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Book Review: Responding to Imperfection: The Theory and Practice of Constitutional Amendment. Edited by Sanford Levinson.

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BOOK REVIEW

RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT.[1] Edited by Sanford Levinson.[2] Princeton, N.J.: Princeton University Press. 1995. Pp. ix, 330. Cloth, $59.50; paper, $18.95.

Eric Grant[3]

In this collection of essays, Sanford Levinson has brought together an impressive group of constitutional theorists and political scientists to discuss the theory and practice of amending constitutions. Nine of the volume's thirteen contributions are original, and even the four previously published works are useful abridgements of valuable scholarship.[4] In the following pages, I will discuss in detail a group of four essays that consider whether the United States Constitution may legitimately be amended outside of Article V.[5] Before doing that, however, I will briefly

1. This volume consists of the following essays: Sanford Levinson, *Introduction: Imperfection and Amendability*; Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change*; Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*; Bruce Ackerman, *Higher Lawmaking*; Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*; David R. Dow, *The Plain Meaning of Article V*; Frederick Schauer, *Amending the Presuppositions of a Constitution*; Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*; John R. Vile, *The Case against Implicit Limits on the Constitutional Amending Process*; Mark E. Brandon, *The "Original" Thirteenth Amendment and the Limits to Formal Constitutional Change*; Donald S. Lutz, *Toward a Theory of Constitutional Amendment*; Stephen Holmes and Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*; Noam J. Zohar, *Midrash: Amendment through the Molding of Meaning*; *Appendix: Amending Provisions of Selected New Constitutions in Eastern Europe*. See pp. vii-viii.

2. W. St. John Garwood and W. St. John Garwood Jr. Regents Chair in Law, University of Texas.

3. Associate, Jones, Day, Reavis & Pogue, Washington, D.C.

4. The essays by Professors Levinson, Amar, Dow, and Vile in Chapters Two, Five, Six, and Nine, respectively, are based on previous works. See pp. 13, 89, 117, 191.

5. Article V provides:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for pro-

summarize the remaining essays in the hope of whetting your appetite for the entire volume.

In his introductory essay, Levinson puts forward "the distinction between what might be termed 'ordinary' change within a legal system that is the result of standard-form interpretation of the relevant materials within that system and a special kind of change that we call 'amendment' " (p. 7), which he describes loosely as "a genuine change not immanent within the preexisting materials" (p. 21). Subsequent essays by Levinson and Stephen M. Griffin draw on this distinction to consider whether the United States Constitution has been "amended" *apart from* what Levinson calls the "explicit textual additions" (p. 25) that begin with "Amendment I" and end with "Amendment XXVII." In other words, they consider, as a historical matter, whether Article V has served as the exclusive method of bringing about constitutional amendment. One can guess what the answer is, and Griffin obligingly puts it bluntly: "The crucial constitutional fact of the twentieth century is that all significant change in the structure of the national government after the New Deal occurred through non-Article V means" (p. 51).

Three essays by Walter F. Murphy, John R. Vile, and Mark E. Brandon address another kind of exclusivity—the exclusivity of Article V's restrictions on the *substance* of amendments. Recall that Article V explicitly prohibits any amendment that would authorize Congress to ban the importation of slaves prior to 1808 or would deprive states of equal suffrage in the Senate without their consent. As Vile notes, these "two entrenchment clauses . . . lead logically to the question of whether there are any *implicit* limits on the constitutional amending process" (p. 191, emphasis added). Vile himself makes the case against such limits, responding to arguments by (among others) Murphy, who contributes a contrary answer. Brandon usefully surveys the various approaches to implicit limits by asking how each would treat the

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posing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's [sic] equal Suffrage in the Senate.

As Levinson notes in his introductory essay, the "internal" structure of Article V raises a number of fascinating questions regarding ratification, constitutional conventions, etc. See generally Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 Yale L.J. 677 (1993). These questions are not addressed in *Responding to Imperfection*.

