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Book Review

Two Foxes in the Forest of History


Jack N. Rakove*

In the pantheon of American history, John Bingham is something less than a household name. Even the most engaged citizens whom Bruce Ackerman wants to mobilize for higher lawmaking would be strapped to identify him, and one wonders how many law students or graduate students in history would do any better.1 Akhil Amar

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1. Bingham was a Republican congressman from Ohio who served on the 15-member Joint Committee on Reconstruction which was the principal engine for framing congressional reconstruction policy in the Thirty-ninth Congress. Bingham is widely credited as the principal author of Section One of the Fourteenth Amendment. The fact that his name does not appear in the index of the first two standard American history textbooks I consulted for reference...
concludes his new book with a proposal to elevate Bingham to a niche near the exalted place occupied by the familiar personage who lies closer to my own historian's and biographer's heart: James Madison, leading framer of the Federal Constitution and Bill of Rights. For in Amar's telling, Bingham's role in framing the Fourteenth Amendment made possible the eventual transformation in the meaning of the Bill of Rights that has been so conspicuous a feature of modern constitutional jurisprudence. While "Madison did believe in strong individual rights... he was ahead of his time" in doing so, and "the nauseous project" of amendments that he forced down the throats of a reluctant Congress in 1789 proved far more federal than liberal in both its enactment and interpretation—that is, it was far more concerned with limiting national power and protecting the autonomy of the states than with establishing a robust list of individual rights (or privileges and immunities) to be protected against all forms of governmental abuse. That interpretation of the original meaning of the Bill of Rights was sanctified by the Supreme Court in *Barron v. Baltimore.* But it was to reverse the doctrine of *Barron* that Bingham rallied his fellow Republicans of the Thirty-ninth Congress (or Convention Congress, to use an Ackernym).

A concern with such major transformations in the constitutional order is one theme that ties the most recent books of this Yale Law School tag-team of Amar and Ackerman together; another is their common conviction that the formal amendment procedures of Article V do not exhaust the actual mechanisms by which such fundamental changes have been (Ackerman) or may be (Amar) effected. Both books illustrate the marked turn toward history—especially the history of politics and institutions—that seems so conspicuous a feature of contemporary legal scholarship as well as of social science. Both books are substantially (though only partly) historical in character; for the essence of the historian's enterprise is the explanation of change—including transformative change—rather

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3. 32 U.S. (7 Pet.) 243 (1833) (holding that the restrictions on government power in the Bill of Rights constrain only the national government, not the states).

4. Curiously, this resurgence is occurring at a time when many political historians are grumbling about the seeming marginality of their traditional interests to the dominant agenda of contemporary historical scholarship. For a description of this general phenomenon, see THE HISTORIC TURN IN THE HUMAN SCIENCES (Terrence J. McDonald ed., 1996).
than the archaeological recovery of artifacts and mores, or the simple narration of events. And both books evince a reasonably informed engagement with the requisite historical monographs and syntheses.

Having made these concessions, a working historian should immediately interject that it is by no means evident what criteria he should apply in assessing their arguments. It will not do to read either book as one would read the work of a disciplinary colleague. Of the two authors, Amar comes closer to casting his story in the recognizable mold of a work of history. *The Bill of Rights* has a simple linear framework and a straightforward causal explanation of how the transformation in the understanding of the Bill of Rights came about. But at crucial points—perhaps most notably in staking a starting position about the original meaning of the Bill of Rights—Amar relies more on text than texture; more on a refined reading of the language of the amendments than upon a close, documented reconstruction of the motives and concerns of their authors.

Ackerman, for his part, has so many ends to pursue in his ambitious *We the People* project that no account of the contents of *Transformations* (its second volume) can quite do justice to its structure. It is, in part, an essay in historical revisionism, insofar as it reminds readers (professional historians included) that the extraordinary constitutional developments of 1866-68 and 1935-37 represented momentous chapters in the dramas of Reconstruction and the New Deal. For intramural readers within the legal academy, it challenges "hypertextualist" and "hyperformalist" models of constitutional history, which insist both that *Lochner*-era jurisprudence was a heretical deviation from the true path first surveyed by the Marshall Court and then regained by the post-1937 New Deal Court, and that truly fundamental constitutional change occurs only through Article V processes. This challenge in turn makes *We the People* an exercise in constitutional theory, for in emphasizing the agency of popular sovereignty in legitimating the transformative moments of 1787, 1866, and 1937, Ackerman seeks to convert that crucial concept from legal fiction into (occasionally) operative practice. Finally, Ackerman's evocation of popular sovereignty as a legal fiction, albeit a useful one, see EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988).
sovereignty also takes the form of an appeal to the citizenry to be prepared to exercise their sovereignty again—though not quite as freely as Amar the spontaneous plebiscitarian would recommend. Rather, Ackerman closes this second volume of his projected trilogy by proposing to replace (or complement?) Article V with a Popular Sovereignty Initiative under which a second-term president could initiate constitutional change by submitting a suitable proposal for approval—first by the prescribed two-thirds vote of each house of Congress and then by the people at two successive presidential elections, after which “it should be accorded constitutional status by the Supreme Court.” And all this is couched in a rhetorical style that is so colloquial and conversational as to border on vulgarity—at least by the prissy and admittedly formal standards of literary propriety to which most historians still adhere.

