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We the People: Each and Every One

ABSTRACT. In his book series, *We the People*, Bruce Ackerman offers a rich description of how constitutional law comes to be changed by social movements. He also makes some normative claims about "popular sovereignty," "popular consent," "higher law," and "higher-lawmaking." In this essay, I examine these claims and find them to be both highly under-theorized and deeply problematic. Ackerman's own presentation of what he considers to be an informal process of constitutional amendment illustrates the importance of formality in protecting the rights retained by the people. And he assumes a collective conception of popular sovereignty without considering the serious normative problems raised by majority and supermajority rule. Rule by a majority or supermajority is not the answer to the problem of constitutional legitimacy; it is the problem that requires a normative solution. As an alternative to collective or majoritarian conceptions of popular sovereignty, I identify an individualist conception that yields fundamentally different conclusions about the purpose of a written constitution, including the importance of written amendments in safeguarding the rights retained by a sovereign people, each and every one. Finally, in a Postscript, I respond to Professor Ackerman's reply to this essay.

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INTRODUCTION

"We the People" is a powerful trope—so powerful that it has propelled three books of that title by the distinguished Yale law professor Bruce Ackerman, with a fourth and final one on the way. In this series, Ackerman has presented a novel thesis. "We the People" can amend the written Constitution by means other than those provided by Article V and, what's more, the People have done so more than once. The first amendment took place during the New Deal in the 1930s and '40s, and the second during the Second Reconstruction in the 1950s and '60s.

By this maneuver, Ackerman does not challenge head-on the method of constitutional interpretation known today as "originalism," which specifies simply that the meaning of the Constitution should remain the same until it is properly changed. Not only does he accept the original meaning of the text of the Constitution as enacted, he claims the title of "originalist" for himself. "Scalia and Thomas call themselves 'originalists,'" he writes, "but they are wrong in doing so. I am the originalist, not they."[1] He thinks he can do this because the text of the Constitution has supposedly been properly amended outside of Article V through exercises of so-called "popular sovereignty," ratifying a deviation from the original text. He then can claim to be adhering to the original meaning of the Constitution *as amended* more faithfully than those who today call themselves originalists.

Ackerman's three books can be read at two levels. The first is a deeply insightful description of how constitutional law has changed since the Founding, and why. They present a richly detailed story of the mechanisms by which the Supreme Court eventually bends to the demands of social movements and changes its doctrines to accommodate legislation that the Court would previously have deemed unconstitutional. Ackerman provides an incisive explanation of how constitutional law came to accommodate the exercise of legislative power, both state and federal, formerly considered at odds with the Constitution's text.

Continually shadowing the level of description and explanation, however, is another level of normativity and legitimacy. Ackerman persistently claims more than to be presenting an accurate and informative narrative of the evolution of constitutional law; he *justifies* this evolution as a normatively legitimate expression of "popular sovereignty." On his account, "We the People" have *properly* amended the text of the written Constitution through a

1. 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 329 (2014) [hereinafter ACKERMAN, CIVIL RIGHTS].

complex interaction of the Congress, President, and Supreme Court, ratified by elections. With Volume Three, we are now told that this process is not only complex, it is also highly variable, as no two informal constitutional amendments are made in quite the same manner. After describing these varying mechanisms, he then proposes his interpretation of the true "original" meaning of these unwritten constitutional amendments.

One can accept Ackerman's series on one of these two levels without accepting it at the other. One can learn much from his marvelous narrative of the evolution of constitutional law without being persuaded by his effort to justify it as legitimate constitutional change. In this essay, I will not challenge his story and, for present purposes, will grant its accuracy. Instead, I will challenge his normative claim that changes in constitutional law have effected a legitimate amendment to the Constitution itself. While its lack of theoretical specificity is enough to find it unpersuasive, I will do more. I will also identify an alternative conception of popular sovereignty that explains why Ackerman's appeal to "We the People" is misplaced.

I. ACKERMAN'S UNDERSPECIFIED NORMATIVE CLAIM

"We the People" appears sixty-four times in the text of *We the People: The Civil Rights Revolution*. "Popular sovereignty" appears fifty-eight times. "Popular consent" appears seven times.[2] The phrases "higher law" or "higher lawmaking" appear twenty-four times. Given the centrality of these concepts to the title and thesis of the book, one would expect they would be carefully defined. Indeed, offering a definition would seem to be the least that a theory of legitimate constitutional change must deliver before advancing a normative claim. Yet, because none of these phrases is defined, we are left to piece together their meanings.

We can start with this passage early in the book that utilizes all four phrases:

> *Popular sovereignty* isn't a myth. The Founders developed a distinctive form of constitutional practice which successfully gave ordinary (white male) Americans a sense that they made a real difference in determining their political future. This Founding success established paradigms for legitimate acts of *higher-lawmaking* that subsequent generations have developed further. Reconstruction Republicans, New Deal Democrats, and the Civil Rights leadership once again confronted the task of

2. Other related terms include "mandate" (eighty) and "popular mandate" (fifteen).

> winning broad and self-conscious *popular consent* for their sweeping transformations of the constitutional status quo—and each time, they (more or less) succeeded. The challenge is to analyze the concrete ways in which the evolving constitutional system tested their claims by requiring them to return repeatedly to the voters to earn the very special authority required to create a new regime in the name of *We the People*.[3]

It is difficult enough to claim popular consent to rule; it is exponentially more difficult to claim "the very special authority required to create *a new regime*." In *We the People: Foundations*, Ackerman does explicate the claim of constitutional revolutionaries to supplant one regime by another, even if doing so was outside the formal rules of the previous regime.[4] But this is an entirely different matter than claiming that the formal mechanisms for amending the regime can be ignored while professing to remain within it.

In this regard, the precise nature of Ackerman's claims throughout the three volumes is ambiguous. On the one hand, he quite clearly claims that the adoption of the Republicans' Thirteenth and Fourteenth Amendments was as genuinely a revolutionary regime change as the replacement of the Articles of Confederation with the Federalists' new Constitution. To this end, like others today and Democrats back then, he has emphasized the "unconventional" or illegal nature of the ratification processes for the Thirteenth and Fourteenth Amendments.[5] This move is in service of his contention that the "New Deal Revolution" represented a revolutionary *regime change* in this sense. Presumably, so too did the "Civil Rights Revolution" (though I did not find this claim quite so clearly presented in Volume Three).

On the other hand, a more moderate claim also seems to pervade the work: that the formal amendment procedures of Article V were themselves informally amended by the Thirty-Ninth Congress, and that this new informal amendment process of "higher-law making" was utilized again during the New Deal and Second Reconstruction. According to this claim, the regime was not replaced by an extra-legal revolution, as the regime governed by Articles of

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3. ACKERMAN, CIVIL RIGHTS, *supra* note 1, at 3 (emphasis added).

4. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 169-79 (1991) [hereinafter ACKERMAN, FOUNDATIONS] (discussing the theory of constitutional revolution identified in *The Federalist*).

5. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 141-50 (1998) [hereinafter ACKERMAN, TRANSFORMATIONS] (discussing the "unconventional" ratification of the Thirteenth Amendment); *id.* at 230-32 (describing Congress's "blatant[]" refusal to respect the structure of Article V).

Confederation was supplanted by a new regime governed by the Constitution. Instead, the existing regime was simply informally *amended* or modified, as the Republicans had innovated in the nineteenth century while otherwise remaining within it. Indeed, to the extent that the Republicans had merely amended the amendment process of Article V, there is nothing particularly "revolutionary" about later using the new informal process of constitutional amendment to make further changes.

So which is it? Have we had four "regimes" since the Articles of Confederation, like the French have had five republics?[6] Or did the Republicans in the Thirty-Ninth Congress merely informally amend Article V to allow for further informal amendments to the existing regime? It makes a difference, for one can hardly claim that the American people have "self-consciously"[7] engaged in the higher-lawmaking of replacing one regime with another if the fact of regime change was kept from them. Unlike the Founding, when the revolutionary nature of the change was made clear by Congress's referring the matter to conventions in the states, this was never the claim made on behalf of these later changes at the time they were being debated.

On the other hand, to make out the more modest claim that the New Deal and Second Reconstruction marked changes to constitutional law akin to the formal amendments achieved by the Republicans in the Thirty-Ninth Congress, Ackerman merely needs to show that, under the amended amendment procedures, a super-majority of the American people have yet again informally amended the Constitution rather than replaced regimes. For all the talk of revolution, this far more modest claim seems to do much of the work in his narrative.

With this in mind, let us stipulate that Ackerman is trying to mimic the super-majoritarian requirements of Article V with other super-majoritarian procedures of higher-lawmaking. Of course, the principal objection to Article V is that its procedures are too onerous to keep the Constitution in tune with the exigencies of the times.[8] For this reason, Ackerman desires a lesser level of popular support; otherwise he would be content with Article V as written. Yet,

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6. *See* ACKERMAN, FOUNDATIONS, *supra* note 4, at 34 (characterizing as a "Bicentennial Myth" that "the French have run through five republics since 1789," while "we have lived in only one").

7. *See infra* note 9 (identifying where Ackerman claims that higher-lawmaking must be "self-conscious").

8. This may well be true, in which case, for reasons I will make clearer in what follows, the solution is to modify the amendment procedures in writing. The issue here is not whether to make the process of amending the Constitution easier, but whether the text of the written Constitution should be amended informally.

while he insists that mere majoritarian sentiment cannot suffice as "higher-lawmaking," the appropriate quantity and composition of super-majoritarian support for legitimate regime change is never specified.

Say what you will about the difficulties of Article V, at least it specifies the super-majority it requires for changing the Constitution, so everyone knows the threshold in advance.