Corwin Amendment, an 1861 proposal that intended to perpetuate slavery by amending Article V to preclude the adoption of any subsequent amendments authorizing Congress to abolish or interfere with the "domestic institutions" of the states.[6]

The final three essays in *Responding to Imperfection* might be described as "comparative" analyses of the amending process. Donald S. Lutz presents a fascinating empirical study of the formal amendment of state and foreign constitutions.[7] Stephen Holmes and Cass R. Sunstein analyze the politics of constitutional revision in Eastern Europe. For the new democracies emerging from Communist tyranny, they prescribe a regime that "sets relatively lax conditions for amendment, keeps unamendable provisions to a minimal core of basic rights and institutions, and usually allows the process to be monopolized by parliament, without any obligatory recourse to popular referenda" (p. 275). Finally, Noam J. Zohar considers the problems of interpretation and amendment in the context of Jewish law (the Halakha). He poses the provocative question, "How can anyone purport to 'amend' divine revelation?" (p. 307). His essay describes how the sages of classical Judaism conceived of a vehicle (Midrash) to do so. The result: "The text is eternally fixed; but its meaning is ultimately fluid" (p. 318). Midrash thus appears to illustrate one of Lutz's empirical propositions: "[a] relatively difficult [formal] amendment process will tend to be associated with a broad theory of judicial construction" (p. 273).

I have canvassed the foregoing essays in order to give some flavor of the variety of analyses presented in this volume. I want to turn now to the remaining four essays, contributed by Bruce Ackerman, Akhil Reed Amar, David R. Dow, and Frederick

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6. The lame-duck Thirty-Sixth Congress, already lacking Senators and Representatives from the seven Deep South states that had seceded, proposed the Corwin Amendment to the states on March 2, 1861. President Lincoln gave his support to the amendment in his First Inaugural Address; indeed, Lincoln personally signed the joint resolution, the only President to do so. Just three states ratified the Corwin Amendment, which in any event became moot upon ratification of the Thirteenth Amendment in 1865. See pp. 218-19.

7. Lutz's essay is excellent in all respects but one. Arguing that "the U.S. Constitution is unusually, and probably excessively, difficult to amend," Lutz suggests that we should (among other alternatives) "reduce the number of states required for amendment ratification to two-thirds (from three-fourths), which would . . . roughly triple the amendment rate" (p. 265). This is a historically testable hypothesis, and it tests false: only six amendments have been submitted to the states but not ratified by the necessary three-fourths. See 1-6 U.S.C. lxviii-lxix (1994). At least two of the proposed amendments—the Corwin Amendment discussed in note 6 above and the Child Labor Amendment—failed to garner ratification by even two-thirds of the states. At most, therefore, only four additional amendments conceivably would have been ratified under Lutz's proposed rule, a far cry from the 54 predicted by his hypothesis.

Schauer. Each looks at Article V from a theoretical perspective: as a *legal* matter, does (should) Article V constitute the exclusive mechanism for amending the United States Constitution?

I

It is useful to begin with Schauer's contribution in Chapter Seven, because it illuminates the debate and provides an insightful framework for analyzing *Responding to Imperfection*'s three other answers to this question. In "Amending the Presuppositions of a Constitution," Schauer observes that "most existing treatments of the process of constitutional amendment . . . are *internal* to the constitution itself. They take a constitution's own provisions . . . as the sole source of legitimate amendment" (p. 146). Applying such "internalist" analysis to the United States Constitution, Schauer makes short work of ascertaining the legitimate methods of amendment: "the Constitution is most easily read as implying that its own specified conditions for valid amendment are to be treated as exclusive" (p. 146). Thus, while acknowledging that these conditions for amendment do not specify their own exclusivity, Schauer believes that "any fair literal reading of the text of Article V produces the conclusion that nothing *in* the Constitution textually authorizes methods of amendment other than the two alternative procedures established in Article V itself" (pp. 146-47).