James Madison once observed of Thomas Jefferson that “[a]llowance also ought to be made for a habit in Mr. Jefferson as in others of great genius of expressing in strong and round terms, impressions of the moment.” Without quite confusing or equating those two leading original theorists of American constitutionalism with their latter-day avatars, a similar allowance might be made for

8. Ackerman, supra note 5, at 414-16. This procedure does not correspond very well to Ackerman’s conception of historical constitutional moments, which typically take thirty months or less to run their course.
9. I freely confess to being one of those readers who does not relish being treated as the immediate and continuous object of a conversation (admittedly one-sided) with an author. The experience of reading Ackerman, however, is far more pleasant than that of reading another once celebrated legal scholar, William Crosskey, whose hectoring tone in his two-volume Politics and the Constitution in the History of the United States (1953) often made me feel as if I should shower after every chapter.
10. Letter from James Madison to Nicholas Trist (May 1832), in 9 WRITINGS OF JAMES MADISON 479 (G. Hunt ed., 1910).
11. Jefferson’s initial contributions to American constitutional theory—as distinguished from either his later doctrines of constitutional interpretation or his contributions to political theory—deserve more consideration. A promising start has certainly been made by Donald Mayer. See DONALD N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON (1994). Jefferson’s concern with the problem of distinguishing a constitution from other forms of legislation helped drive a critical evolution in constitutional theory after 1776; and, as I argue elsewhere, Ackerman’s failure to address this question fully poses a problem for his treatment of the “illegality” of the Constitution. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 94-130 (1996) [hereinafter Rakove, Original Meanings]; Jack N. Rakove, The Super-legality of the Constitution, Or, A Federalist Critique of Ackerman’s Neo-Federalism, 108 YALE L.J. (forthcoming 1999) [hereinafter Rakove, Super-legality]. Equally interesting, apropos of Amar, is Jefferson’s early realization that articles affirming rights should be incorporated in the main text of a constitution, rather than presented in the form of a freestanding declaration of rights of uncertain legal authority. See JACK N. RAKOVE, DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS 75-81 (1997) (discussing and reprinting the fourth, rights-based article of Jefferson’s draft constitution for Virginia, 1776).
12. Ruminating on a work by the great Progressive historian, Carl Becker, I have often
the rhetorical conceits of legal writing. While the conventions of legal scholarship need not and often do not mirror the conventions of legal argument, one sometimes has the impression that the realms of academic and professional writing do overlap in significant ways. Legal academic writing does seem to be more persuasive and polemical in its rhetoric and more pronounced and robust in its conclusions, characteristics which must reflect, whether directly or indirectly, professional norms of adversarial advocacy, and perhaps the hard-wiring of the legal mind. A historian’s fondness for nuance, understatement, texture, and even irony—much less an acceptance of ambiguity—is not what one would expect of most legal writing, and there is no point holding the latter to the aesthetic preferences of the former. Nor is it certain that either author cares all that deeply about the original intentions of the historical actors (with the noteworthy exception of Amar’s homage to Bingham). As Ackerman observes of the “equivocal” nature of the “evidence” attesting to the celebrated interpretative switches of Chief Justice Charles Evans Hughes and Justice Owen Roberts in 1937: “I could not care less. I am not interested in the hidden wellsprings of their private motives, but in the public meaning of their constitutional actions.” It is difficult to imagine a historian making quite the same claim.

Yet some measure of accountability to historians’ norms can be expected when arguments about what actually happened in the past form an essential foundation for the transformative stories our tag-team wants to tell. To this problem I now turn.

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Amar posing the less complicated case, we shall start there. As already noted, the central argument of The Bill of Rights is straightforward and linear, though the commentary offered en route is replete with the nuance and discrimination that his audience might expect.

All historical narratives begin with a starting point that must always be arbitrary to one degree or another. We agonize a great deal over exactly which starting point is either most appropriate or at least good enough; and sometimes, like good journalists, we cast

admirè the capacity of modern constitutional legal scholars to pose as Everyperson Her/His Own Theorist. It must be a wonderful feeling. See generally CARL BECKER, EVERYMAN HIS OWN HISTORIAN (1935).

13. ACKERMAN, supra note 5, at 343.

14. Thus, in writing a history of the Continental Congress, I could have pushed the starting point back to antecedents such as the Albany Congress of 1754 or the Stamp Act Congress of
about for the "hook" of a telling vignette with which to sink the larger (analytical) tale into the consciousness of the reader. For Amar, the necessary point of departure is less historical than historiographical. That is, he wants to challenge the strongly nationalist interpretation of the meaning of the Bill of Rights that flows naturally from living in an incorporated world where vigorous federal enforcement of its protections against the states is taken for granted as the steady-state condition of constitutionalism. In his opening chapter, Amar pursues this challenge by using the first two of the original twelve amendments that Congress proposed in September 1789 to confirm his underlying thesis that the controlling animus of the Bill of Rights was strongly anti-national. The first of these amendments (poorly drafted and never ratified) would have tinkered further with the formula for apportioning representation among the states; the second, only recently ratified and now happily enshrined, to the wonderment of all, as the Twenty-seventh Amendment, prohibits the implementation of congressional pay raises until a fresh election of representatives has occurred. Despite the failure of the states to ratify either article, their presence in the package of the twelve proposed amendments suggests that a desire to assuage lingering Anti-Federalist anxieties about the adequacy of national representation provided a dominant motif for the Bill of Rights more generally.

To appreciate the import of this move, consider the alternative standard openings that Amar does not choose. He has little to say about the politics of the ratification struggle, or the hoary question of 1765; but in part for reasons of economy, and in part because it posed the more immediate political problem that the calling of the First Continental Congress of 1774 was meant to overcome, it seemed to make more sense to begin with the collapse of the non-importation movement of 1768-1770. See Jack N. Rakove, The Beginnings of National Politics: An Interpretive History of the Continental Congress 3-20 (1979).

15. Thus Bernard Bailyn opens his biography of Thomas Hutchinson, the royal governor who presided over the collapse of imperial authority in Massachusetts, with the poignantly ironic image of Hutchinson receiving an honorary degree from Oxford University on July 4, 1776. See Bernard Bailyn, The Ordeal of Thomas Hutchinson 1 (1974).

16. As a strong textualist, Amar relishes noting the "technical glitches" created by the wording of the original (as proposed) First Amendment. See Amar, supra note 2, at 15.