* * *

In his Introduction, Ackerman also says that "popular consent" to "sweeping transformations of the constitutional status quo" must be "*self-conscious*."[9] In other words, the requisite supermajority must *know* they are changing the Constitution when they vote, say, for FDR, LBJ, or for their Senator or Representative who then "ratifies" the vision of these Presidents by voting for what Ackerman calls "landmark statutes"[10] or "super-statutes."[11] Sometimes, however, he changes who must self-consciously assent,[12] and to

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9. Ackerman repeatedly insists on the "self-conscious" nature of popular consent to constitutional change. *See, e.g.*, ACKERMAN, CIVIL RIGHTS, *supra* note 1, at 3-4 ("*We the People* followed Reconstruction Republicans and New Deal Democrats step-by-step as they built new systems of popular sovereignty to win broad and self-conscious popular support for their transformative initiatives."); *id.* at 11 ("[T]he President and Congress, with the critical assistance of Martin Luther King . . . self-consciously repudiated the idea that Article Five should monopolize higher lawmaking—choosing instead to use their landmark statute to function as an engine of constitutional change in the name of the American people."); *id.* at 28 ("Since the Civil War, [Americans] have given decisive and self-conscious support to national politicians and their judicial appointees to redefine constitutional values through landmark statutes and super-precedents."); *id.* at 320-21 ("[T]he Court, Congress and the Presidency worked with one another to express the self-conscious decision by ordinary Americans to move the Second Reconstruction far beyond the constitutional principles of the nineteenth century."); *id.* at 330 (contending that, in *Shelby County*, Chief Justice Roberts "struck down a key provision of the Voting Rights Act . . . without even noticing that the American people . . . self-consciously repudiated the application of his asserted principle to voting rights").

10. *See id.* at 33-34 ("Though the notion of a superprecedent has become familiar, we have not yet begun to consider seriously whether landmark statutes also deserve a central place in the modern constitutional canon. This will be a central thesis of this book."); *id.* at 34 (proposing to "grant full constitutional status to the landmark statutes of the civil rights revolution").

11. Ackerman borrows the term "super-statute" from WILLIAM ESKRIDGE & JOHN FEREJOHN, A REPUBLIC OF STATUTES (2010). *See* ACKERMAN, CIVIL RIGHTS, *supra* note 1, at 34.

12. *See, e.g.*, ACKERMAN, CIVIL RIGHTS, *supra* note 1, at 92 ("*Congress* . . . self-consciously displac[ed] Article Five with the modern higher lawmaking system based on landmark statutes and judicial super-precedents." (emphasis added)); *id.* at 119 ("The *civil rights leadership* . . . self-consciously assert[ed] Congressional authority to use the Voting Rights Act as a substitute for a constitutional amendment." (emphasis added)); *id.* at 329 ("*Martin*

what.[13] How seriously can we take these normative claims for "the *very special authority* required to create a new regime"[14] when their content is so woefully underspecified?

Say what you will about the difficulties of Article V, at least it clearly puts everyone, including members of Congress and the general public, on notice that a modification of the constitutional "regime" is on offer.

* * *

To the indeterminacy of the signal that a constitutional amendment is on offer, we can add the indeterminacy of the substance of the higher law that the People have supposedly ratified at a "constitutional moment."[15] In the end, it falls to, well, Bruce Ackerman to tell us what happened. That is the lesson of Ackerman's sustained criticism of the lawyers' received wisdom of the meaning of *Brown v. Board of Education*. He urges "future generations [to] lift their eyes beyond the *United States Reports* to hear spokesmen for the people such as Lyndon Johnson and Martin Luther King Jr., Hubert Humphrey and Everett Dirksen."[16] Future scholars should "reflect[] on their achievements" instead of "cast[ing] these leaders as tired epigones living off the constitutional heritage left by the giants of an ever-receding past."[17]

In other words, on Ackerman's theory, the true constitutional meaning of the Second Reconstruction is what he urges in his book despite a lack of recognition even by legal professionals, much less the general public. How "self-conscious" can this constitutional transformation be if, fifty years on, specialists in constitutional law are unaware it happened?

Say what you will about the difficulties of Article V, at least it clearly informs everyone of the terms of a constitutional change actually adopted.

* * *

Luther King Jr. and *a bipartisan political leadership* self-consciously designed alternative methods for constitutional revision." (emphasis added)).

13. *See, e.g.*, *id.* at 61 ("[T]he American people gave their sustained and self-conscious consent *to a series of landmark statutes* marking an egalitarian breakthrough." (emphasis added)); *id.* at 202 (reporting that President Johnson "was prepared to provoke a 'bitter civil rights fight' to gain the broad and self-conscious support of the American people *for another landmark statute*" (emphasis added)).

14. *Id.* at 3 (emphasis added).

15. A phrase Ackerman made famous in his earlier volumes, which is used fourteen times in his latest.

16. *Id.* at 316.

17. *Id.*

Then there is the shifting mechanism of constitutional change. At least with his account of the New Deal, Ackerman seemed to present a recognizable—and presumably repeatable—process of presidential initiative, approved by an overwhelming proportion of Congress, and ratified by successive elections. Yet now we are told that "history never repeats itself—and the civil rights path toward popular sovereignty differed from the New Deal in key respects."[18] Sometimes change is initiated by the President, sometimes by the Court, and sometimes by Congress. Ackerman's theory molds itself to fit the facts of any "constitutional moment" he proposes.

Say what you will about the difficulties of Article V, at least it is specific about the alternative procedures by which constitutional amendments may be proposed and ratified.

* * *

Finally, and most remarkably, we now learn that popular sovereignty apparently can overcome the textual limits on government power but cannot supply any new ones. This peculiar feature of Ackerman's theory of regime change does not emerge until he discusses massive popular resistance to the Supreme Court's effort to impose forced busing as a means of integrating public schools.

In a chapter called "The Switch in Time," Ackerman chronicles the "popular mobilization"[19] against the Court's use of forced busing. "Gallup polls were confirming the hard-liners, showing 76 percent of Americans against busing, only 18 percent in favor. Even blacks were sharply divided."[20] Without doubt, "the overwhelming majority of Americans were firmly opposed to the courts' escalating busing campaign."[21] Indeed, "anti-busing sentiment was a significant force behind the tidal wave propelling Nixon to a landslide victory"[22] in 1972.

Ackerman never considers the possibility that this sustained popular and politically expressed resistance constituted another "constitutional moment" that established a constitutional line that the federal government cannot cross. Instead, he claims that "the American people were plainly *disengaging* from the intense struggle for black civil rights,"[23] and that the civil rights "issue was

18. *Id.* at 313.

19. *Id.* at 283.

20. *Id.* at 263.

21. *Id.* at 264.

22. *Id.* at 266.

23. *Id.* at 286 (emphasis added).

returning to the realm of normal politics, where civil rights advocates no longer could credibly claim that the mobilized majority of ordinary Americans were on their side."[24] Just three pages after describing the "popular mobilization" against forced busing,[25] he characterizes this development as "the inexorable *decline* of constitutional mobilization by ordinary Americans."[26] Rather than conclude that there arose a "self-conscious" assertion of constitutional limits on the means by which integration can be achieved, he concludes instead that "[n]o great popular movement lasts forever" and that the constitutional moment for civil rights had "come to an end."[27]

These quotes are simply stunning coming from so ardent a proponent of popular constitutionalism. Ackerman is much too smart to have missed the fact that he just described in considerable detail—and to his credit as a scholar—a political tsunami of very engaged American voters opposing forced busing. So his remarkable description of this intense political mobilization as a "*decline* of constitutional motivation" can most charitably be interpreted as revealing his unstated view that "constitutional moments" only work to overcome textual restrictions on power, rather than provide new ones. Constitutional moments are like ratchets, and ratchets only go one way.

Say what you will about the difficulties of Article V, at least it specifies a mechanism for constitutional change that can work to decrease as well as increase the power of government.

* * *

In the end, we are left to ask what the term "constitutional" adds to Ackerman's captivating account of the political power that winning social movements have quite obviously achieved. In what sense are these gains in power entitled to any *additional* "legitimacy" beyond the acquiescence that is given to the positive law? Why don't these successful assertions of power just have the political force they have—until they don't have it anymore? What does Ackerman's thesis about "higher-lawmaking" add to *that*?

I think I know the answer we are supposed to give to these questions. Once the limits on constitutional power contained in the written Constitution have been breached, we are supposed to accept that these limits are now gone

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24. *Id.*

25. *Id.* at 283. Ackerman refers here to the "popular mobilization against [the Court's] strong commitment *to integration*," *id.* (emphasis added), but offers no evidence that this was opposition to anything other than forced busing.

26. *Id.* at 286 (emphasis added).

27. *Id.* at 286 (emphasis omitted).

forever. They can never "legitimately" be restored by a differently composed Supreme Court because *the Constitution* itself has now informally been "amended" to eliminate them from the text—the very same way that the Twenty-First Amendment repealed the Eighteenth. In short, Ackerman seeks for his informal amendments the same "lock in" that is sought by putting constitutional limits and guarantees in writing.

Yet, it is one thing to claim, accurately, (a) that the Supreme Court's previously existing constitutional *law* or doctrine provided a legal barrier to a set of politically popular policies, and (b) that this barrier was eventually overcome by a complex political process that led the Supreme Court to modify its doctrines to accommodate these policies. It is quite another to wrap this doctrinal change in the mantle of "higher law"—as connoted by the terms "super-precedent" and "super-statutes"—such that a future Supreme Court cannot legitimately confess error.

