirksen's great speech justifying cloture with regard to the filibuster over the Civil Rights Act of 1964).

78. *Id.* at 134.

79. See *supra* text accompanying note 20.

80. ACKERMAN, CIVIL RIGHTS, *supra* note 43, at 61 (emphasis added).

81. *Id.* at 17 (emphasis added).

the speeches of these central figures. Everett Dirksen's speech on the occasion of his voting to end the seventy-seven-day filibuster by Southern Democrats of the Civil Rights Act of 1964 will for most readers, I suspect, be a revelation, a truly great speech and meditation on what it means to take one's oath to the Constitution with consummate seriousness.⁸² It alone vindicates Ackerman's argument about the patent inadequacy of a "canon" that privileges, say, *Katzenbach v. McClung*, the stunningly ineloquent (albeit unanimous) opinion upholding the constitutionality of the Civil Rights Act, over Dirksen's speech.

Ackerman writes that his "task is to interpret the American Constitution as it is, not as it ought to be."⁸³ To paraphrase Donald Rumsfeld, we carry on constitutional politics in this country with the Constitution we have, not the Constitution we (or at least some of us) wish we had. *That* form of politics, Ackerman believes, is an extraordinarily complex pageant of interconnected "signals" that something may be going amiss in the political system. This pageant includes various elections staggered over several cycles that will generate the kinds of responsive and imaginative leaders capable of engaging in the de facto constitutional amendment necessary to preserve the overarching, albeit now changed, political order.

To be sure, many readers will no doubt disagree with Ackerman's ostensibly positivist "as it is" description of the contemporary Constitution. He asserts, for example, that the patent "inadequacy" of "state-centered" forms of constitutional amendment inscribed in Article V has created such a "serious problem" with regard to "redefin[ing our] fundamental commitments" that We the People have accepted a substitute form of constitutional amendment through the passage of the "landmark statutes" that are the focus of *The Civil Rights Revolution*.⁸⁴ The central message of this new book is the importance of recognizing "the coordinate model of constitutional revision in which the President, Congress, and the Court collaborate with landmark statutes and superprecedents" that "serves as a legitimate substitute for formal Article V amendments under modern conditions."⁸⁵

82. The text of the speech, given well before the days of C-SPAN, is available at Everett M. Dirksen, *Speech to Senate on the Civil Rights Bill*, AM. RHETORIC: ONLINE SPEECH BANK, <http://www.americanrhetoric.com/speeches/everettmdirksencivilrightsbillsspeech.htm> (last visited Feb. 12, 2014).

83. ACKERMAN, *CIVIL RIGHTS*, *supra* note 43, at 71.

84. *Id.* at 32.

85. *Id.* at 120.

There is something at once splendid and perplexing about the Ackermanian scheme of epicycles that constitute constitutional amendment outside the formal constraints of Article V. Recognizing the patent defects of the 1787 constitutional document, Ackerman has devoted what is now the bulk of his career to demonstrating that it is in fact not a fatal bar to constitutional rectification. Remarkable things *have* happened, but, to say the least, one can doubt that there is a consensus, either professional or lay, around the proposition that there are indeed “legitimate substitute[s] for formal Article V amendments under modern conditions.” For better or, I would say, for worse, I doubt that this understanding is part of many courses on American constitutionalism, even, perhaps, at the Yale Law School. Everyone within the community of academic constitutional theory is, of course, aware of the Ackermanian argument, but that is very different from proclaiming that it has carried the day. One must add, as well, the point that Ackerman must not only persuade skeptics that these changes constitute genuinely amendatory moments—rather than, for example, simple doctrinal extensions of what is already present in our Constitution waiting only to be discovered and elaborated by sufficiently talented lawyers.⁸⁶ He must also convince doubtful interlocutors that these moments comprise genuine instances of “popular sovereignty” as distinguished, say, from elite-driven changes that are accepted, perhaps with resignation, by the population in general who scarcely play any generative role and may well feel alienated from the political system established by the Constitution. It may be that forcing someone ostensibly committed to “popular sovereignty” to work within the limits of the United States Constitution, even as imaginatively reconceived by Ackerman, is a bit like writing a novel without using the letter “e”⁸⁷ or, perhaps, playing a Beethoven sonata only on “period instruments” regardless of what we regard today as their patent deficiencies.⁸⁸ Both can be done, and the experiments no doubt have a certain interest, but why would one want to adopt these limits as a way of life?