17. Amar professes agnosticism on the validity of a ratification process that allowed the original Second (now Twenty-seventh) Amendment to circulate in constitutional limbo-space for two centuries before securing ratification. See Amar, supra note 2, at 17 n*. Ackerman pulls no punches, not counting himself among those misguided souls "who have the impression that a twenty seventh amendment was enacted in 1992." See Ackerman, supra note 5, at 490-91 n.1. One would suspect, though, that the deluded would include all the state legislators who rushed to ratify the amendment, most members of Congress and their constituents, and any Supreme Court that might have to adjudicate a challenge to it in future years—not that such a challenge seems likely to occur. The next amendment ratified will be numbered twenty-eight, and any Ackermendments adopted under the Popular Sovereignty Initiative would follow the same numerology.
whether or not Madison's decision to make the cause of amendments his own amounted to a campaign conversion, a genuine change of heart owing something to Jefferson's admonitions (some delivered in "strong and round terms"), or a calculated decision to reach out to moderate Anti-Federalists to preempt any possibility of a second constitutional convention. If Madison's theory of rights was distinctly liberal and minoritarian—as it certainly was—Amar does not attempt to explain whence this departure from conventional thinking originated. Nor does he address the intriguing question of how thinking about the juridical nature and authority of bills of rights might have evolved since their first promulgation accompanying some of the state constitutions of 1776, to which they stood in a somewhat problematic relation. There is a fairly significant scholarly literature on these questions, but save for a few passing references, Amar Shortly shrifts it.

This may sound like sour, ego-damaged grapes on the part of a reviewer who has spent some time and labor reflecting on these questions and not infrequently recycling his answers to them. After all, Jack (I might say, in imitation of Bruce), don't you owe Akhil more credit for using the amendments that were not adopted to offer a fresh perspective on the integrity and coherence of the remaining ten? Indeed I do—but it is more important to identify the mode of analysis that is at work here from the outset. For Amar, the meaning of the Bill of Rights is to be derived primarily from close textual and structural analysis, informed by a general but less-than-conclusively demonstrated stipulation about the essential thrust of the amendments. Once Amar moves beyond the failed amendments to examine the articles that were ratified, his judgments rest primarily on matters of text and structure, with excerpts from constitutional debate or relevant cases (both prior English cases and subsequent American ones) summoned for illustration. But the argument remains more deductive than empirical; more a proof of how to read the amendments, if one accepts the essential premise that they were designed for the greater security of federalism, than an account firmly grounded on documentary evidence of the original intentions of framers or the understandings of ratifiers.

19. See, e.g., ACKERMAN, supra note 5, at 116.
What resonates most for Amar is the recurrence of the word *people* throughout the Bill of Rights and the understanding of federalism it supports. In five succeeding chapters, Amar strolls (admittedly briskly) through the adopted amendments, consistently emphasizing how they should be read not as stringent efforts to assert principles and rules protective of the rights of individuals and minorities (the dominant modern as well as Madisonian reading), but rather as a sustained attempt to counter one dangerous (national) form of majoritarianism in the interest of supporting another (state-based). Amar thus gives a new twist to the classic counter-majoritarian dilemma beloved of Yale constitutional theory: In its original incarnation of 1789, counter-majoritarianism was directed against putatively dangerous national legislative majorities on behalf of current or future state majorities. The Free Press, Speech, Assembly, and Petition clauses of the First Amendment were designed to prevent a self-serving national legislature from enhancing its own power. Similarly, the Establishment Clause is “agnostic” on the matter of what form of support a state could give to the church(es) to which it accorded special recognition of a traditional sort. The people of the Second Amendment are close cousins—nay, fraternal housemates—of the people in the First, keeping the arms they might one day need to bear against an abusive national government after their peaceful assemblies and petitions had presumably failed. So, too, the restrictions on the coercive power of the national government provided in the more legalistic amendments were designed not merely to protect individuals in the exercise of basic liberties, but rather to ensure that juries (grand and petit) would remain powerfully democratic and localist institutions, thereby again checking the abuse of national power.

Some of these points are quite compelling—especially much of what Amar says about the role of juries and the educative functions of statements of rights, which I especially like because they parallel my own analysis.2 Given his known interest in the law of criminal procedure, it is not surprising that Amar urges readers to grasp the prevalent eighteenth-century notion of the essential role of the jury in protecting not merely the rights of the accused (or of defendants in civil litigation) but the very fabric of constitutional government. In that conception, jury service was arguably a higher badge of citizenship—and certainly a more important function—than the exercise of suffrage. But some of Amar’s inferences seem more problematic. The idea that the protective function of juries might

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extend to resolving matters of constitutionality seems a stretch for a textualist who should recall that the Supremacy Clause is addressed explicitly to state judges, not juries, and implicitly to the federal bench. How does one square the 1789 affirmations of the essential role of juries with the ambition of Article III to enable the federal judiciary to act, too, as an "inestimable bulwark" of liberty? So, too, one wonders about the depth of textual massaging needed to support Amar's whimsical suggestion that a contemporary reading of the Second Amendment might protect the peoples' right to be "'armed' with modems more than muskets, with access to the Internet more than to the shooting range," because, "[a]s recent events in Russia and China have shown, fax machines are perhaps the most powerful weapons of all."21 (Not at Tiananmen Square, it would seem.)

But an analysis that relies so heavily on inferences from text and structure leaves the historian more nervous in other respects. To read the Bill of Rights as closely and ingeniously as Amar does requires high confidence that all of its clauses were drafted with scrupulous precision and a close attention to the echoes and resonances among the clauses that Amar's sensitive ear detects. Perhaps lawyers must read certain legal texts in just this way. Yet if circumstances strongly suggest that the texts in question were not crafted and drafted with quite the attention to symmetry and holistic fit that Amar's textualism presupposes, how can we assume that linguistic resonances offer the dominant key to interpretation? The very notion that the Bill of Rights was framed with partly educative purposes in mind—or even that its framers could not be certain of the extent to which its statements would act as positive commands—suggest that some caution is in order about Amarguments that rely so much on language and structure to produce fine-tuned meanings. Historians are less constrained by the need to find consistency; ambiguity and incompletion work just as well for us, and we have no stake in requiring every contradiction, tension, or oversight to be resolved. When we reconstruct the circumstances surrounding the adoption of the Bill of Rights, all kinds of reasons emerge to raise questions about how much weight the exact choice of language can be made to bear.