No doubt, it might well take a political sea change for a future Court to feel moved to such a change—perhaps something similar to the intense political activity that precipitated the judicial departure from its previous doctrine. But Ackerman wants more than the natural stickiness of established doctrine. He wants to delegitimate any judicial deviation from the doctrines achieved during his "constitutional moments" as *unconstitutional* in the same sense as it would be unconstitutional for the Court to give California more than two Senators.

Of course, one can object to the very idea of being bound by a written constitution.[28] But the only serious objection to Article V in particular is that its procedures make changing our Constitution too hard. This may well be true. For reasons I have already suggested and will expand upon below, however, the appropriate solution to this problem is to modify the amendment procedures in writing.

My difference with Ackerman and the "living constitutionalists" is not about whether to make the process of amending the Constitution *easier*, but rather about whether the text of our written Constitution should be amended *informally*. After all, however "legally" the Thirteenth and Fourteenth Amendments came to be ratified, both entered the written Constitution *in written form*.

In this way, there is a sharp discontinuity between the Republican amendments of the 1860s—as well as the Progressive Sixteenth, Seventeenth, and Eighteenth Amendments of the 1910s—and what transpired during the

28. *E.g.*, LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE (2013) (contending that the Constitution should be treated as a piece of poetry to liberty and self-government rather than as binding law).

New Deal and the Second Reconstruction. An argument for more easily ratifying new text does not, without much more, justify informally ratifying no text at all.

II. THE PROBLEM WITH UNWRITTEN AMENDMENTS TO "THIS CONSTITUTION"

In Part I of this essay, I enumerated several advantages to the "formal amendment"[29] process of Article V over Ackerman's process of informal amendment. But in advancing these advantages of formalism, I need not reinvent the wheel. In his famous 1941 article, *Consideration and Form*,[30] the renowned Harvard contract scholar Lon Fuller identified the evidentiary, cautionary, and channeling functions of formality. Here is how Professors Calamari and Perillo summarized these three functions, while adding a fourth, the clarifying function:

> Formalities serve important functions in many legal systems. . . . Important among these is the *evidentiary function*. Compliance with formalities provides reliable evidence that a given transaction took place. A *cautionary function* is also served. . . . Before performing the required ritual the promisor had ample opportunity to reflect and deliberate on the wisdom of his act. . . . A third function is an earmarking or *channeling function*. The populace is made aware that the use of a given device will attain a desired result. When the device is used, the judicial task of determining the parties' intentions is facilitated. A fourth function is *clarification*. When the parties reduce their transaction to writing . . . they are more likely to work out details not contained in their oral agreement. In addition, form requirements can work to serve regulatory and fiscal ends, to educate the parties as to the full extent of their obligations, to provide public notice of the transaction, and also to help management efficiency in an organizational setting.[31]

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29. This term appears some twenty times in the book. *See, e.g.*, ACKERMAN, CIVIL RIGHTS, *supra* note 1, at 3 ("Americans have occasionally used the formula for formal amendment laid out by the Founders in Article Five—under which Congress proposes, and state legislatures ratify, changes in our higher law.").

30. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

31. JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 238 (6th ed. 2009) (emphasis added).

All of these highly practical advantages are lost in a process of informal amendment of the sort Ackerman advocates. Lost as well is the benefit of having a written constitution to bind those who are given great power to govern the people.

But that's not all. Because the Constitution itself privileges its writtenness, more would need to be amended than Article V. So too would the oaths of office for all federal and state officers. The Supremacy Clause of the Constitution in Article VI provides that "*This* Constitution . . . shall be the supreme law of the land; and the [j]udges in every [s]tate *shall be bound* thereby."[32] "This Constitution" is obviously a reference to the written Constitution in which the Supremacy Clause is contained. Article VI then continues by stipulating that: "The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support *this* Constitution."[33] Again, the oath is to support the written Constitution.

Living constitutionalists like Ackerman think that "the Constitution" is a broader concept, which may (or may not) include the text of the written constitution. As explained by Professor David Strauss, Supreme Court "precedents, traditions, and understandings form an indispensable part of what might be called our small-*c* constitution: the constitution as it actually operates, in practice. That small-*c* constitution—along with the written Constitution—is our living Constitution."[34]

But this claim is inconsistent with the text of Article V. The Constitution that is "the supreme law of the land" to which all federal and state officers swear to support is "*this*" one, the written one, not a *small-c* constitution provided by the Supreme Court of the United States. *This* Constitution is the law that governs those who govern us. And "*this* Constitution" cannot serve this purpose if those who are supposed to be governed by it can, on their own, *or in combination*, change the rules that apply to them.

Of course, it is true that "this Constitution" does not supply all the information that is needed to give it legal effect. In addition to constitutional

32. U.S. CONST. art. VI (emphasis added).

33. *Id.* (emphasis added).

34. DAVID A. STRAUSS, THE LIVING CONSTITUTION 35 (2010). Ackerman is not as explicit as Strauss about this assumption of living constitutionalism. *Cf.* ACKERMAN, CIVIL RIGHTS, *supra* note 1, at 336 ("*The* Constitution is a work of many generations." (emphasis added)). Although this sentence could be limited to subsequent formal amendments, it appears just before a reference to the "important contributions" of the Second Reconstruction, *id.*, which were not included in the written Constitution.

interpretation to identify the communicative content of "this Constitution," constitutional construction is often necessary to apply the communicative content of the text to particular cases and controversies.[35] So the text itself may need to be supplemented by implementing doctrine that is true to its spirit as well as its letter.

Ackerman is claiming merely to be supplementing the formal amendment procedures of Article V, which do not *expressly* claim to be exclusive of any others. To make out this argument, he has appealed to the way that the Articles of Confederation were superseded by the Constitution without following the amendment rules therein. But there is an enormous difference between supplanting a previous regime and professing to amend or modify an existing regime while remaining within it. Moreover, not only are the amendment procedures specified in Article V *implicitly* exclusive, these procedures cannot be "supplemented" without overriding the passages that make "*this* Constitution"—the written one—the "law of the land" and binding by oath on those who are to govern the People under its authority.

To be clear, I am not making the circular or "bootstrapping" claim that the text of the Constitution is binding because the text of the Constitution *says* it is binding. Rather, I am claiming that those who pledge to be bound by "this Constitution" are publicly pledging to be bound by "this Constitution," and "this Constitution" does not empower *them* to change it without going through the procedures of Article V. Like others who believe in the "living constitution," Ackerman claims that "We the People" have changed "*the* Constitution." He alludes to "the ongoing conversation that is *our* Constitution."[36] But what he cannot claim is that the People have informally changed "*this* Constitution." "This Constitution" has only been changed twenty-seven times.

I deny that the Civil Rights Revolution, as Ackerman so wonderfully describes it, required a constitutional amendment to achieve. Although I accept the claim that the New Deal Court deviated from the original meaning of the Commerce and Necessary and Proper Clauses—though never expressly to the degree claimed by modern progressives—I am unconvinced about the "revolutionary" nature of the Second Reconstruction. True, the requirement of "state action" that seems to be stipulated in the text of the Fourteenth

35. *See generally* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013) (explaining the activity of constitutional construction and how it relates to the activity of constitutional interpretation).

36. ACKERMAN, CIVIL RIGHTS, supra note 1, at 36 (emphasis added).

Amendment[37] was surpassed. But the Equal Protection Clause imposes on state governments an affirmative duty to provide the "protection of the laws" to all persons with their jurisdictions and to do so equally. This is a duty that can be breached by state *in*action as well as by state action.

More fundamentally, the Thirteenth Amendment is not limited by the state action requirement. This was a radical amendment aimed at the heart of the problems created by at least two hundred years of slavery.[38] If Justice Harlan's justly famous dissenting opinions in the *Civil Rights Cases*[39] and *Plessy v. Ferguson*[40] were correct, then there is a lot less to fear from the original meaning of the Thirteenth and Fourteenth Amendments than its critics claim.

This is a major claim that I am not in a position to vindicate here. Suffice it to say that advocates of "living constitutionalism" have an interest in bolstering their case by exaggerating the extent to which landmark civil rights decisions cannot be reconciled with the original public meaning of the text. So, for example, while Michael McConnell's account of the extent to which *Brown* was consistent with the original meaning of the Constitution[41] has not effectively been impeached,[42] neither has it knocked living constitutionalists from their posture of moral superiority.

Suppose, however, that some now-popular aspects of the civil rights laws of the twentieth century were unauthorized by the original meaning of the formal civil rights amendments of the nineteenth. The fact would still remain that none of these "super-statutes" were sold to the public as amendments or changes to the written Constitution. Instead, the public was told at the time by these measures' proponents that they were entirely consistent with both the spirit and letter of the Constitution.[43] Although there were undoubtedly legal

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37. *See* U.S. CONST. amend. XIV ("No *State* shall make or enforce any *law* . . . ." (emphasis added)).

38. As Ackerman notes, "Republicans were preparing to use the recently ratified Thirteenth Amendment as a platform for a series of landmark statutes vindicating the nation's new commitment to equality. It was only [President Andrew] Johnson's repeated vetoes that forced the Republicans to make the Fourteenth Amendment their 1866 election platform . . . ." ACKERMAN, CIVIL RIGHTS, *supra* note 1, at 57-58.

39. 109 U.S. 3, 26-62 (1883) (Harlan, J., dissenting).

40. 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

41. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

42. *Compare* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995), *with* Michael W. McConnell, *The Originalist Justification for* Brown*: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995).