Ackerman is well aware that there are competing models of “popular sovereignty” in the American constitutional mosaic, particularly if one looks at

86. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* (2012).

87. See GEORGES PEREC, *LA DISPARITION* (1969) (written without using the letter “e,” the most common letter in French).

88. See Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1598-99 (1991) (reviewing *AUTHENTICITY AND EARLY MUSIC* (N. Kenyon ed., 1988)).

American states. He contrasts the presence of “direct democracy” in many American states with the exclusive reliance on “representative democracy” at the national level. “Under the direct system, mandates are tested through a specially structured referendum procedure that gives voters the final say.”⁸⁹ There are certainly those who believe that this is a “better” (or at least richer) conception of “popular sovereignty” than one in which voters are deprived of *any* real say save their ability to vote for candidates in elections that will inevitably involve a plethora of competing issues.⁹⁰ Ackerman aptly describes our elections as “bundl[ed]” inasmuch as many voters will be forced to accept a decidedly mixed package of issue positions on the part of those for whom they cast their ballots.⁹¹ Claims of “mandates” are often tendentious and patently self-serving given that many voters will have voted for a particular candidate *in spite of* rather than *because of* his or her position on a given issue. Ackerman not only stresses the positivist point about the particular structure of the national Constitution under which we operate, but also appears quite strongly to prefer its procedures over those that actually empower the mass public. But why?

The key paragraph in Ackerman’s argument is as follows:

Neither [direct nor representative democracy] is perfect—but that’s life. While both can be greatly improved, my task is to interpret the American Constitution as it is, not as it ought to be. From this perspective, the bundling objection [to multi-issue elections] is simply inapt: it falsely supposes that our Constitution seeks to test claims of a mandate by isolating single issues for focused decision by the voters. Instead, our national tradition of popular sovereignty tests claims of a mandate in a different way—by engaging the voters and their representatives in a series of elections, and awarding a mandate to constitutional movements that survive a rigorous institutional obstacle course that gives their opponents repeated opportunities to defeat their

89. ACKERMAN, CIVIL RIGHTS, *supra* note 43, at 71.

90. See, for example, the debates on initiatives and referenda at state constitutional conventions summarized in JOHN DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 84-91 (2009). And, lest one think this is simply an aberrational view shared by American populists, see DIRECT DEMOCRACY IN EUROPE: A COMPREHENSIVE REFERENCE GUIDE TO THE INITIATIVE AND REFERENDUM PROCESS IN EUROPE (Bruno Kaufmann & M. Dane Waters eds., 2004); and REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY (David Butler & Austin Ranney eds., 1978) [hereinafter REFERENDUMS AROUND THE WORLD].

91. ACKERMAN, CIVIL RIGHTS, *supra* note 43, at 71.

initiatives at the polls. The point of my six-stage analysis is to describe that obstacle course⁹²

But Ackerman seems to be doing more than simply “describ[ing]” an “obstacle course.” He appears affirmatively to embrace it and see it as *better* than the more monistic brand of constitutional reform available in many American states and other nations around the world. Because “it is usually too easy to get initiatives on the ballot,” “voters are regularly confronted with long lists of unfamiliar proposals and cast their ballots on the basis of hurried reactions to a media blitz.”⁹³ These do not constitute genuinely deliberative moments by a Publian electorate, but instead are “charades” that “generate well-founded skepticism about cheap appeals to popular sovereignty.”⁹⁴ Even if elected representatives have their own “deficiencies,” they are nonetheless “often more knowledgeable than normal voters about the selfish motives that lurk behind attractive slogans; and they have many political incentives to safeguard the public against excessive factional depredation—incentives that are lacking when the general electorate is invited to make a single up-or-down vote on a complex issue.”⁹⁵