In this conclusion, Schauer joins the Article V "exclusivists," who are represented in *Responding to Imperfection* by David R. Dow's contribution in Chapter Six, "The Plain Meaning of Article V."[8] Opposed to them are the "nonexclusivists," who (in Schauer's words) undertake "heroic efforts to explain either how other provisions of the Constitution might also allow amendment in different ways, or how different readings of Article V itself might suggest a broader conception of what it takes to amend the Constitution" (p. 147). The (in)famous theses of Bruce Ackerman and Akhil Reed Amar represent this camp in Chapters Four and Five, respectively.[9]

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8. Dow states that his essay is a substantially abridged (and slightly revised) version of his article, *When Words Mean What We Believe They Say: The Case of Article V*, 76 Iowa L. Rev. 1 (1990). P. 117. See generally infra Part II.

9. Ackerman states that his essay will serve, in modified form, as the first chapter his forthcoming book, *We the People: Transformations* (Harv. U. Press, 1996). P. 69 n.3. This continues a project that includes *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013 (1984); *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453 (1989); and *We the People: Foundations* (Harv. U. Press, 1991). See generally infra Part III.

Amar states that his essay is a highly abridged version of a lecture he published as *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L.

But notwithstanding his own exclusivist leanings, Schauer is not concerned to settle the dispute between the exclusivists and the nonexclusivists. Rather, he dismisses the disputants' shared premise that "the internal resources of the Constitution . . . provide the only or most appropriate way of thinking about the process of constitutional change" (p. 147). Arguing instead for an "external" focus, Schauer concludes that "constitutions can and do change not only when they are amended according to their own provisions or their own history . . . , but whenever there is a change in [their] underlying presuppositions—political and social, but decidedly not constitutional or legal" (p. 148).

Schauer reaches this conclusion in a somewhat roundabout way. First, he asks us to consider what it is that makes a constitution "valid." Upon reflection, one must agree with Schauer that nothing *in* a constitution can give that constitution validity—that is, a constitution cannot supply its own grounding.[10] Schauer argues that "constitutions rest on logically antecedent presuppositions that give them their constitutional status" (pp. 147-48). These presuppositions, which are political and social, make up what Schauer calls the "ultimate rule of recognition" (borrowing from H.L.A. Hart), or more succinctly, the "*Grundnorm*" (borrowing from Hans Kelsen).[11] To determine the validity of a con-

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Rev. 457 (1994). P. 89. This amplified his earlier work, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988). See generally infra Part IV.

Ackerman and Amar together form "what might be called the "Yale school" of constitutional interpretation': that the Constitution may be amended by means other than the cumbersome and constraining procedures set out in Article V." Charles Fried, *The Supreme Court, 1994 Term—Foreword: Revolutions?*, 109 Harv. L. Rev. 13, 28 (1995) (footnote omitted) (quoting Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1246 (1995)). Citing *Responding to Imperfection* by name, Justice Fried discusses many of the same issues considered herein. See id. at 24 n.61, 24-33.

10. Schauer humorously illustrates this point by offering a self-framed document entitled, "The Constitution of the United States of America." In six brief "Articles," Schauer's United States Constitution grants all legislative, executive, and judicial powers over the territory of the United States to Schauer himself or to his appointees. Article VI of Schauer's United States Constitution, like Article VII of the "real" United States Constitution, specifies the conditions for its establishment: "This Constitution shall be established and in force upon signing by the individual named in Article I [i.e., Frederick Schauer]." As one might expect, the document does bear Schauer's signature.

Is Schauer's self-described "silly collection of words" *the* Constitution of the United States, to the exclusion of the document found in the National Archives? If it is not, Schauer argues, "[w]e know this not because of anything internal to one document or the other, because internally they are equally valid." Rather, as explained in the text, our certainty that Schauer's document lacks any pretense to validity is based on "what we know empirically and factually about the world." See pp. 152-53.