43. *See, e.g.*, WALTON H. HAMILTON & DOUGLASS ADAIR, THE POWER TO GOVERN: THE CONSTITUTION – THEN AND NOW (1937).

academics, and perhaps some Justices, who believed otherwise, the Court has always denied that any of its decisions were so in conflict with the text as to constitute an informal amendment.[44]

It is simply too late now to reinterpret the Court's own jurisprudence after the fact to support a claim that the People "self-consciously" amended the Constitution when they merely accepted what they were repeatedly told about the constitutionality of these results. This Constitution cannot be informally amended *nunc pro tunc*.[45]

III. THE PROBLEM WITH MAJORITARIAN POPULAR SOVEREIGNTY

Given its lack of conceptual specificity, Ackerman's project gets its traction with readers by tapping into their commonly held intuitions of popular consent or popular sovereignty, by which the "will of the People" is expressed by either a majority or supermajority of the persons who make up the polity. This, however, begs the age-old question of what gives some subset of the polity the rightful power to bind the minority to its commands? In what manner does even a "mobilized" majority, or supermajority, get to speak on behalf of "We the People" as a whole?

In my book, *Restoring the Lost Constitution*, I challenge this majoritarian conception of popular sovereignty as a fiction. Indeed, in my opening chapter, entitled "The Fiction of 'We the People': Is the Constitution Binding on Us?," I begin by quoting historian Edmund Morgan:

> Government requires make-believe. Make believe that the king is divine, make believe that he can do no wrong or make believe that the voice of the people is the voice of God. Make believe that the people *have* a voice or make believe that the representatives of the people *are* the people. Make believe that governors are the servants of the people. Make believe that all men are equal or make believe that they are not.[46]

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44. The case that comes closest to asserting the power to amend due to changed circumstances was the "Minnesota Mortgage Moratorium Case" of *Home Building & Loan Ass'n v. Blaisdell*. 290 U.S. 398, 442-43 (1934) ("If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.").

45. *See* BLACK'S LAW DICTIONARY 1174 (9th ed. 2009) ("[Latin 'now for then'] Having retroactive legal effect through a court's inherent power.").

46. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 11

I then challenged "the idea, sometimes referred to as 'popular sovereignty,' that the Constitution of the United States was or is legitimate because it was established by 'We the People' or the 'consent of the governed.'"[47] I denied "that the conditions needed to make this claim valid existed at the time the Constitution was adopted or ever could exist."[48] Although "'the People' can surely be bound by their consent," I claimed "this consent must be real, not fictional – unanimous, not majoritarian. Anything less than unanimous consent simply cannot bind nonconsenting persons."[49] Moreover, I contended that "if taken too seriously, the fiction of 'We the People' can prove dangerous in practice and can nurture unwarranted criticisms of the Constitution's legitimacy. To understand what constitutional legitimacy requires, we must first consider what it means to assert that a constitution is 'binding.'"[50]

Constitutions are not, and do not purport to be, binding on the People themselves. Instead, they purport to be binding on those who make laws that are imposed on the People; and it is then claimed that, if a "legitimate" constitution is followed, the *resulting laws* will be at least prima facie binding *on each person*. Since unanimous consent is taken to be impossible to obtain,[51] how does it come to pass that a majority or super-majority gets the authority to create a constitutional regime in which legislation is supposed to be binding on a dissenting minority?

In essence, the majoritarian conception of popular sovereignty posits that, somehow, the minority has consented to be governed by the majority, and they cannot thereafter complain. Since the express consent of the minority to majority rule is never solicited, much reliance is placed on the concept of "tacit consent" to majoritarian rule. In my book, I then debunk each of the stories told to explain how this tacit consent is obtained based on voting, residence,

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(rev. ed. 2014) (quoting EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 13-14 (1988)). Given this statement, it is curious that, in his cover endorsement of *We the People: Foundations*, Morgan says that Ackerman's first volume "gives pragmatic meaning to government of, by, and for the elusive, invisible, inaudible, but sovereign people." In other words, in Morgan's terms, Ackerman's book has either transcended the "make-believe" that "the people have a voice" to identify a *genuine* popular voice or, more likely, Morgan views Ackerman's work as exemplifying the best and highest tradition of such inevitable make-believe.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. But, as I explain, it is only impossible to obtain unanimous consent to a monopolistic government governing a geographical territory. Unanimous consent to governance by nongeographically based authorities is both possible and commonplace. *See id.* at 39-43.

the consent of the Founders, and general acquiescence.[52] A theorist, like Bruce Ackerman, who places all his chips on the concepts of "popular sovereignty" and "popular consent" really must come to grips with the normative implications of his claims by specifying precisely who is governing whom, and by what right.

In his first volume, Ackerman described what he called a "dualist" approach that, in some respects, is superior to more common appeals to majoritarian popular sovereignty. In contrast with what he calls a "monistic democracy" in which "[d]emocracy requires the grant of plenary lawmaking authority to the winners of the last general election . . . [and] all institutional checks upon the electoral victors are presumptively antidemocratic,"[53] Ackerman denies that "the winner of a fair and open election is entitled to rule with the full authority of We the People."[54] Instead, he distinguishes "the will of We the People from the acts of We the Politicians."[55]

Ackerman posits a "dualist" constitution in which normal, validly enacted legislation is not confused with the "higher lawmaking" that "represents the constitutional judgment of We the People."[56] That appellation is limited to lawmaking initiatives that follow an "arduous obstacle course"[57] designed to create a "deepening dialogue between leaders and masses within a democratic structure that finally succeeds in generating broad *popular consent* for a sharp break with the status quo."[58]

Ackerman's dualism represents a refreshing and important improvement over what we might call the "simple" majoritarian fiction of popular sovereignty. To the extent that *ordinary* legislative "will" is decoupled from "We the People," the danger posed by that fiction is greatly reduced. No longer is the process of systematically checking legislative rule seen as running afoul of the so-called "countermajoritarian difficulty."[59]

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52. *See id.* at 24. I also critically examine nonconsensual theories of legitimacy. *Id.* at 25-28. Because, however, Ackerman is clearly asserting a theory of legitimacy based on popular consent, my critique of these theories does not apply to him.

53. ACKERMAN, FOUNDATIONS, *supra* note 4, at 8.

54. *Id.* at 9.

55. *Id.* at 10.

56. *Id.* at 9.

57. *Id.* at 10.

58. *Id.* at 19 (emphasis added). Note the reliance here on "popular consent."

59. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (1962) (noting the judiciary's role in checking political legislators). *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2012)

However much might be said for dualism as a descriptive account of how constitutional doctrine actually changes over time, in *We the People: Transformations*, Ackerman made clear that he thinks he has provided "a normative argument"[60] that rests on the imperative of gaining the "considered support" of "We the People."[61] While denying the authority of "the People" to ordinary legislation, Ackerman ultimately claims that the result of "higher lawmaking" deserves to be called the will of "We the People."

In *We the People: Foundations*, he spoke freely and unselfconsciously of "principles of higher law validated by the People during their relatively rare success in constitutional politics"[62] and of "fundamental principles previously affirmed by the People."[63] As he summarizes in *We the People: The Civil Rights Revolution*:

> Higher lawmaking in America is never a matter of a single moment; it is an extended process, lasting a decade or two, that begins when a leading governmental institution inaugurates a sustained period of extraordinary political debate, and it culminates with all three branches generating decisive legal texts *in the name of We the People*.[64]

He now clearly claims that the amendment procedure of Article V has been "self-consciously" displaced "with the modern higher lawmaking system based on landmark statutes and judicial superprecedents."[65]

But all this too is a fiction and, therefore, could not justify a duty of obedience in the citizenry. Although "the People" can be said to really exist—and can be characterized as the "sovereign," as I shall suggest in the next Part—the people *as a whole* never speak, never rule, and never validate anything. Only some subset, whether a majority or minority of the whole, ever vote for or against anything. Even if those who support some constitutional change can somehow bind themselves (which I doubt), their votes cannot bind either dissenters or nonvoters.

(arguing that the independent decisionmaking capacity of the Supreme Court has been constrained by the American public).

60. ACKERMAN, TRANSFORMATIONS, *supra* note 5, at 6.

61. *See id.* (describing how dualism "prevents the political elite from undermining the hard-won achievements of the People . . . and mobilize[s] their considered support before foundational principles may be revised in a democratic way").

62. ACKERMAN, FOUNDATIONS, *supra* note 4, at 21.

63. *Id.*

64. ACKERMAN, CIVIL RIGHTS, *supra* note 1, at 51 (emphasis added).

65. *Id.* at 92.

Consent simply does not work that way. For consent to justify authority, the person being commanded must himself or herself have consented. In a group of three people, a majority of two cannot consent for the third, unless the third has previously designated the other two as her agents. Even then, they cannot violate her inalienable—i.e., non-transferable—rights.[66]

This leaves the normative question of constitutional legitimacy, by which I mean how individuals come to be bound to obey lawful commands because they are constitutional. To his credit, Ackerman sees the problem, which he addresses at the end of Volume One, in a chapter called "Why Dualism?" Indeed, in a crucial passage, he identified a "good enough" conception of constitutional legitimacy, which merits reproducing in full:

> The ultimate question is not whether this Constitution meets the standards of our highest moral ideals—no constitution in world history has ever come close—but whether it is good enough to warrant respectful and conscientious support. "Good enough," in terms of the moral quality of its past achievements; "good enough," in providing reasonably fair methods for resolving existing disputes; "good enough," in opening up the future to popular movements that promise further political growth. If the existing tradition is good enough along those lines, *we will make more progress by building upon it rather than destroying it.* And it seems to me to provide a good enough reason to accept its *claim to legitimacy.*[67]

I read Volume One before I published *Restoring the Lost Constitution*, in which the concept of "good enough" plays a central role in my treatment of constitutional legitimacy.[68] In my personal copy of *We the People: Foundations*, I highlighted the passage above, and underlined the italicized portions of the last two sentences, while writing in the margin, "basis of legitimacy." Having revisited Volume One to prepare this essay, I now suspect that I was influenced

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66. *See* BARNETT, *supra* note 46, at 14-24.