92. *Id.*

93. ACKERMAN, *TRANSFORMATIONS*, *supra* note 20, at 410.

94. *Id.*

95. *Id.* at 410-11. He repeats his aversion to direct democracy in his response to this symposium. What is telling, I believe, is his tendency to identify direct democracy with “California realities.” Bruce Ackerman, *De-Schooling Constitutional Law*, 123 *YALE L. J.* 3104, 3115 (2014). This tendency to conflate all notions of direct democracy with the particularities of California is, I have found, extremely common whenever one brings up the possible benefits of alternatives to the cramped procedures of the United States Constitution. Obviously, no system is perfect (including, most certainly, that created by the framers of that Constitution), and we are always faced with the choice of accentuating either the positive or working to eliminate the negative features of any given system. As contemporary psychologists would predict, the actualities of such choices are often based on idiosyncratic factors far more than a systematic (and dispassionate) survey of the full set of strengths and weaknesses associated with any given possibility. *See, e.g.*, DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011). Even if one concedes that the California experience may present some reasons for caution, one should recognize as well that referenda are used throughout the world, and there is a substantial literature about their strengths and weaknesses. *See, e.g.*, REFERENDUMS AROUND THE WORLD, *supra* note 90. And, of course, they are used in many other American states besides California. In his recent critique, *The Founding Fathers v. the People: Paradoxes of American Democracy*, Anthony King, an English political scientist, expresses surprise at the lack of any direct democracy at the national level of American government even as it is a frequent part of state procedures. *See* KING, *supra* note 64, at 7-8, 119-21. Even, then, if there are important things to learn from the “realities” of the California

Ackerman's description of the United States Constitution as instantiating "our national tradition of popular sovereignty"⁹⁶ obviously begs the question. As John Dinan argues in his important book *The American State Constitutional Tradition*, the evidence provided by repeated instances of constitutional creativity in the states is at least as telling, with regard to our "national tradition of popular sovereignty," as is the singular set of decisions made in 1787 by framers decidedly skeptical of the actual competence of "We the People."⁹⁷ One may well believe that the 1787 Constitution was drafted at almost the last possible historical moment in the United States when such a patently undemocratic document would have been capable of achieving even the particular form of popular ratification represented by the state conventions mandated by Article VII. In any event, anyone interested in "American constitutionalism" defined more broadly than a single-minded focus on only one of the fifty-one current constitutions within the United States⁹⁸ must explain why the model of "popular sovereignty" provided by the National Constitution is better than competing models found all across the country. It cannot be dispositive that, say, the use of the initiative and referendum has produced objectionable outcomes in California any more, presumably, than the existence of objectionable outcomes without more delegitimizes all decisionmaking by the President or Congress. There are, of course, *no* perfect procedures, and one ultimately must engage in an analysis of the *frequency distribution* of both positive and negative results in any given procedural regime.

Ackerman quite obviously is no fan of Article V inasmuch as his project is in effect to render it near irrelevant in favor of the complex process of non-Article V "amendment." He has also offered at least one formal reformation of our current process of adopting constitutional amendments. Interestingly enough, it adopts ratification by referendum, though the ability to propose an amendment is restricted to a second-term President; in addition, the proposals must apparently be accepted by a two-thirds vote of Congress.⁹⁹ At that point,

experience, there are other, perhaps equally (or even more) important realities that can be discerned in, say, Oregon, Washington, Ohio, or Maine, to mention only four American states, let alone Switzerland or New Zealand.

96. ACKERMAN, CIVIL RIGHTS, *supra* note 43, at 71.

97. DINAN, *supra* note 90.

98. Indeed, the number goes up to fifty-two if one includes Puerto Rico.

99. ACKERMAN, TRANSFORMATIONS, *supra* note 20, at 410-11. This is not altogether clear, as Ackerman refers only to "approv[al] by Congress," which could also mean that only a majority of each House (assuming no filibuster) would be required.

they would be submitted to double national referenda, one occurring at each of the “next two Presidential elections,” and any proposals “should be added to the Constitution if they gain popular approval.”¹⁰⁰ In any event, such proposals would escape having to run the gauntlet of gaining the approval of at least 75 legislative houses in 38 states.¹⁰¹ I regard this latter feature as an undeniable good. I share Ackerman’s general abhorrence of an amendment process that excessively privileges the power of states to prevent necessary (or even “merely” highly desirable) changes in our political system. That shared abhorrence is not enough, however, to make me an enthusiastic proponent of Ackerman’s proposal.