11. Schauer draws mainly on H.L.A. Hart, *The Concept of Law* (Clarendon Press, 1961), especially pp. 97-114, 245-47, and Hans Kelsen, *General Theory of Law and State*

stitution, then, one should measure it against a society's *Grundnorm.*

Although Schauer is less than precise in defining and explaining his concepts, one can infer the following from his essay: The *Grundnorm* is the set of "ultimate" legal norms by which all other sources of law in a society are judged as valid or not; its own "legal" validity is presupposed or hypothesized.[12] The existence and content of the *Grundnorm* "is a matter of social fact, and so determining it is for empirical investigation rather than legal analysis" (p. 150). Such investigation most fruitfully focuses on "practice"—whether or not a particular norm has been accepted by the people, by their officials, and by judges in particular. Consider, for example, the dilemma that arises when a revolutionary movement attempts to substitute a new constitution for an old one: one might ask, which constitution is the valid one? Yet this, says Schauer, "is a question that the internal resources of neither the old nor the new constitutions can answer." Rather, "[t]he fact of constitutional displacement is just that—a fact," because the choice between the two constitutions is a "social choice," not a legal one (p. 154).

Complete substitution of a later constitution for an earlier one, or "total constitutional displacement," frames the preceding question in its starkest form. Schauer argues, however, that "the essential point about the externality (to a constitution) of the determination of constitutional change applies equally to partial displacement" (p. 155).[13] Thus, "the constitution" according to the *Grundnorm* need not be something written at one time, for a written constitution can be partially displaced by changes in the (unwritten) *Grundnorm.* Schauer then takes the final step: "If partial displacement can take place outside of the 'primary' written constitution, then so too can partial 'supplementation' take place outside of the written constitution" (p. 156). In countries

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(Anders Wedburg trans.) (Russell & Russell, 1961), especially pp. 115-36. While borrowing their terms, Schauer self-consciously departs from the analyses of Hart and Kelsen in significant respects. See pp. 149-51, 155-56.

12. Schauer concedes that "we might still use the word *valid* to refer to some [non-legal] norm system, such as a moral one" (p. 150).

13. Schauer posits the example of a country divided between the partisans of Constitution A (containing structure of government provisions in part A.1 and a bill of rights in part A.2) and the partisans of Constitution B (comprising analogous parts B.1 and B.2). If the struggling forces were to agree, with widespread public support, that the country should henceforth be governed by a combination of the constitutions, namely, part A.1 together with part B.2, "the content of the ultimate rule of recognition would be such that it then recognized as the supreme law this combination of A.1 and B.2." Accordingly, "the correct answer to the question 'What *is* the constitution?' would be 'the combination of A.1 and B.2.' " See p. 155.

that have a single document called "the Constitution," observes Schauer, the *Grundnorm* is more-or-less built around that document but is not necessarily congruent with it. The *Grundnorm* of the United States, for example, most likely "refuse[s] to recognize parts of the written Constitution of 1787 as valid law, and most certainly recognizes as valid law sources of law not traceable to or through the Constitution of 1787."[14]

In Schauer's view, therefore, it is "necessarily the case that constitutions [here he uses the word loosely to mean ultimate rules] are always subject to amendment by changes—amendments—in the practices of a citizenry, in the practices of its officials, and in the practices of its judges" (p. 161). If this is true, whether the supermajoritarian process set forth in Article V constitutes the exclusive mechanism for amending the document in the National Archives called the United States Constitution is not an interesting question. We should ask instead whether that supermajoritarian process constitutes the exclusive mechanism for amending the United States *Grundnorm.* And this latter question, says Schauer, "will be a question of social and political fact and not a question of law, constitutional or otherwise" (p. 161).

II

I would like now to consider the three related contributions to *Responding to Imperfection* in light of Schauer's construct. Beginning with the proposition that Article V "is an example of . . . [a] text the meaning of which is essentially clear" (p. 117), David Dow advances the exclusivist thesis that "the mechanism outlined in Article V clearly and unequivocally sets out an exclusive mode of constitutional amendment" (p. 118). Some of

14. P. 156 (citing Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 Mich. L. Rev. 621 (1987)). Schauer hints that the Second Amendment is one part of our written Constitution no longer recognized as valid. See p. 157. I would nominate the Contracts Clause. See U.S. Const. art. I, § 10, cl. 1 (forbidding states to "pass any . . . Law impairing the Obligation of Contracts"); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

In his introductory essay, Levinson suggests that the following legal norm is recognized as valid despite its absence from (and necessary conflict with) the Constitution of 1787: "Congress may pass any regulation it believes conducive to the national health, safety, or welfare so long as the conduct regulated has any link whatsoever with 'interstate commerce' " (pp. 7-8). Since Levinson's suggestion, however, the Supreme Court has decided *United States v. Lopez*, 115 S. Ct. 1624 (1995), which struck down, as beyond the enumerated powers of Congress, a statute criminalizing the possession of firearms within 1000 feet of a school.