67. ACKERMAN, FOUNDATIONS, *supra* note 4, at 296-97 (emphasis added).

68. *See, e.g.*, BARNETT, *supra* note 46, at 98 ("[W]e may and probably should ignore or disregard a constitution that is not good enough in what is says to merit respect and adherence."); *id.* at 112 ("[W]e are bound by laws passed pursuant to the written Constitution only if what it says establishes lawmaking procedures that are good enough to impart the benefit of the doubt on the laws that emerge from the constitutional process."); *id.* at 113 ("To repeat, if the original meaning of the Constitution is not 'good enough,' then originalism is not warranted because the Constitution is itself defective and illegitimate. This represents a rejection of the Constitution itself, not a rejection of originalism per se."); *id.* at 322 ("If this original meaning creates a lawmaking process that is good enough to produce laws that are binding in conscience, then the original scheme is legitimate.").

by this passage in ways that went unacknowledged in my later writings, so I am pleased for the opportunity to acknowledge it now.

Yet whereas Ackerman's approach to constitutional legitimacy rests on what I consider to the fiction of consent by "We the People," let me now sketch another answer to this question based on a rather different conception of popular sovereignty that stresses instead the rights retained by the people, which I insist are quite real.

IV. INDIVIDUAL POPULAR SOVEREIGNTY AND PRESUMED CONSENT

In *Restoring the Lost Constitution*, I identify a path to legitimacy in which laws imposed on nonconsenting persons can be binding in conscience.[69] For the "consent of the governed" to matter in the first instance, we must assume (and there is also good reason to conclude[70]) that "first come rights, then comes government." As the Declaration of Independence stated: "We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty and the pursuit of happiness."[71] It then affirmed: "That *to secure these rights*, governments are instituted among men, deriving their just powers from the consent of the governed."[72] It is these "other" natural rights that the Constitution expressly describes in the Ninth Amendment as "retained by the People."[73]

The assumption that "first come rights, then comes government," and that the first duty of government is "to secure" the rights retained by the People, helps explain how lawmaking can be legitimate in the absence of consent. For a law would be *just*, and therefore binding in conscience, if its restrictions on a citizen's freedom were (1) *necessary* to protect the rights of others, and (2) *proper* insofar as they did not violate the preexisting rights of the persons on whom they were imposed.

The second of these requirements dispenses with the need to obtain the consent of the person on whom a law is imposed. After all, if a law has not violated a person's rights, then that person's consent is simply not required.

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69. *See id.* at 32-52.

70. *See* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (2d ed. 2014) (providing a normative defense for certain fundamental "natural" rights).

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

72. *Id.* (emphasis added).

73. *See* BARNETT, *supra* note 46, at 53-86 (discussing the natural rights "retained by the people" as liberty rights).

The first requirement supplies the element of obligation. If a law is necessary to protect the rights of others, then it is obligatory for the person on whom it is imposed for the same normative reasons that the underlying rights are obligatory.

In this way the pre-existing obligation to respect the rights of others supplies the duty to obey such a law. Laws can bind in conscience, at least prima facie, when promulgated by a legal system with procedural assurances that this standard is likely to be met. A constitution that provides such procedures can be called "legitimate." A written constitution that binds lawmakers and law enforcers bolsters the reliability of these procedures.

In the first edition of *Restoring the Lost Constitution*, I framed this nonconsensual source of constitutionality as superior to a majoritarian conception of popular sovereignty that fictitiously assumes the consent of the minority. Since it was published, however, I came to learn of an alternative to collective or majoritarian popular sovereignty that was in existence at the time of the Founding, a conception of popular sovereignty that is consistent with the approach to constitutional legitimacy I previously developed. This conception does not rest on the collective consent of a body of people—which in practice means consent by a majority of those who are allowed to vote—but is instead based on the individual sovereignty of each person.[74] This conception of popular sovereignty, based on the consent of each and every person who is supposed to be bound by the laws, was most strikingly presented in the first great constitutional case to be decided by the Supreme Court: *Chisholm v. Georgia*.[75]

A. Individual Popular Sovereignty[76]

In *Chisholm*, the Supreme Court, by a vote of four to one, rejected the state of Georgia's assertion of sovereign immunity as a defense against a suit in federal court for breach of contract brought against it by an individual citizen of another state. The majority concluded instead that members of the public could sue state governments because "sovereignty" rests with the people rather

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74. *See id.* at 361-69; Randy E. Barnett, *The People or the State?:* Chisholm v. Georgia *and Popular Sovereignty*, 93 VA. L. REV. 1729 (2007) (describing the conception of individual popular sovereignty expressed by the justices in *Chisholm v. Georgia*).

75. 2 U.S. (2 Dall.) 419 (1793).

76. An expanded version of the material in this Section and the next will appear in Randy E. Barnett, *The Judicial Duty to Scrutinize Legislation*, VAL. U. L. REV. (forthcoming), which was the basis for my Seegers Lecture in Jurisprudence, given at the Valparaiso University School of Law in October 2013.

than with state governments. The Justices in *Chisholm* affirmed that, in America, the states are not kings, and their legislatures are not the supreme successors to the Crown.

Justice James Wilson began his opinion by stressing that the Constitution nowhere uses the term "sovereignty." "To the Constitution of the United States the term Sovereign, is totally unknown," he wrote.[77] There was only one place in the Constitution "where it could have been used with propriety," he observed, referring to the Preamble. "But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves 'Sovereign' people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration."[78]

Wilson contended that if the term sovereign is to be used at all it should refer to the individual person. "[L]aws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require. The sovereign, when traced to his source, must be found in *the man*."[79] In other words, obedience must rest on the consent of the individual person who is asked to obey the law. Wilson believed that the only reason "a free man is bound by human laws, is, that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the Courts of Justice, which are formed and authorised by those laws."[80]

For Wilson, then, states were nothing more than an aggregate of free individuals. "If *one free man, an original sovereign*," may bind himself to the jurisdiction of the court, "why may not an aggregate of free men, a collection of *original sovereigns*, do this likewise? If the dignity of each singly is undiminished; the dignity of all jointly must be unimpaired."[81] And he was not alone in locating sovereignty in the individual person.

In his opinion in *Chisholm*, Chief Justice John Jay referred tellingly to "the joint and equal sovereigns of this country."[82] Jay affirmed the "great and glorious principle, that the people are the sovereign of this country, and consequently that fellow citizen*s* and joint sovereign*s* cannot be degraded by appearing with each other in their own Courts to have their controversies

77. 2 U.S. (2 Dall.) at 454 (opinion of Wilson, J.) (emphasis omitted).

78. *Id.*

79. *Id.* at 458 (emphasis omitted and added).

80. *Id.* at 456 (emphasis omitted).

81. *Id.* (emphasis added and omitted).

82. *Id.* at 477 (opinion of Jay, C.J.).

determined."[83] Denying individuals a right to sue a state, while allowing them to sue municipalities, "would not correspond with the equal rights we claim; with the equality we profess to admire and maintain, and with that popular sovereignty in which every citizen partakes."[84]

Neither Wilson nor Jay's individualist conception of popular sovereignty conforms to the modern notion of popular sovereignty as a purely "collective" concept. Their opinions in *Chisholm* present the radical yet fundamental idea that if anyone is sovereign, it is "We the People" as individuals, not Congress, state legislatures, or a majority of the citizenry.

I am not claiming that Wilson and Jay's conception of individual popular sovereignty stood alone at the Founding. Nor am I claiming anything about the original meaning of the Constitution to which, as Wilson observed, the term "sovereign" is "totally unknown."[85] Instead, I offer it to make sense of an approach to the "consent of the governed" that also existed at the time of the Founding—an approach that further supports the natural rights conception of constitutional legitimacy that I summarized above.

If it is the people *as individuals* who are sovereign, and the people *as individuals* retain their preexisting rights, as is affirmed in the text of the Constitution by the Ninth Amendment,[86] and if it is the case that the existing government lacks the express consent of every person, then we are faced with the issue of what the people *could have* consented to. Put another way, to the extent any government claims to be based on the consent of the governed without obtaining each person's express consent, we need to ask to what each person could be said to have consented.

B. Presumed Consent

How then do we reconcile the individual conception of popular sovereignty based on the consent of each and every person with the fact that such unanimous consent to governance is never expressly solicited and would be

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83. *Id.* at 479.

84. *Id.* at 473.

85. *Id.* at 453 (opinion of Wilson, J.) (emphasis omitted).

86. *See generally*, Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 937 (2008) [hereinafter Barnett, *Majoritarian Difficulty*] (rejecting a "collectivist" interpretation of the "rights . . . retained by the people" to which the Ninth Amendment refers); Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006) [hereinafter Barnett, *The Ninth Amendment*] ("[T]he Ninth Amendment is what it appears to be: a meaningful check on federal power and a significant guarantee of individual liberty.").

impossible to obtain? As it happens, there is an oft-overlooked answer to this question that can be found at the time of the Founding and long before. If we start with the proposition that it is the people as individuals who are sovereign, and that they retain their preexisting rights unless they are expressly delegated to their agents, then *in the absence of such express consent*, we must ask to what each person could be *presumed* to have consented.

In his 1845 book, *The Unconstitutionality of Slavery*, Lysander Spooner contended that, since the consent of the governed "exists only in theory,"[87] the people cannot be presumed to have given up their preexisting rights. "Justice is evidently the only principle that *everybody* can be presumed to agree to, in the formation of government."[88] But Spooner was far from the first to make this argument.