On the one hand, we certainly cannot ignore the evidence that its

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21. AMAR, supra note 2, at 49-50. From the right to bear arms, Amar seems to move to the question: With what resources must the modern citizen be armed? On that basis, the original Second Amendment was poorly drafted because it failed to protect the right to bear quills along with the right to kill bears (with something heavier than quills). To be fair, Amar's linkage of First and Second Amendments might do the work here; but in that case, wouldn't the Second be redundant? I would think that a textualist would locate the right to log on as an aspect of freedom of speech, press, assembly, and petition.
framers were aware of linguistic nuance. Madison's substitution of the mandatory "shall" for the monitory "ought" that was typical of most American bills of rights prior to 1789 is one critical point on that head. And the various versions of the Establishment Clause as it made its way from Madison's proposals to the House floor to the Senate and then into the joint conference committee obviously bear scrutiny.

Yet other circumstances warrant greater caution. Editorial care notwithstanding, the Bill of Rights retained something of the earlier notion that such declarations simply recognized truths that rested on some prior foundation—the laws of nature or its God, custom since time immemorial, or the Lockean recognition that freedom of conscience was indeed a natural right because true belief can never be coerced. Or again, modern agonizing over the exact text of the Second Amendment may seem a bit beside the point if all it was meant to do was to remind future congresses—at a time when few Americans were well armed—that supporting the militia was a good idea.22 Anyone who reads through the debates of the First Federal Congress will find it hard to resist concluding that the amendments were drafted in a relatively casual way, with many members palpably feeling that Madison was wasting their time by insisting that they pursue a project they deemed politically unnecessary.23 In that case, more attention to Madison's wise-before-his-time liberal understanding of the problem of rights might still be in order.

But Amar, like Ackerman, is not really interested in documenting intentions—at least as I understand the process. At this point in his narrative, text and structure suffice to establish the baseline from which the transformations of 1866 may be plotted. Given that the corpus of Bill of Rights jurisprudence remained so slim throughout the nineteenth century, the heavy lifting of his historical argument need never have taken place there in any case. We know from many other sources that respect for federalism was a dominant value of early nineteenth-century and antebellum constitutionalism. And given the low, not to say miniscule, level of national governance in

22. As the soon-to-be-published research of Michael Bellesiles will demonstrate, many American households did not contain firearms in the eighteenth century, and few households would have possessed the kind of weapons that you would carry into battle against British regulars. Grandpa's seventeenth-century fowling piece would not quite do the trick. The same situation existed when the Civil War erupted in 1861. One could therefore read the Second Amendment as an injunction to Congress to support the local militia. See Michael Bellesiles, The Origins of Gun Culture in the United States, 1760-1865, 83 J. AM. HIST. 425 (1996).

an era when the United States government remained “a midget institution in a giant land,” the desuetude of every article of the Bill of Rights other than the Tenth Amendment is completely unsurprising.

Thus, the establishment of an explicitly causal dimension to Amar’s explanation of the transformation of the meaning of the Bill of Rights must await Part II of the book, which is devoted to Reconstruction and the framing of Section One of the Fourteenth Amendment. Here the context is set less by *Dred Scott v. Sandford* and its denial of black citizenship than by *Barron v. Baltimore,* which in Amar’s account accurately represented the original understanding that federalism was the dominant value the amendments of 1789 were conceived to protect. John Bingham, the principal framer of Section One, here appears as a *Barron*-contrarian who had long since realized that the Marshall Court’s refusal to shelter the protection of individual rights under the banner of the Bill of Rights was wrong, if not in history, then at least in impact. To Bingham and other Republicans, the defense of federalism no longer made sense—at least if that defense would empower unrepentant ex-Confederate majorities to use the restoration of legal governments to impose upon their former bondspeople a regime of Black Codes backed by cruel and vicious terror. The conflict between majorities and minorities that Madison had once theorized so abstractly—or fretted about excessively in terms of rights of property holders and religious dissenters—and now assumed a vivid form. In 1866 the imperative was to extend constitutional protection to the freed slaves so as to enable them to escape the rights-denying legislation they would otherwise encounter. Federalism was no longer the solution to the problem of protecting rights but the problem itself.

In sustaining this argument, Amar gives equal weight to textual and historical considerations in a way that seems superior to his approach to the framing of the Bill of Rights. With *Barron* as a point of departure and parallel chapters on “Text” and “History” examining the original meaning of the Section One clauses on citizenship and privileges and immunities, Part II has a clear causal


27. Yet it is worth noting that Madison understood that the oppression of African-American slaves was a paradigmatic form of majority tyranny so severe as to call into question whether slave societies could ever be truly republican. See RAKOVE, ORIGINAL MEANINGS, supra note 11, at 337.
framework that Part I lacks. As a textualist, Amar relishes the fact that Section One speaks of "persons" and "citizens" who individually possess and exercise "privileges and immunities" that are interchangeable with rights and freedoms. That collective entity of the people has disappeared. As a historian, tracing something developing over time, he equally relishes the opportunity to array evidence that the repudiation of Barron was an essential purpose of the Amendment's framers. Following the earlier research of Michael Kent Curtis, Amar persuasively argues that the leading framers of the Fourteenth Amendment clearly understood that the "privileges and immunities" it would protect subsumed the fundamental protections of the original Bill of Rights. If contemporary debates failed to document this consensus adequately, that was not because such agreement did not exist, but rather because it was both taken for granted and less controversial than other sections of the Amendment.