Dow's arguments are textual; others are originalist.[15] But Dow has an additional kind of argument, one that Schauer would find interesting.

Dow begins with the following empirical observations: "In the United States, we believe in, and our political institutions reflect, majority rule. At the same time, we also believe [and presumably our political institutions also reflect the fact] that not everything ought to be subject to [majority rule]" (p. 119). From these facts Dow infers that "our American political commitment to majoritarianism is . . . qualified and not absolute." Thus, he asks rhetorically:

> Do we not believe that we can agree today to bind ourselves tomorrow, and, further, that we can agree today that we shall not have the right tomorrow to change our minds? Do we not agree that a majority can (i.e., it has the authority to) agree today that it will take more than a mere majority tomorrow to interfere with [certain rights]? . . . Indeed, we believe in each of these propositions, for these make up what our Constitution is (p. 122).

Based on these empirical observations, Dow concludes that quite apart from arguments based on text or intent, "Article V *must* be understood to negative other conceivable [that is, majoritarian] modes of amendment" if the Constitution is to reflect accurately our belief that individual rights must be protected against encroachment by majorities (p. 127, emphasis added).

This strand of Dow's argument echoes Schauer's *Grundnorm* concept. To the extent that Dow's "beliefs" are reflected in our political institutions—and Dow claims they are—they correspond (if loosely) to Schauer's "practices." For Dow, then, the American *Grundnorm* treats the supermajoritarian mechanisms of Article V as exclusive. As explained above, Schauer's analysis demands that such a proposition be established not as a matter of law, but as a matter of social and polit-

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15. The textual argument is simply the following: "Interpretation cannot proceed without accepted hermeneutical techniques. In American law, both statutory as well as constitutional, one such basic rule is the principle *expressio unius est exclusio alterius*: The expression of one thing is the exclusion of another." That is, Article V expresses two supermajoritarian mode of constitutional amendment; therefore, all other modes (especially majoritarian ones) are excluded. Although the title of his essay refers merely to the "plain meaning" of Article V, Dow needs an originalist backup, given his concession that "the applicability of [the *expressio unius*] maxim of interpretation depends upon the intentions of the parties who drafted the document." He accordingly endeavors, in conventional and solid fashion, to demonstrate that "the Framers must be understood to have intended Article V to be exclusive." See p. 127.

ical fact. Dow himself explicitly acknowledges the empirical underpinnings of his conclusions:

> When I say "we believe in," as I do throughout this essay, I am making an empirical assumption concerning the ideas that are prevalent in our culture: concerning, more specifically, the ideas that define our culture, that are its essence rather than merely its attributes. Insofar as these empirical assumptions are flawed or erroneous, my argument suffers accordingly (p. 119 n.8).

Given Dow's own admission that a particular empirical reality—the fact that "our commitment to majoritarianism is severely circumscribed" (p. 121)—undergirds his entire enterprise, one would expect him to justify his empirical assumptions. But Dow does not, either by his own research or by reference to the scholarship of others.[16] This lack of evidence is especially suspect, because he does not hesitate to muster facts in other contexts, as when he is attempting to refute Bruce Ackerman's historical arguments.[17] Verification of the *Grundnorm* posited by Dow will have to wait for another day.