John Locke, in his *Second Treatise*, observed that "men when they enter into Society, give up the Equality, Liberty, and Executive Power they had in the State of Nature, into the hands of the Society, to be so far disposed of by the Legislative, as the good of the Society shall require."[89] He then considered the scope of the legislative or police power that is given up, employing an analysis very similar to Spooner's:

> [Y]et it being only with an intention in every one the better to preserve himself his Liberty and Property; (For no rational Creature *can be supposed* to change his condition with an intention to be worse) the power of the Society, or Legislative constituted by them, *can never be suppos'd* to extend farther than the common good; but is obliged to secure every ones [sic] Property, by providing against those three defects . . . that made the State of Nature so unsafe and uneasie [sic].[90]

Like Spooner, Locke asked what a "rational creature can be supposed" to have consented to, in the absence of any explicit consent, when leaving the state of nature to enter civil society. And the individual can only be supposed to

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87. LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 153 (Boston, Marsh 1845). ("Our constitutions purport to be established by 'the people,' and *in theory*, 'all the people' *consent* to such government as the constitutions authorize. But this consent of 'the people' exists only in theory. It has no existence in fact.").

88. *Id.* at 143.

89. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 353 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

90. *Id.* (emphasis omitted and added). The "three defects" to which Locke refers are the absence of standing laws, the want of an effective power to protect one's rights, and the lack of an independent and impartial magistrate to adjudicate disputes. These three defects are ameliorated by the legislative, executive, and judicial functions of government.

have consented to the common good, which consists of the protection of each person's life, liberty, and property.

This idea of "supposed" or presumed consent appears again in Attorney General Edmund Randolph's opinion on the constitutionality of a national bank. In addressing whether the power to incorporate a national bank is among the implied powers of Congress, Randolph observed that a legislature governed by a written constitution without an express "demarcation of powers, may, perhaps, *be presumed* to be left at large, as to all authority which is communicable by the people," provided that such authority "does not affect any of those paramount rights, which a free people *cannot be supposed* to confide even to their representatives."[91] Once again, given the sovereignty of the people as individuals, the people cannot "be presumed" or "supposed" to have confided in their legislature any power to violate their fundamental rights.

But perhaps the most striking use of this notion of the presumed or supposed consent of the governed appears in the 1798 Supreme Court case of *Calder v. Bull*. *Calder* has become known for its clash between Justices Samuel Chase and James Iredell. Chase's opinion is famous for its assertion of "the great first principles of the social compact" that restrict the "rightful exercise of legislative authority,"[92] and Iredell's for its far grander conception of legislative power in the absence of any express constitutional limit. Generally overlooked is the fact that, like Locke, Randolph, and Spooner, Chase too employs the notion of supposed or presumed consent.

Justice Chase begins by providing examples of laws that violate these "great first principles," such as a law "that punished a citizen for an innocent action," or "a law that destroys, or impairs, the lawful private contracts of citizens," or "a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B." He then contends that the enactment of such laws is beyond the legislative power because "it is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, *it cannot be presumed that they have done it.*"[93]

To be sure, the concept of natural justice or natural rights lurks in the background of all these considerations of "presumed consent," but only as a way of interpreting the scope of legislative power in the absence of an express consent. When combined with the concept of individual popular sovereignty,

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91. EDMUND RANDOLPH, OPINION OF EDMUND RANDOLPH, *reprinted in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 86 (M. St. Clair Clarke & D.A. Hall eds., Washington, Gales and Seaton 1832) (emphasis added).

92. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.).

93. *Id.* (emphasis added).

all these invocations of "presumed," "supposed," or "theoretical" consent cast the issue of popular sovereignty and the "consent of the governed" in a new light that supports the approach to constitutional legitimacy I present in *Restoring the Lost Constitution*.

We can separate the steps of this argument as follows:

- First, sovereignty rests not in the government, but in the people themselves considered as individuals;
- Second, to be legitimate, the government must receive the consent of all these sovereign individuals;
- Third, in the absence of express consent by each person, however, the only consent that can be attributed *to everyone* is consent only to such powers that do not violate their retained fundamental rights;
- Fourth, protecting these rights retained by the people assures that the government actually conforms to the consent it claims as the source of its just powers; finally
- Fifth, only if such protection is effective will its commands bind in conscience on the individual.

V. RECONCEIVING ARTICLE V AS A CHECK ON THE GOVERNORS

If sovereignty resides in each and every individual person, then two propositions follow:

- The sovereign people themselves never rule.
- But the sovereign people always require effective protection from those who do.

The only way to justify rule by some *subset* of the sovereign people—whether a supermajority, simple majority, majority of a group of "legislators," or a king and his court—is by providing effective assurance that the measures the rulers impose on the people as a whole do not violate the rights retained by any person or group of persons.

In short, given the ultimate sovereignty of the people, majorities and supermajorities are not the solutions to the problem of constitutional legitimacy; in a republican form of government, they *are* the problem to be solved. James Madison explained this quite clearly:

> But I confess that I do conceive, that in a government modified like this of the United States, the great danger lies rather in the abuse of the community than in the Legislative body. The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest

> danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or Legislative departments of Government, but in the body of the people, operating by the majority against the minority.[94]

In *The Federalist* No. 10, Madison famously contended that the rights retained by the people are at risk from factions, be they a minority or majority of the whole. "By a faction," he wrote, "I understand a number of citizens, whether amounting to a *majority or minority of the whole*, who are united and actuated by some common impulse of passion, or of interest, *adverse to the rights of other citizens*, or to the permanent and aggregate interests of the community."[95]

Ackerman has shown how a concerted "mobilized" majority can overcome the structural and textual barriers on the powers of Congress contained in the Constitution. However, he has not addressed why we should believe that the triumph of this mobilized majority is always, or even usually, for the best. Perhaps the ends were salutary, but were the means by which they were achieved dangerous to the rights of the minority? That question generally goes unasked, much less answered, in the *We the People* series.

True, in Volume One, Ackerman reproduces a lengthy quotation from Alexander Hamilton, writing as "Publius," on the need for judicial review to protect the "rights of individuals" and to guard against the "serious oppressions of the minor party in the community."

> [The] independence of the judge is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.[96]

And he also includes this passage from Hamilton on how the Constitution is to be properly changed:

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94. 1 DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 437 (photo. reprint 2003) (Joseph Gales ed., 1834).

95. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

96. ACKERMAN, FOUNDATIONS, *supra* note 4, at 193 (quoting THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

> Until the people by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act.[97]

Seemingly accepting the need for this judicial fidelity to the written Constitution, Ackerman responds that Hamilton "does not say that the judges should resist until the transformative movement satisfies all the *legal rules* for constitutional amendment that are contained in his new Constitution."[98] Rather, he "leaves open the relationship between these new rules and the kinds of 'solemn and authoritative' action that should convince the judges."[99] Really?

I confess this strikes me as an informal amendment of what Publius is actually saying, one that elides the fundamental difference between extra-legal regime change and modifications of the existing regime, which I discussed at the beginning of this essay. Be this as it may, when invoking Hamilton's assertion of judicial fidelity to the written Constitution as the guardian of individual rights and the interests of minorities, Ackerman undermines this protection by expanding the ways a concerted majority can overcome the constitutional constraints upon it without addressing the impact for individual rights of this expanded assertion of majoritarian power.

Just before the lengthy passage from *The Federalist* No. 78 that Ackerman quotes, Hamilton affirms that "the courts of justice are to be considered as the bulwarks of a *limited Constitution* against legislative encroachments."[100] Yet, put simply, the entire object of these three volumes is to legitimize permanent judicial acquiescence to assertions of congressional power that exceed the textual limits of the written Constitution, either by claiming the existence of a constitutional "revolution" or an informal constitutional "amendment" by "We the People." None of his case for such change addresses the concerns for individual rights or the rights of the minority that a written constitution is enacted to protect and that Hamilton says the independent judiciary is tasked with enforcing.

Nor can Ackerman defend his informal amendment process as merely providing an alternative appeal to "the solemn and authoritative" judgment of

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97. *Id.* (quoting same).

98. *Id.* at 195.

99. *Id.*

100. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

"the people themselves" that is provided by the written Constitution itself. After all, Article V does not purport to appeal to "We the People." Instead it provides two alternative ways by which amendments proposed by a supermajority of Congress (or state conventions) can be ratified: by a supermajority of three-quarters of state legislatures, or by three-quarters of state conventions. Only the latter can be conceived, somewhat fictitiously, as the voice of the people themselves.[101] Although the Constitution itself was submitted for ratification to conventions in each of the states, the Constitution can be amended by a combination of Congress and state legislatures, not the people themselves.

Viewed in this light, Article V is not a way for the people "to speak."[102] Instead it can be more realistically viewed as yet another prudential "check" on government power, by recognizing a power in a *different subset* of the people than the one seeking to expand or modify its grant of power. If a written constitution provides the laws that govern those who govern the sovereign people, then the governors cannot on their own—even in combination with each other—safely be entrusted with the power to change the rules by which they govern the people. That power of change must reside in some other hopefully competitive body, like those of elected state legislatures.

Ackerman's informal amendment procedures simply cannot claim greater legitimacy than the Article V procedures he seeks to supplement. Indeed, to override Article V's countermajoritarian constraint on the will of the majority of the People, Ackerman appeals to the majority itself. In this, he misconceives the nature of popular sovereignty that includes each and every fellow citizen and joint-sovereign, and the purpose and function of Article V in safeguarding that sovereignty.

This is not to say that Article V may not make amending the Constitution too difficult, which it may well do. But however the amendment process should be reformed, any new procedures should be debated and then implemented openly by means of a written text that, like the existing Article V, satisfies the evidentiary, cautionary, channeling, and clarifying functions of formality.[103]

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101. *See* MORGAN, *supra* note 46, at 91 ("[T]he idea of an elected convention that would express enduring popular will in fundamental constitutions superior to government was a viable way of making popular creation and limitation of government believable.").