So what is wrong with the proposal, beyond the unlikelihood of its actual acceptance inasmuch as its initial adoption would itself require a constitutional amendment that would presumably require running the almost-certainly fatal gauntlet of veto by at least thirteen state legislatures unwilling to acknowledge their irrelevance even in these particular circumstances? The answer, frankly, is that such a procedure, dependent as it is on the approval of both President and Congress, is almost completely unlikely ever to address any of the deep structural problems inflicted on the United States by our adherence to the surprisingly *unamended* 1787 Constitution. No President, for example, is likely to initiate a proposal that he or she be subject to removal by a two-thirds vote of no-confidence of both Houses of Congress meeting collectively.¹⁰² This is true even if one takes into account the fact that, because of the mechanics of Ackerman’s proposal, the incumbent President would be long gone from the Oval Office by the time such an amendment took effect. The reason is simple: All Presidents, it appears, become devoted, as Madison certainly predicted,¹⁰³ to strengthening (or, at least, not diminishing) the powers of the Chief Executive. It would be quite remarkable if any President self-consciously wished to leave to a successor the inevitably diminished power that a mechanism for displacement by a vote of no-confidence would represent. A similar analysis would operate with regard, say, to weakening the President’s

100. *Id.* at 410.

101. This assumes that Nebraska would be one of the states; otherwise ratification requires the approval of seventy-six houses in thirty-eight states.

102. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 119-21 (2006) (defending adoption of such a “no-confidence” procedure).

103. See *THE FEDERALIST* NO. 51 (James Madison).

perhaps excessive veto power, given the immense difficulty of gaining the requisite two-thirds vote in each branch of Congress to override vetoes.¹⁰⁴

Nor is it likely that Congress would approve a constitutional amendment, however desirable, requiring some form of proportional representation in the House of Representatives instead of the present exclusive reliance on single-member geographically based districts.¹⁰⁵ Perhaps both President and Congress would agree that life tenure of Supreme Court justices is an outmoded concept, which is surely the case, but that is scarcely the major structural deficiency posed by the Constitution with regard to the ability of the national government effectively to confront the challenges facing us. Moreover, the at least four- or (more likely) five- or six-year delay between proposal and ratification—given the necessity of two referenda concurrent with presidential elections—requires that the presidential proposals not be predicated on the notion that some pressing national problem demands a reasonably rapid solution (that cannot be achieved, for whatever reason, through ordinary legislation or the standard Article V procedure).

Direct democracy arose in the Western United States at the turn of the twentieth century not simply because of an abstract commitment to a particular notion of “democracy,” but also, and almost certainly more importantly, because of a well-justified disillusionment with the actual workings of representative democracy. Hiram Johnson and his Progressive Era colleagues did not “replace” representative democracy with direct democracy. Rather, they supplemented the former with the latter, as a way both of holding representatives accountable and of providing a way by which new ideas could blast through a potentially congealed representative system.¹⁰⁶ As suggested earlier, though, any given example of “popular sovereignty” must be tested not only against some abstract notions of “democracy” or “government by the people,” but also with regard to actual measurable results. All systems have their dangers; all systems have their attractions, and the challenge is to try to figure out with some precision the actual costs and benefits of any given blend of elite and popular governance. We should recognize that if we conclude that

104. See LEVINSON, *supra* note 102, at 38-49 (demonstrating the overwhelming tendency of Presidents to prevail in veto battles).

105. See, e.g., Sanford Levinson, *To End Government Shutdowns, End Partisan Gerrymandering*, AL JAZEERA AMERICA, Oct. 13, 2013, <http://america.aljazeera.com/articles/2013/10/13/government-shutdowngerrymanderingdistricts.html>.

106. See, e.g., LEVINSON, *supra* note 27, at 123 (citing Stephen Griffin, *California Constitutionalism, Trust in Government and Direct Democracy* (Tulane Univ. Sch. of Law, Public Law and Legal Theory Research Paper Series, No. 08-04, 2008), <http://ssrn.com/abstract=1114115>).

the costs of robust government “by the people” are likely to outweigh any benefits, whether the root cause is popular ignorance¹⁰⁷ or mendacity, then this must necessarily call into question why any serious person would adopt popular sovereignty as a regulative ideal.