III

The *Grundnorm* concept can also illuminate Ackerman's theory of "Higher Lawmaking." In brief, Ackerman argues that modern Americans should not "read Article V as if it described the only mechanisms they may appropriately use for constitutional revision at the dawn of the twenty-first century" (p. 72). Rather, "constitutional authority to speak in the voice of We the People" may be obtained by "decisive electoral victories" (p. 81) that grant the victors power successfully to displace the constitutional vision of any dissenting institutions. In modern times, these victories enable an activist President self-consciously to

16. Indeed, Dow's only empirical reference in this regard is a statement about Jewish law, as explicated by the talmudic rabbis. See p. 121 & nn.20-22 (citing *Exodus* 23:2; *Deuteronomy* 6:17-18; *B[abylonian] Talmud*, Baba Mezia 59b).

17. Moreover, when he does grapple with facts, Dow commits errors glaring enough to make me suspicious of taking his empirical claims on faith alone. Two errors jumped out at me. First, in the course of discussing the ideology of the Republican Party in 1860, Dow refers to the "conservative" wing of the party, which he says was "[l]ed by Henry Clay and Daniel Webster" (p. 133). Clay and Webster both died in 1852, two years before the earliest date of the party's founding. Second, in dismissing Ackerman's conclusions about the Thirty-Ninth Congress, Dow repeatedly refers to the elections of 1860. See pp. 133-34 & nn.69-70 (citing Ackerman, 93 Yale L.J. at 1065-68 (cited in note 9)). The Thirty-Ninth Congress was constituted by the elections of 1864. It is ironic that these errors appear under the heading "Structural Amendments and the (Ab)use of History" (p. 131).

make "transformative judicial appointments" (p. 83). As reconstituted by such appointments, the Supreme Court will write "transformative opinions" that displace the existing constitutional order and therefore "operate . . . as the functional equivalent of formal constitutional amendments" (p. 82).

According to Ackerman, such higher lawmaking has occurred twice in our history, the first occasion being the framing and ratification of the Fourteenth Amendment. But wasn't that Amendment adopted pursuant to the rules of Article V? No, says Ackerman, the Reconstruction Republicans succeeded in ratifying the Fourteenth Amendment only by "press[ing] the rules of Article V beyond their breaking point" (p. 73). That is, the Republicans cheated by obtaining ratifications from Southern legislatures by military coercion, and the Amendment is therefore not valid according to the counting rules set forth in the text of Article V. Admitting that this historical assertion is debatable, Ackerman expects that "a large chunk of [his] forthcoming book . . . will be required to establish this single conclusion" (p. 73). The second instance of higher lawmaking occurred during the New Deal. This is the familiar story of the Supreme Court's "switch in time" after the elections of 1936 and the Court-packing proposal of 1937.

Ackerman would have us believe that his is an interpretive theory (or, in Schauer's terminology, an internalist analysis): higher lawmaking is merely an alternative to "the monopolistic [that is, exclusivist] interpretation of Article V" (p. 73). Don't believe it. Ackerman simply assumes the conclusion—"The Article makes its procedures sufficient, but not necessary, for the enactment of a valid constitutional amendment" (p. 72)—and then attempts to justify that conclusion wholly apart from interpretive principles. Indeed, with one minor exception, Ackerman's theory rests solely on the social and political *facts* of Reconstruction and the New Deal.[18]

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18. The exception is his implicit (and transparently instrumental) premise that any reading of Article V "delegitimizing the Fourteenth Amendment" is bad and should not be adopted. The "monopolistic reading" of Article V does just this because, as explained in the text, Ackerman believes that the Reconstruction Republicans who framed the Fourteenth Amendment did not (at least in spirit) comply with the rules of Article V. See pp. 72-73.