102. *Cf.* ACKERMAN, CIVIL RIGHTS, *supra* note 1, at 329 ("Scalia and Thomas suppose that Article V provides the *only* way that We the People can speak, and I reject their hyper-formalism as historically unjustified.").

103. *See* supra notes 30-31 and accompanying text.

CONCLUSION

In his series of fascinating and learned books, Bruce Ackerman has claimed that "We the People" are the sovereign. On that we can agree. He also claims that "We the People" can legitimately rule by speaking informally in the various ways he takes pains to describe. But this normative claim is not clearly specified, and is subject to several fundamental criticisms. It fails to appreciate the protection afforded to the rights retained by the people by formal constraints on powers. And it fails to offer any normative justification for rule by a politically mobilized faction. Upon closer inspection, Ackerman fails to present or sustain a normative argument for why a supermajority can legitimately override the text of the written Constitution that was put in place to protect "We the People," each and every one.

POSTSCRIPT

In his remarks for this Symposium, Professor Ackerman graciously responded to some of the criticisms of his project I make here, as well as offering his own criticisms of the conception of individual popular sovereignty and presumed consent that I propose. Ackerman writes:

> Professor Barnett's appeal to *Chisholm* is flatly inconsistent with his originalist commitment to textualism. However inspiring he may find the opinions of Jay and Wilson, Americans of the Founding era emphatically disagreed. It took them only one year to mobilize in Congress and the states to enact the Eleventh Amendment, which repudiated *Chisholm* and propelled the Constitution in a different direction. . . . Interpreting popular sovereignty on the basis of *Chisholm* is like interpreting citizenship on the basis of *Dred Scott*. Professor Barnett must choose: either he is a textual originalist *or* he is an advocate of social contract theory. But not both.[104]

In his reply to critics, Professor Ackerman rightly emphasizes that some of the criticisms advanced against his latest book were addressed in earlier volumes. In my discussion of *Chisholm* above, I similarly neglected to refer the reader to where I had previously considered and rejected the claim that the Eleventh Amendment "repudiated" the individualist conception of popular sovereignty articulated in *Chisholm*.[105] In this Postscript, I do not present a full

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104. Bruce Ackerman, *De-Schooling Constitutional Law*, 123 YALE L. J. 3104, 3106 (2014).

105. *See* Barnett, *supra* note 74, at 1741-55 (discussing "why the Eleventh Amendment did not

defense of my views but seek instead to clarify just two points: (1) the Eleventh Amendment's relationship to *Chisholm*, and (2) the relationship of my invocation of individual popular sovereignty to originalism.

Did the Eleventh Amendment "Repudiate" Chisholm?

By invoking the Eleventh Amendment in response to my discussion of the conception of popular sovereignty in *Chisholm*, Ackerman has waded into deep and treacherous waters. In his reply, Ackerman is claiming that the highly technical language of the Eleventh Amendment construing Article III's state citizen diversity[106] should be read as a repudiation of the idea expressed in *Chisholm* that the people as individuals are sovereign. He offers no evidence whatsoever that the Amendment was so read at the time, and this reading of the text itself is so implausible as to border on absurdity. Indeed, if the Eleventh Amendment's partial protection of state immunity from lawsuits in federal court really did replace the sovereignty of "We the People" with a state-based conception of sovereignty, the implications for Ackerman's own theory would be devastating.

Subtleties matter when considering the relationship of the Eleventh Amendment to the Justices' seriatim opinions *Chisholm*. For a start, we must carefully distinguish between two distinct positions. The first is the claim that the Court in *Chisholm* had incorrectly interpreted the original meaning of Article III and that, therefore, the Eleventh Amendment *restored* that original meaning. The second is that *Chisholm* was a correct interpretation of Article III and that, therefore, the Eleventh Amendment *changed* or qualified that original meaning.

Ackerman is unclear whether he thinks the Eleventh Amendment changed or restored the original meaning of the text: "It took [Americans of the Founding era] only one year to mobilize in Congress and the states to enact the Eleventh Amendment, which repudiated *Chisholm* and *propelled the Constitution in a different direction.*"[107] Does this mean that the Eleventh Amendment took *the Constitution* in a different direction (change), or that the Eleventh Amendment took "the Constitution" of the Supreme Court in a different direction (restoration)? He does not say which. At moments like this, it is useful to be able to distinguish the meaning of "the Constitution" itself from

repudiate *Chisholm*'s approach to popular sovereignty").

106. *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

107. Ackerman, *supra* note 104, at 3106 (emphasis added).

the constitutional law of the Supreme Court, but Ackerman's project elides this distinction, and here it shows.

Then there is a second subtlety: Whether it was a restoration or a modification of the original meaning of Article III, did the original meaning of the Eleventh Amendment "repudiate" the principle of individual popular sovereignty announced in *Chisholm* in favor of a general unwritten principle of state sovereignty or, perhaps more narrowly, state sovereign immunity? Or did it instead merely do what it says and nothing more: insulate a state from suits in federal court by citizens of other states and of foreign nations. While the latter, far narrower proposition has been endorsed by a broad swath of ideologically and methodologically diverse Eleventh Amendment scholars,[108] Ackerman is apparently endorsing the first of these readings.

As it happens, however, Chief Justice John Marshall did not agree. In a little-noted passage of his opinion in *Fletcher v. Peck*,[109] some twenty years after the Eleventh Amendment was adopted, he observed: "The constitution, *as passed*, gave the courts of the United States jurisdiction in suits brought against individual states. A state, then, which violated its own contract was suable in the courts of the United States for that violation."[110] Marshall then concluded that, although "[*t*]*his feature is no longer found in the constitution,*" it nevertheless still "aids in the construction of those clauses with which it was originally associated."[111] In other words, according to John Marshall, *Chisholm* was a faithful interpretation of the original meaning of the Constitution at the time it was decided, and remained a correct reading of the general principles of our

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108. *See, e.g.*, Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines* (pt. 1), 126 U. PA. L. REV. 515, 515 (1978) (arguing that "sovereign immunity is a common law doctrine[] and not constitutionally compelled"); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983) (arguing that the Amendment does not cover federal question or admiralty jurisdiction); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983) (arguing from a historical standpoint that the Amendment's passage was primarily secured as part of a bargain to enforce the Treaty of Paris); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 1010 (2000) (arguing that "sovereign immunity is in some respects unjust" and that "the adoption of the narrowly worded Eleventh Amendment need not be understood to have endorsed that injustice as a general proposition"); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998) (arguing that the Amendment represented a compromise on fiscal policy between the states and the federal government).

109. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

110. *Id.* at 139 (emphasis added).

111. *Id.* (emphasis added).

political institutions even after the text was amended to carve out a limited immunity for states.

Given that Ackerman plays the *Dred Scott* card,[112] it is ironic that he endorses the reading of the Eleventh Amendment that was first adopted by the same shameful post-Reconstruction Supreme Court that gutted the Republican's revolutionary formal amendments. For it was not until the 1890 case of *Hans v. Louisiana*,[113] decided just six years before *Plessy v. Ferguson*,[114] that the Supreme Court first took the position that the Eleventh Amendment had repudiated its own decision in *Chisholm*. Like Ackerman, the Court in *Hans* asserted that the views of state sovereignty articulated by Justice Iredell in his solo dissent in *Chisholm* "were clearly right,—as the people of the United States in their sovereign capacity subsequently decided"[115] when they enacted the Eleventh Amendment.

This position was then reaffirmed and extended by the Rehnquist Court in *Seminole Tribe of Florida v. Florida*.[116] In his opinion in *Seminole Tribe*, Chief Justice Rehnquist explained the progeny of *Hans*: "Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand *not so much for what it says*, but for the presupposition . . . which it confirms.'"[117] Like Ackerman, Chief Justice Rehnquist excoriated the dissent for "relying upon the now-discredited decision in *Chisholm v. Georgia*."[118]

Not only does the text itself not support the conclusion that the Eleventh Amendment repudiated *Chisholm*'s view of popular sovereignty, but to reach its conclusion, the Supreme Court also needed to reject arguments based on the text:

> The dissent's lengthy analysis of the text of the Eleventh Amendment is directed at a straw man—we long have recognized that blind reliance

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112. *See* Ackerman, *supra* note 104, at 3106 ("There are only two other times in American history when a Supreme Court judgment has been self-consciously repudiated by formal amendment: the Fourteenth rejected *Dred Scott*; the Sixteenth, the *Income Tax Cases*. Interpreting popular sovereignty on the basis of *Chisholm* is like interpreting citizenship on the basis of *Dred Scott*.").

113. 134 U.S. 1 (1890).

114. 163 U.S. 537 (1896).

115. *Hans*, 134 U.S. at 14.

116. 517 U.S. 44 (1996).

117. *Id.* at 54. (emphasis added) (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991)).

118. *Id.* at 68.

> upon the text of the Eleventh Amendment is [quoting *Hans*] "to strain the Constitution and the law to a construction never imagined or dreamed of." The text dealt in terms only with the problem presented by the decision in *Chisholm* . . . .[119]

The Court's modern Eleventh Amendment doctrine, seemingly endorsed by Ackerman as the original meaning of the Constitution, rests not on the literal text of the Amendment, but rather on what the Court claims to be its unwritten underlying "presupposition."[120]

To establish this unwritten principle, the Court in both *Hans* and *Seminole Tribe* employed the now-generally-rejected approach to originalism that is based on the original intentions of the framers or ratifiers, rather than upon the original public meaning of the text that was adopted.[121] Justice Bradley's opinion in *Hans* exemplifies a typical feature of original intent Proto-Originalism: its reliance on the counterfactual hypothetical intentions of the framers rather than on historical evidence of textual meaning.