At both poles of his historical argument, Amar thus offers unequivocal accounts of dominant, paradigmatic understandings of the essential nature and desired application of the Bill of Rights. The storyline is transparent: There is a clear starting point and an equally clear conclusion, and if Amar is correct to identify Barron-contrarianism as the connective mechanism between the two, energized by the circumstances of 1865-66, we have an extraordinarily elegant explanation of how and why the transformation occurred. In many ways, it fits almost perfectly the model of historical explanation I was taught in graduate school—explaining a demonstrable change over time—and yet, a certain something is missing. That something is perhaps best described as texture, by which I mean a willingness to tolerate nuance and ambiguity and to provide the measure of descriptive detail that gives historical narrative its veracity. For the study of both the Founding and Reconstruction—or any period of intense political argumentation—texture may also require a willingness to understand that conflicting and inconsistent ideas not only exist concurrently (which is obvious) but may even coalesce and collaborate to muddy the consequences of any attempt to reach consensus on points of political discussion and constitutional doctrine. That was one of the brilliant features of Gordon Wood's seminal study of the origins of

29. For a discussion of this point, see Amar, supra note 2, at 197-206.
30. For brief reflections, see Jack N. Rakove, Encountering Bernard Bailyn, 19 Humanities 9, 9-10 (1998).
American constitutionalism. Its primary achievement was not to recover a language or discourse of republicanism, but rather to capture the complexity and the simultaneously retrospective and progressive dimensions of American political thinking.\textsuperscript{31} That is also the strength, I think, of a recent book that Amar and Ackerman both curiously neglect: William Nelson's account of the drafting of the Fourteenth Amendment, which explains how ambiguities inherent in the structure of mid-nineteenth-century thinking about rights, equality, and federalism created the conditions that virtually required a course of judicial interpretation to transform abstract and generally formulated principles into workable constitutional doctrine.\textsuperscript{32} Amar husbands his sense of nuance not for historical reconstruction but for the theory of "refined incorporation" that offers the doctrinal payoff of his book—a theory I am professionally incompetent to judge, but that seems to offer a sophisticated method of ascertaining the basis on which individual provisions of the Bill of Rights may or may not be applied against the states.

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Bruce Ackerman is far more interested in processes of historical change than is his colleague Amar. Indeed, he devotes the historical sections of Transformations to elaborating a model of transformative constitutional change that covers the three Ackermoments of the Founding, Reconstruction, and the New Deal. This raises an immediate and fundamental question about the nature of the enterprise. For historians, truth be told, are not model-builders,\textsuperscript{33} and no conventional constitutional historian would ever dream of developing a general theory of transformation capable of subsuming three such disparate events under one heading. In many ways (at least at first glance), Ackerman's project, though about history, resembles a conventional if weak form of political science (his other discipline). On the other hand, historians may be model-users; that


\textsuperscript{32} See William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 13-39, 64-90 (1988). Amar has suggested (in a somewhat frenetic recent conversation in New Haven, when I was dashing to my car) that he simply finds Nelson's account unpersuasive, but I would have preferred to see its claims addressed forthrightly.

\textsuperscript{33} This claim is probably overstated and is doubtless subject to qualification. Certainly that group of scholars who classify themselves as social science historians (primarily interested in economic history) would have theory-building pretensions; so do comparative historians who study subjects like the rise of slave societies. Yet most historical scholarship remains so focused on one time and place that the idea of elaborating general theories, as opposed to interpretations of particular events, still seems to lie beyond the discipline's essential purpose.
is, they may embrace a model developed in other disciplines if it helps them to make sense of the particular phenomenon (a set of events unfolding in a locale among identifiable actors at a defined moment of time) they are studying. The practical value of Ackerman’s project would thus seem to lie in its capacity to afford a fresh view of familiar events by delineating a sequence of stages through which such transformations unfold.

The Ackermode involves a number of propositions. The starting point is the view that the three critical episodes—and an Ackermoment is a compressed episode—cannot be described in either hyperformal or hypertextual terms as changes effectuated within the known parameters of the existing constitutional regime. All were “unconventional” in their circumvention of prevailing norms and rules; all depended on a measure of political entrepreneurship that risked defying these conventions to pursue the justifiable changes sought. Yet all stopped well short of the truly revolutionary upheavals that we have witnessed in the two centuries since our own Founding, which have brought much-told grief to so many millions. Ackerman is a sympathetic (though not uncritical) reader of Hannah Arendt’s insistence that the creation of permanent, freedom-enhancing constitutional regimes on the American model offers an expression of the revolutionary impulse superior to the other experiments carried out (ostensibly in the name of the people) by the other revolutionary tradition, which traces its origins to the radical Jacobinry of the Terror.34 What redeems the great American constitutional reform movements from the taint of sedition is that their success depended on securing the assent and consent of institutions, acting outside the boundaries of strict legality, yet providing the requisite legitimacy to carry the desired transformations through to victory. Reduced to its crudest form, political success in winning institutional and popular endorsement for reform provides the legitimacy that trumps immediate illegality while establishing long-term legality.

But a crude model cannot be very useful. Ackerman instead proposes a five-stage process that he first detects operating in the Federalist movement of the 1780s. The process begins with Signaling, in which a reform movement indicates its intention to earn

34. See 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 204-12 (1991) (discussing HANNAH ARENDT, ON REVOLUTION 13-52 (1963)). It is a bizarre irony that the French translation of We the People goes under the title Au Nom du Peuple (in the name of the People), apparently because the original American phrase simply does not translate well into French. (Maybe that’s their problem.) Ackerman shared this anecdote with participants at the recent Yale Law Journal symposium on his project.
“sufficient authority to challenge the status quo.” Then follow two closely linked but discrete stages of the Proposal and Triggering Functions, which involve demonstrating a more concrete intention to replace the existing regime with another, and to seek “an entirely new procedure for ratification” of the resulting change. Then comes Ratification, which requires utilizing the new procedures to secure actual approval for the desired change. Finally, there must be a Consolidation of the change that goes beyond mere initial approval to a lasting acceptance, so that no lingering doubts about the legitimacy of what has transpired will persist to disrupt the transformation. Cumulatively, the whole process produces a bandwagon effect, in which success at each stage creates additional incentives to accede to the legitimacy of the process even if doubts about its legality persist.