As Professor Tribe has recently observed, "Ackerman's willingness to embrace a public discourse that would treat the Constitution as amendable by procedures nowhere specified therein has led him to treat *all* constitutional text and structure as casually as he treats Article V. *What remains is barely recognizable as an interpretive undertaking at all.*" Tribe, 108 Harv. L. Rev. at 1233 (cited in note 9) (second emphasis added). Tribe was discussing Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799 (1995), in which the authors judge the exclusivity of the treaty-making provi-

If, for Schauer, the *Grundnorm* "is a matter of social fact, and so determining it is for empirical investigation rather than legal analysis" (p. 150), then Ackerman has followed Schauer's prescription to the letter. The heart of Ackerman's argument is his examination of "The Facts" of Reconstruction (pp. 74-77), which he then organizes into "The Reconstructed Pattern" (pp. 77-79). When he turns to the twentieth century, Ackerman immediately describes "The New Deal Pattern" (pp. 80-81) and considers, in factual terms, "What Was New about the New Deal" (pp. 81-82). If Schauer is disposed to look for the *Grundnorm* "in the practices of a citizenry, in the practices of its officials, and in the practices of its judges" (p. 161), then so is Ackerman. During Reconstruction in the nineteenth century, various "officials" (the Republican Congress and President Johnson, respectively) sought to implement competing constitutional visions, the "citizenry" (the electorate of 1866) awarded a decisive electoral victory to one set of competitors, and the victors (Congress) successfully forced the defeated (the President) to acquiesce in practice (pp. 78-79). In our own century, this pattern was repeated during the New Deal—with the additional nuance that "judges" (the Supreme Court as reconstituted by transformative appointments) actively participated in implementing the new order (pp. 81-82).

In short, Ackerman has given us a historical account of changes in the United States *Grundnorm*—but no more. Besides, the Reconstruction half of his account seems unnecessary: the very great changes to our ultimate legal norms during that era occurred not just as a matter of social fact but also as a matter of very positive law, namely, the text of our Constitution. (Ackerman deserves, I suppose, the chance to prove otherwise, but his present essay does not attempt such proof; we must wait for his promised book.) So only the New Deal remains as an example of Ackerman's extra-textual higher lawmaking. Ultimately, then, Ackerman's theory reduces to Griffin's statement that "all significant change in the structure of the national gov-

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sions of Article II, Section 2, Clause 2 solely by reference to a series of political events that took place in the 1940's.

I cannot help thinking that Ackerman has failed to heed his own counsel that "if the interpretivist is *serious* about interpretation, he cannot refuse to read a text simply because he finds its message inconvenient." Ackerman, 93 Yale L.J. at 1070 (cited in note 9). In describing the theory of higher lawmaking as an alternative "reading" of Article V, Ackerman is "playing so fast and loose with the traditional disciplines of legal interpretation as to make the entire notion of interpretation seem utterly fraudulent." Id.

ernment after the New Deal occurred through non-Article V means" (p. 51).[19]

IV

This brings us to Akhil Amar's discussion of "Popular Sovereignty and Constitutional Amendment." Amar advances the thesis that the American People "have a legal right to alter our government—to amend our Constitution—via a majoritarian and populist mechanism akin to a national referendum, even though that mechanism is not explicitly specified in Article V" (p. 89). The key word for our purposes is *legal*. If, by this word, Amar had referred to natural law, so as to argue that we have a *natural* right to reconstitute our polity without resort to Article V, it would be difficult for me to quarrel with him. But I read Amar to refer to the Constitution itself, so as to argue that we have a *constitutional* right to amend our Constitution outside Article V. This meaning of *legal* is evident, for example, in Amar's positing "two plausible interpretations of Article V": (1) the "conventional" exclusivist reading, and (2) "an alternative reading that it enumerates the only mode(s) by which *ordinary government* [as opposed to the People] may amend the Constitution" (p. 91). Moreover, Amar asserts that if he is correct, "we need to seriously rethink much of constitutional law" (p. 108).

In my view, Amar does not prove this more ambitious claim of a *constitutional* right of the People to amend the Constitution outside of Article V's specified procedures. Indeed, his evidence points in the opposite direction, indicating that the asserted right of the People "to alter our government" by amending the Constitution is independent of, even superior to, any enumeration in positive law, including the Constitution. In other words, it is a *natural* right, not a *constitutional* one. I offer a very brief sketch of the evidence. Consider first Amar's own formulation of the simple "right" of majoritarian constitutional amendment. He takes it not from the Constitution, but from the Declaration of Independence: "WE hold these Truths to be self-evident . . . , that whenever any Form of Government becomes destructive of these Ends [Life, Liberty, and the Pursuit of Happiness], it is the Right of the People to alter or to abolish it, and to institute new Government . . . ." Indeed, Amar uses this classic statement of natural rights for his title-page quotation (p. 89).