VI. BRUCE ACKERMAN AS A MODEL PUBLIAN

No one reading *The Civil Rights Revolution* can miss the mixture of careful historical reconstruction and sheer admiration for those who engaged in that revolution—whatever one might actually mean by that term—and thereby made the United States a far better country. And no one can miss as well the theme that it ought not be the last such transformation, for the work of moving toward a country that truly achieves the magnificent vision set out in the Preamble to the Constitution is never done. Part of that work, to be sure, is giving full meaning to what has been accomplished by our political forbears; but it is equally important that we view ourselves capable of moving beyond them by engaging in our own work of transformation and amendment. The journey toward what my friend and colleague Jack Balkin has called “constitutional redemption”¹⁰⁸ is never-ending, *always* a work in progress and sometimes, of course, faced with the prospects of significant regression and not-so-attractive transformation.

Yes, we must give “due recognition to *each* generation’s achievements in shaping and reshaping the country’s constitutional commitments over the course of the centuries,”¹⁰⁹ but that is only so that we the living (and future generations) can emulate our forbears by engaging in “shaping and reshaping” of our own—even if, as is undoubtedly the case, they might be quite shocked by some of these developments. Ackerman ends his book with the invidious use of the words “ancestor worship” as the evil to be avoided.¹¹⁰ We must move beyond those dangerous proclivities in American popular and legal culture except insofar as our ancestors provide us models as idol-breakers (like Abraham in Ur), even revolutionaries. We must realize that at least some of the idols *we* must smash were created by our venerable ancestors. Our task is to learn from their example, while not feeling mired in any particular solutions

107. See, e.g., SOMIN, *supra* note 25.

108. JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011).

109. ACKERMAN, CIVIL RIGHTS, *supra* note 43, at 337.

110. *Id.* at 340.

that they believed were in fact adequate at a particular time. Their own willingness to embrace often decidedly irregular *processes* trumps any deeply embedded commitment to fidelity to their inevitably time-bound, incomplete, and perhaps distorted substantive commitments. Again, one can only hope that this “creativity” is in the service of admirable ends.¹¹¹

Ackerman can easily be compared to Publius not only in his ambivalence about the duty always to remain faithful to established forms, but also because his entire life as a political theorist, law professor, and commentator on public affairs has been devoted to pursuit of the public good. He fully instantiates the spirit of what remain my two favorite paragraphs in *The Federalist*. The first is quite literally from the first paragraph of the first of the 85 essays published under the name Publius, though this one was in fact written by Alexander Hamilton.

[I]t seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.¹¹²

Do we privilege and make normative whatever exists—the consequences of “accident and force”—or do we instead engage in the Enlightenment virtue of “reflection” in order ultimately to choose for ourselves how we wish to be governed? After all, the Declaration of Independence speaks of the cardinal political norm of “consent of the governed,” and Publius suggests in effect that the American people collectively are capable of giving genuine, and not merely manufactured, consent. Ackerman’s overall project makes relatively little sense unless he believes that Publius is describing what will become an *ongoing* project of the American people through time and not merely a one-time episode of “reflection and choice” that is followed by an almost mindless “veneration” for the choices made at historical time *T*.

The second passage is the concluding paragraph of *Federalist* 14 that I quoted earlier, though I now add the last line: The People of America, acting through “the leaders of the Revolution,” “formed the design of a great Confederacy, which it is incumbent on their successors to improve and

111. See *supra* Part I.

112. THE FEDERALIST NO. 1 (Alexander Hamilton).

perpetuate.”¹¹³ To perpetuate our “great Confederacy,” which, of course, was substantially overthrown by the Constitution itself, requires a willingness to be open to suggestions of how existing institutions and legal norms established in the wake of that Constitution, however transformational it was for its time, need to be “improve[d],” even if that requires what many would see as radical transformation.

The point is not that one must necessarily agree with Ackerman in each and every one of his suggestions for improvement, let alone the entirety of his remarkable schema of American constitutional development. Rather, it is that one must recognize in Ackerman the instantiation of the Publian patriot, consumed by a relentless devotion to achieving the public good. One need never analyze an Ackermanian argument by asking cynically what “real” agendas underlie his surface proclamations. In this he differs radically from Publius himself, given the fact that Hamilton and Madison were crafting their arguments to win over wavering skeptics about the new constitutional project and, almost certainly, said many things they did not believe. Ackerman, like all humans, may make his share of errors and mistakes, but they are truly “honest” errors, not the product of a desire to manipulate gullible readers. He has aspired to (and achieved) no higher public office than “good citizen.” But in a Republican Form of Government, what higher office is there?

113. THE FEDERALIST NO. 14 (Alexander Hamilton).