How well does this model describe the process of constitutional formation that unfolded from roughly 1785 to 1789? The three middle stages seem relatively uncontroversial, but the initial and concluding phases that bracket them are more problematic. Ackerman implies that the Federalist movement had acquired at least a latent coherence—but presumably rather more—by 1786, when “Madison & Co.” were ready to abandon Article XIII procedures for amending the Confederation as the maneuvers leading first to the calling of the Annapolis Convention and then its proposal of a general convention to assemble in Philadelphia in May 1787 attest. This account smoothes over a fair number of rough spots in the actual politics of 1786, not least of which is the absence of any firm evidence of the nature of the constitutional changes that even ambitious reformers—like Madison and Hamilton, both present at Annapolis—would have sought. A better (or more detailed) case could be made that the call that issued from Annapolis in September 1786 was driven more by a desperate sense that all other alternatives had been exhausted than by any coherent notion of what form a reconstituted Union might take or the exact agenda that reformers should pursue. That much speculation was taking place about the possible content of constitutional reform is evident: “It is therefore not uncommon to hear the principles of Government stated in common Conversation,” wrote one Massachusetts delegate to Congress. “Emperors, Kings, Stadholders, Governors General, with

35. ACKERMAN, supra note 5, at 40.
36. See id. at 49.
37. See id. at 40-68.
38. Article XIII required that all amendments to the Articles of Confederation be proposed by Congress and then ratified by all thirteen state legislatures.
a Senate, or House of Lords, & House of Commons, are frequently the Topics of Conversation." But these conversations, however frequent or numerous, lacked a focal point. Whatever "signaling" was going on in this period could have conveyed few firm impressions of the course the Federal Convention would take; as in other forms of intelligence gathering, discerning the true "signal" from surrounding "noise" would have been quite tricky. Even Madison, perhaps the premier agenda-control maven of his age, only began drafting his agenda for the Convention in the weeks immediately preceding its scheduled opening—which nearly all the delegates missed by the better part of a fortnight. Nor could it have been evident—the anomalies apparent in the calling of the convention notwithstanding—that it would substitute an entirely new mode of ratification for the existing rules of the Confederation.

So, too, one can quarrel with Ackerman's account of the final consolidation phase of the process. Perhaps a conversation or two with Amar⁴¹ might have convinced Ackerman to ask what role the adoption of the Bill of Rights played in confirming the authority and legitimacy of the Constitution. Instead, Ackerman's brief account exaggerates the importance of bringing the two holdout states, North Carolina and Rhode Island, into the reconstituted Union. Without them, the new Congress remained "a secessionist body"—and so too must have been the Thirty-ninth Convention Congress of 1866 while it refused to reseat the South. "Unless and until the dissenters got on the bandwagon, the problematic legality of the new regime would be a matter of open and endless contestation." But there is simply little evidence in the well-documented history of the First Federal Congress to suggest that its members found the holdout issue very troubling; what is more intriguing is the way in which the holdout North Carolina Anti-Federalists tried to imagine how their state might remain in the Union, even if not actively participating in its government. For all intents and purposes, consolidation was completed with the first federal elections of 1789.⁴⁴

40. See RAKOVE, ORIGINAL MEANINGS, supra note 11, at 42-56.
41. In my limited experience, one should do the trick.
42. ACKERMAN, supra note 5, at 64-65.
43. Id.
44. There are other problems with Ackerman's account of the Founding, which I will discuss in a concurrent essay being published by another New Haven legal journal. Foremost among these is the emphasis on what Ackerman calls the "flagrant illegality" of the Constitution, a claim that ignores the critical doctrinal developments in the American
Determining exactly how well the five-stage “bandwagon” model applies to the other two episodes may perhaps best be left to specialists for other periods. There the greater difficulty may not be whether the five stages fit, but how well Ackerman can convert the critical congressional elections of 1866 and 1936 into explicit, conscious, and focused mandates for constitutional transformation, as opposed to all the other sorts of preferences that might have come into play. That the victorious Republican and Democratic parties in those respective elections might plausibly claim to have received a decisive (or at least sufficient) mandate for their constitutional program is not surprising. But whether the electorate was truly engaged in exercising its popular sovereignty is another matter entirely, and skeptical readers with a political scientific bent may not find enough evidence arrayed here to be persuaded. By contrast, in the case of 1787-89 it seems much more plausible to infer that elections to the ratification conventions and then to the First Federal Congress can indeed be described as mandates on the Constitution.

There are, however, other fundamental questions that a historian can raise about Ackerman’s model. Let us concede that it identifies the three fundamental transformations in American constitutional history. But is that equivalence in drama, stature, or impact sufficient to group these three episodes together as one class of phenomena? Ackerman’s strongest answer to this reservation seems to rely on his intramural engagement with the orthodox stories of constitutional history told within the legal academy. Taking arms (and modems, too, no doubt) against those shadowy bands of scholars who march under the banners of hypertextualism and hyperformalism, Ackerman repeatedly (and I do mean repeatedly) reminds readers that only his bandwagon process of revolutionary reformers gaining legitimacy by co-opting institutions to validate their “illegal” understanding of a constitution that had taken place during the decade since the first state constitutions and the Articles of Confederation were drafted in the mid-1770s. There is a curious irony here. In Transformations, Ackerman the legal theorist poses as a shrewd political realist, which is the same characterization that it is fair to say my work has earned for me; yet here I am claiming that Ackerman ignores or at least undervalues critical developments in legal theory occurring before 1787. See Rakove, Superlegality, supra note 11.

On occasions like this, the historian’s trusty and universal disclaimer—“That’s after (before) my period”—always comes in handy.

Notwithstanding the publication of a four-volume history, see DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS (Merrill Jensen et al. eds., 1976-89), the significance of these elections has not been carefully studied, with the exception of the short monograph by Steven Boyd. See STEVEN R. BOYD, THE POLITICS OF OPPOSITION: ANTIFEDERALISTS AND THE ACCEPTANCE OF THE CONSTITUTION (1979).

The concept of “extra-legality” employed by Pauline Maier to describe modes of resistance to duly constituted authority before 1776 might be more appropriate than “illegality,” which to my mind suggests that the perpetrators should have been promptly locked...
initiatives describes the messy process by which our most basic changes have been effectuated. Not being entirely sure how numerous or resilient these shadowy hyper-types actually are, I wonder why this exercise in Ackerpuncture needs to deploy so many needles.