> *Can we suppose that*, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? *Suppose* that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States can we imagine that it would have been

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119. *Id.* at 69 (citation omitted) (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 326 (1934) (quoting *Hans*, 134 U.S. at 15)).

120. *Id.* at 54; *see also Monaco*, 292 U.S. at 322 ("Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control."); Pennsylvania v. Union Gas Co., 491 U.S. 1, 37 (1989) (Scalia, J., dissenting) ("*Hans* was not expressing some narrow objection to the particular federal power by which Louisiana had been haled into court, but was rather enunciating a fundamental principle of federalism, evidenced by the Eleventh Amendment, that the States retained their sovereign prerogative of immunity."). *Seminole Tribe* reversed *Union Gas*. *Seminole Tribe*, 517 U.S. at 66 ("We feel bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled.").

121. Lawrence Solum has recently characterized the approach relying on the intentions of the framers or ratifiers as "Proto-Originalism," as it preceded the rise of a self-conscious "originalist" movement and was superseded by original public meaning originalism as early as the 1980s. *See* Solum, *supra* note 35, at 462-64.

> adopted by the States? *The supposition* that it would is almost an absurdity on its face.[122]

Even before I was an originalist, I dubbed this technique, "channeling" the framers.[123]

Which leads to a second irony of Professor Ackerman's invocation of *Dred Scott*. By appealing to the principles, "presuppositions" or "postulates" allegedly held by the relevant drafters or ratifiers to override the public meaning of the text itself, the Court in *Hans* employed the same type of hypothetical original intent reasoning used by Chief Justice Taney in *Dred Scott* when he interpreted the meaning of "the People" in the Preamble and in the Declaration of Independence.

> *It cannot be supposed* that [the State sovereignties] intended to secure to [free blacks] rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion. More especially, *it cannot be believed* that the large slaveholding States regarded them as included in the word citizens, or *would have consented* to a Constitution which might compel them to receive them in that character from another State.[124]

This use of hypothetical original intent to narrow the meaning of the text of the Reconstruction Amendments later became a favorite technique of the Reconstruction Era Supreme Court, beginning as early as *The Slaughter-House Cases*.[125]

Why I Was Not Making an Originalist Argument About Popular Sovereignty

Regardless of whether the individualist conception of popular sovereignty expressed by Chief Justice Jay and Justice Wilson in *Chisholm v. Georgia* was somehow repudiated by the Eleventh Amendment, as I noted above,[126] by invoking their opinions I was not myself making an originalist argument. That

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122. *Hans*, 134 U.S. at 15 (emphasis added).

123. *See* Randy E. Barnett, *The Relevance of Framers' Intent*, 19 HARV. J.L. & PUB. POL'Y 403, 405 (1996).

124. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 416 (1857) (emphasis added).

125. 83 U.S. (16 Wall.) 36, 71-72, 74, 77-78 (1873).

126. *See supra* note 85 and accompanying text ("I am not claiming that Wilson and Jay's conception of individual popular sovereignty stood alone at the Founding. Nor am I claiming anything about the original meaning of the Constitution to which, as Wilson observed, the term 'sovereign' is 'totally unknown.'").

is, I was not claiming that the individualist conception of popular sovereignty was somehow to be found in the communicative content of the text of the Constitution. Instead, I was making a normative argument about the conditions of establishing constitutional legitimacy. Or, more precisely, I was responding to the implicit normative argument made by Ackerman when he invokes the higher-lawmaking power of a super-majority of "We the People."

Rather than alleging the consent of majorities, super-majorities, or states, I proposed using the "presumed consent" of individuals to reconcile the assertion in the Declaration of Independence that governments are instituted "to secure these" pre-existing individual, natural, and inalienable rights retained by the people with its assertion that such governments "deriv[e] their just powers" from "the consent of the governed."[127] The individualist conception of popular sovereignty articulated by Jay and Wilson reduces the tension between these two claims in a manner that today's exclusive focus on collective popular sovereignty conceals.

I then proposed that—as explained by Justice Chase in *Calder*, as well as by Locke, Edmond Randolph, and Lysander Spooner[128]—there are legislative powers to which *it cannot be presumed* that each and every person has consented, even if a majority or supermajority of the people so approve. The existence of the individual natural and inalienable rights retained by the people undercuts any claim that "the People," considered as individuals, impliedly consented to a legislative power to violate these rights.

But this is not an originalist argument. This is an argument about how to construe the scope of nontextual constitutional powers in a way that enhances constitutional legitimacy, by which I mean whether laws that are imposed on a *nonconsenting* individual by a given constitutional order are binding in conscience on that individual.[129] It would be bootstrapping to claim that the constitutional order established by the Founders' Constitution was legitimate because it comported with the Founders' own conception of legitimacy based on their allegedly collective conception of popular sovereignty.

It is true that, for over twenty-five years and beginning well before I myself was an originalist, I have contended that the original meaning of the "rights . . . retained by the people"[130] in the Ninth Amendment was a reference to individual, natural, liberty rights and that, as a matter of positive constitutional

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

128. *See supra* notes 87-93 and accompanying text.

129. *See* BARNETT, *supra* note 46, at 32-52 (discussing constitutional legitimacy without consent).

130. U.S. CONST. amend. IX.

law, such rights should not be denied or disparaged.[131] But, while the normative claim that the legal order established by the Constitution is (or is not) legitimate must begin with the Constitution's positive meaning, which I maintain is its original meaning, it cannot end there. In short, I never naively "base [my] preference for Locke on the ground that the *Second Treatise* influenced some leading Founders."[132]

For this reason, Ackerman's characterization of my position as a "rejection of originalism"[133] is a gross distortion. Unsurprisingly, I remain fully committed to originalism but argue, as I always have, for the legitimacy of the originalist constitutional order on normative grounds. The opinions in *Chisholm v. Georgia* demonstrate that individual popular sovereignty is deeply rooted in our constitutional tradition, but the normative legitimacy of the constitutional order must be supported by reasons that we can affirm here and now.

As I have written, "if the original meaning of the Constitution is not 'good enough,' then originalism is not warranted because the Constitution is itself defective and illegitimate. This represents a rejection of the Constitution, not a rejection of originalism per se."[134] At the same time, I also insisted that "[s]hort of making the claim of illegitimacy, however, we are bound to respect the original meaning of a text, not by the dead hand of the past, but because we today—right here, right now—profess our commitment to this written Constitution, and original meaning interpretation follows naturally from this commitment."[135]

Nor do I offer a social contractarian normative defense of the natural rights retained by the people. Instead, I defend them at length on the ground that they are necessary to address the fundamental social problems of knowledge, interest, and power—problems that must somehow be addressed if persons are

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131. *See, e.g.*, Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 11, 27-32 (1988) (contending that the Founders' belief in natural rights should color our interpretation of Ninth Amendment even if we reject their stance); Barnett, *Ninth Amendment*, *supra* note 86, at 10-82 (identifying five models of the Ninth Amendment's original meaning, and evaluating each in light of the available evidence); Barnett, *Majoritarian Difficulty*, *supra* note 86, at 950-60 (connecting the original public meaning of the Ninth Amendment with the individualist conception of popular sovereignty); Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 622-25 (2009) (responding to the argument that the Ninth Amendment is merely a rule of construction).

132. Ackerman, *supra* note 104, at 3106.

133. *Id.* at 3106 n.9.

134. BARNETT, *supra* note 46, at 113.

135. *Id.* at 114.

to pursue happiness while living in society with each other.[136] My use of "contractarian" reasoning here and elsewhere is simply responsive to the commonplace claim that "the People" have somehow collectively, via a majoritarian decision-making process, "consented" to bind everyone.[137] To this, I reply, "not so fast."

Indeed, it appears to be Ackerman who is invoking the authority of the Founders to establish the legitimacy of his collective conception of popular sovereignty. "Once Professor Barnett abandons his ahistorical appeal to John Locke," he chides, "his commitment to the original understanding requires him to consider whether my blow-by-blow description of these latter-day transformations satisfies *the principles of popular sovereignty established at the Founding*."[138]

Ackerman is right that my "appeal to John Locke" is "ahistorical" insofar as a Lockean conception of natural rights (among others) contributes to our normative assessment of the legitimacy of the Constitution.[139] But what Ackerman then dismisses as "[o]ur philosophical disagreement[]"[140] about the normative legitimacy of the constitution simply cannot be obviated by appeals to history. At some point, constitutional theorists who make claims about constitutional legitimacy must either offer cogent normative arguments, which I acknowledge is demanding, or at least candidly admit their normative assumptions for their audience to judge.

In the end, in his monumental *We the People* series of books, Ackerman may or may not be describing accurately the positive constitutional law of informal constitutional change outside of Article V. For reasons given above, I say "nay." But even Bruce Ackerman cannot derive a normative "ought" from a historical "is," no matter how many volumes he writes.

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136. *See* BARNETT, *supra* note 70.

137. And, given what I have discovered, in recent years I have become increasingly skeptical of historical claims that the Founders' "republicanism" was collective or proto-socialist rather than basically individualist or liberal. Supreme Court Justices make arguments they expect to resonate with their audience, which says something about the audience as well as the Justice. But I am not in a position to prove that historical narrative wrong, which is why I sound this note in a footnote and not in the text.

138. Ackerman, *supra* note 104, at 3110 (emphasis added).

139. On the other hand, it is historical insofar as it helps identify the original meaning of the "rights . . . retained by the people." U.S. CONST. amend. IX.

140. Ackerman, *supra* note 104, at 3108.