The more important objection, however, is that the disparity in the essential character of the three episodes outweighs the similarity they derive from their gross impact. Whether any general theory of constitutional transformation can rest on either the Founding or Reconstruction is surely open to question, because their circumstances are so extraordinary as to verge on the truly unique. In the case of the former, we are dealing with the establishment, not only of the regime itself, but of the very concept of the regime—a distinctive experiment in constitutional governance for which contemporaries boastfully but justifiably felt no useful precedents existed. In the case of Reconstruction, we confront the equally distinctive case of the aftermath of a Civil War waged in defense of a perpetual Union whose defenders now confronted the dispiriting prospect of seeing the unrepentant rebellious states restore the political status quo ante bellum, with the added perverse possibility of the losers gaining additional representation for the freed slaves they were already intent on disfranchising. What connects these events with the New Deal, beyond their gross importance and Ackerman’s all-purpose model of transformation?

A greater difficulty lies in the nature of the transformation itself. Are the transformations required to work out the constitutional settlements of a Revolution and Civil War equivalent to the shifts in judicial doctrine that accompanied the acceptance of the New Deal state? Critics of Ackerman’s treatment of the New Deal could plausibly argue that it has to exaggerate the strength and coherence of the Lochnerian legacy to give the jurisprudential developments of 1935-37 their transformative (as opposed to merely dramatic) power. In a sense, *Lochner* plays the same role in the structure of Ackerman’s historical argument as *Barron* does for Amar. Yet the body of doctrine that the Court inherited in the 1930s was arguably a more complicated, tangled, and therefore manipulable set of materials than those that controlled legal thinking during the middle third of the previous century. Had the Court chosen to acquiesce in the New Deal from the beginning, it had ready at hand the materials

needed to make its acceptance consistent with existing strands of constitutional law.\footnote{48}

It is not, therefore, the deep similarities among the three episodes that hold Ackerman’s comparative project together. As either historical explanation or a weak form of descriptive model-building, the results presented would probably not justify the commitment and even passion that Ackerman has invested in this project. Why, then, does he work as hard as he does to link the three moments together? The answer, I believe, is that the constitutional entrepreneurship of 1787 and 1866 helps to legitimate the New Deal’s radical and permanent departure from established doctrine; and that the latter’s accomplishment, occurring under conditions of democratization substantially greater than participants in the earlier events could have imagined, much less attained, in turn legitimates Ackerman’s call to the citizenry to be prepared to mobilize for the next full-blown crisis that must appear. Ackerman’s model, in short, is linked much more to its normative pretensions—its appeal for a form of democratic citizenship concerned with more than ordinary politics—than to its academic and analytical conventions. The trumpet sounds at the very beginning of Transformations and again at the very end. If Americans do not understand and recall the revolutionary reformist acts that preserved the Constitution through its several transformations, they will be condemned to become the prisoners of the lower forms of lawmaking that represent not our politics at their aspirational best, but the play of passion, interest, and mere opinion that the Madisonian system was designed to control.

Historians do not cover their ears when trumpets sound, but neither do they bolt from their studies (or what were known in the eighteenth century as their “closets”\footnote{49}) at the first flourish. (Or as the Talmudic expression would have it, if the Messiah comes when you are planting a tree, first finish planting, then go out to greet him.) As Gordon Wood has suggested, history may often have to serve an inherently cautionary or even conservative role, offering not promises of liberation but reminders of fallibility. “Unlike sociology, political science, psychology, and the other social sciences”—let us interject law—“which try to breed confidence in managing the

\footnote{48. See Larry Kramer, What’s a Constitution for Anyway? Of History and Theory, Bruce Ackerman and the New Deal, 46 CASE W. RES. L. REV. 885 (1996).}

\footnote{49. Explaining the difficulties the Convention faced, Madison asked: “Would it be wonderful [i.e., surprising] if, under the pressure of all these difficulties, the convention should have been forced into some deviations from that artificial structure and regular symmetry which an abstract view of the subject might lead an ingenious theorist to bestow on a Constitution planned in his closet or in his imagination?” THE FEDERALIST NO. 37 (James Madison).}
future, the discipline of history tends to inculcate skepticism about people's ability to order their destinies at will," Wood writes (apropos of Bernard Bailyn's sympathetic yet critical portrayal of Thomas Hutchinson). "History that reveals the utter differentness and discontinuity of the past tends to undermine that crude instrumental and presentist use of the past that Americans especially have been prone to [make]."\(^5\) By no means would I suggest that Ackerman's use of the past is "crude[,] instrumental and presentist"; \textit{au contraire}, I cannot imagine how a legal scholar with so many other interests to pursue would remain beguiled by the past if he did not find it intellectually alluring. Nor would I spend my own active intellectual hours immersed in the founding era of the Republic merely because it poses some neat puzzles to solve; anyone who cares about the Constitution intellectually should also, I believe, care about it politically.\(^5\)

Yet in the end, it is the normative connections that Ackerman draws across these three episodes, more than the analytical model he weaves from their disparate elements, that holds \textit{Transformations} together. The appeal to the first two episodes of Founding and Reconstruction legitimates the third (New Deal) while illuminating the failure of a potential (if highly problematic) fourth moment (the failed Reaganaut reversal of constitutional doctrine in the 1980s); and this linkage in turn sustains the possibilities for future reformation that Ackerman wants to leave open, however elusive and distant and unfathomable (like everything about the future) those possibilities must remain.

It is here, then—in the polymorphous shuffling back and forth among historical data, political-scientific model-building, a normative theory of constitutional renewal, and the occasional bugle call—that the historian must acknowledge the difficulty of ascertaining the correct criteria by which \textit{We the People} should finally be judged. Diffidence is all the more in order when we have only a glimmer of a notion of what the concluding volume of the trilogy, \textit{Interpretations}, will look like. But an interim problem that the final volume might presumably address can at least be broached: It inheres in the adequacy of Ackerman's working definition of

\(^{50}\) Gordon S. Wood, \textit{The Creative Imagination of Bernard Bailyn}, in \textit{THE TRANSFORMATION OF EARLY AMERICAN HISTORY: SOCIETY, AUTHORITY, AND IDEOLOGY} 46 (James Henretta et al. eds., 1991). This is not the first time I have quoted this passage in conjunction with contemplating the thoughts of Bruce Ackerman. \textit{See} Jack N. Rakove, \textit{Fidelity Through History—(Or to It)} 65 FORDHAM L. REV. 1605-06 & n.58 (1997).

\(^{51}\) This does not mean, however, that we must care about it uncritically, as if our only mission in its interpretation is to purvey its timeless truths to students, readers, and the public more generally.
constitutional moments to capture the main lines of development that any satisfactory theory of American constitutional history must explore. For Ackerman, a constitutional moment is just that: an episode occurring within a highly compressed span of time. The question is, does this implied definition overdramatize and oversimplify processes that cannot be segmented quite so tidily?

I come to this review from the recent experience of having taught a new lecture course in constitutional history that carried me past my usual seventeenth- and eighteenth-century haunts. The subject was the Constitution and race, and its conception (in both senses) was consciously if loosely inspired by Ackerman's notion of moments, in that it was designed to emphasize three distinct and bounded periods (or episodes) when the two subjects were most closely intertwined: the Founding, the era of Civil War and Reconstruction, and the Second Reconstruction which began, more or less, with Brown v. Board of Education and reached a climax, of sorts, with the civil rights legislation of 1964-65. One can already see that a working historian's definition of a moment is naturally more extended than Ackerman's; but, equally important, in designing and teaching the course, I inevitably found myself doing a great deal of backing and filling to provide more context for the highest or most dramatic moments of constitutional decision-making. Inevitably, the historian's natural impulse to contextualize ever more, and not to be (too) arbitrary in segmenting the episodes under study, led me to wonder about the adequacy of Ackerman's chronological framework, with its quite narrow delineation.

But the deeper criticism arises from Ackerman's decision (explained in Foundations) to relegate Brown and its legacy to a secondary position where it is treated more as an extension (or synthesis) of the New Deal transformation than an independent development of equal status. This treatment, if I understand it correctly, inheres in Ackerman's understanding that "the Supreme Court's decisions in Brown and Griswold did not come at moments when a mobilized citizenry was demanding a fundamental change in our fundamental law." It is certainly reasonable to claim that the Supreme Court was acting in advance of any conclusive political mandate in 1954. Nor was the Court resisting bold new initiatives in the way that it, in Ackerman's account, was justified in doing in the mid-1930s, until the New Deal had demonstrated its staying power by mustering the commanding voice of We the People at the polls in 1936. But so what? By any measure, the question of why the Second

52. ACKERMAN, supra note 34, at 131-62 (quotation at 133).
Reconstruction succeeded where the original Reconstruction failed would seem to bring the two episodes into equivalence—and rather more naturally than, say, comparing the New Deal with the Founding. For Ackerman, the problem seems to be that unfolding the legacy of Brown would require a very different model of the stages by which the process of transformation operates. Here it is the Supreme Court that first does the signaling, the states of the South that do the resisting, the people out-of-doors who do the mobilizing, and the political branches of the executive and presidency that eventually fall into line, after demonstrating substantial inertia of their own. The sequence is entirely out of whack with Ackerman’s bandwagon model, but that may identify a fault with the model rather than an assessment of the gross impact of the changes unleashed. For to characterize the changes in race relations in the 1950s and 1960s as less than transformative—or as merely synthetic of the constitutional changes of the 1930s—seems a remarkably stunted assessment of their impact on our politics and jurisprudence alike.³

In short, whatever its formidable normative ambitions, the question of how Ackerman defines and delimits constitutional moments raises troubling questions about the historical Foundations on which his Transformations and eagerly awaited Interpretations rest.

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To bring these two books into common focus for one conclusive assessment is no easy task. They overlap at points, of course, in their common interest in Reconstruction and, to a lesser extent, the Founding. But Ackerman has nothing to say about the drafting of the Bill of Rights, nor Amar about the New Deal. Amar is preoccupied with constitutional text and rules for its interpretation; Ackerman cares little for text, has surprisingly little to say about judicial interpretation—at least so far—and is much more concerned with the politics of constitutional transformation, which seems to bore Amar. Ackerman develops a model of historical change that covers events that historians might balk at comparing, yet that still engages in an extremely insightful way with the twists and turns of

the documentary record. Amar tells a story of change that better conforms to the structure of a historical narrative, but that relies primarily on legalistic arguments from text and structure.

Historians are not the most entrepreneurial of the various species who earn their daily bread practicing the human sciences. To use the late Sir Isaiah Berlin's famous metaphor, we almost always number among the hedgehogs of intellectual life, not its foxes.\textsuperscript{54} We are happy when we come to know one thing, or a very limited neighborhood, quite well. Speaking as a hedgehog, I have always found much to admire in the legal foxes who come tramping (or occasionally trampling) through the neighborhood. Their fur is sleek, they are charming companions, and one envies the ease with which they move from field to field, hunting their prey. One learns a lot from the fox, even though most of it cannot be easily applied. That they manage to extract a few goodies from one's own plot is no object of complaint; historians should be hard workers, and we're a long way from exhausting our plots in any case.

It is the difficulty of grading the fox on any criteria other than foxiness that makes the task of assessment difficult. The fox, that clever cosmopolitan, makes us appreciate things we would otherwise miss. Amar does this with a remarkably elegant argument that sharply clarifies and illuminates the profound shift in rights-thinking that took place between the eras of Madison and Bingham. And whatever one makes of the boundaries of Ackerman's moments or the neatness of his five-step transformative process, the hyperorthodox narrative of American constitutional history will never look the same again. Yet in these works history remains something to be used, and indeed is valuable only insofar as it remains useful. It is one mode of analysis to be followed so long as it seems rewarding, but its own claims have no priority or special value. The fox has too many other objects to pursue.

\textsuperscript{54} See \textsc{Isaiah Berlin}, \textit{The Hedgehog and the Fox: An Essay on Tolstoy's View of History} (1953).
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