19. Although Ackerman describes those means in succinct terms—the Supreme Court now writes opinions that "operate . . . as the functional equivalent of formal constitutional amendments" (p. 82)—this description simply states the obvious.

Amar's discussion of how the Framers viewed this right also undercuts his thesis. At the Philadelphia convention, Madison argued (in Amar's words) that analogues to Article V in state constitutions were "not best understood as depriving the People of their *preexisting* legal right to alter or abolish [governments] at will. For that *preexisting* right . . . was one of the 'first principles' of the legal order" (p. 97, emphasis added). But if Amar is correct that this right of the People is a "preexisting" one—that is, a right that preexists constitutions—then it is not a right granted *by* constitutions. Furthermore, in *The Federalist* No. 39 (in a passage not discussed by Amar), Madison appears to argue that the Convention's own product should be understood differently—as affirmatively taking away any preexisting rights held by mere majorities:

> [Article V is] neither wholly *national* nor wholly *federal.* Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society[,] to alter or abolish its established government.[20]

Except for its first thirteen words, this passage essentially restates Amar's thesis. But of course, this restatement is purely hypothetical: it depends on a proposition—that Article V is "wholly *national*"—the truth of which Madison has only just denied.

Madison's "first principles," or at least those principles he expressed in the Philadelphia convention, were explicated at the Pennsylvania ratifying convention by James Wilson (whom Amar places highest in the pantheon of Framers):

> The truth is, that in our governments, the supreme, absolute, and uncontrollable power *remains* in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions. Indeed the superiority, in this last instance, is much greater; for the people possess over our constitution, control in *act*, as well as right.
>
> *The consequence is, the people may change the constitutions whenever and however they please. This is a right of which no positive institution can ever deprive them.*[21]

Wilson says that the right of the People to change constitutions is not *found in* the constitutions but is *superior to* them. In addi-

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20. Clinton Rossiter, ed., *The Federalist Papers* 246 (Mentor, 1961).

21. P. 98 (quoting Jonathan Elliot, ed., 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 432 (1901)). The emphasis in the second paragraph is Amar's.

tion, no positive institution—a category that includes constitutions—can deprive the People of this right, for it is "supreme, absolute, and uncontrollable." In other words, no written document can contain the right of revolution.[22]

If Amar has not shown that the People have a *constitutional* right to amend the Constitution outside Article V, what has he shown? Schauer can help here. Undoubtedly, Amar has described, in great detail, the *Grundnorm* that existed in American society on the eve of the ratification of the Constitution of 1787. Rooted in a self-conscious conception of the People as sovereign, that *Grundnorm* was ready to embrace the destruction and creation of governments—the total or partial displacement of existing state constitutions and the framing of a national constitution—when certain indicia of popular participation were present. That is, if a legal norm were successfully submitted to a majority vote of the People assembled in convention, it would become social fact and would be accepted by citizenry, officials, and judges. As Amar puts it, "the loyal opposition to the Constitution in 1787 fought the good fight in conventions and not on battlefields. And when outvoted—often by simple majorities—anti-Federalists in every state in the end accepted the outcome" (pp. 92-93).

One might extend Amar's analysis to argue that the same *Grundnorm* does (or should) hold today. Recall that according to Dow, we believe that a majority yesterday can require us to act by supermajority today (p. 122). Perhaps Amar thinks we believe the opposite: if a majority of voters petition for a convention to propose changes in our Constitution, and if a simple majority ratifies the changes so proposed in a national referendum, then such changes ("amendments") would be accepted as ultimate legal norms in our society. But on this score, Amar—like Dow—provides no evidence. We simply do not know.

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22. Conceivably, Amar is arguing merely that Article V does not purport to displace the preexisting natural right of the People to amend the Constitution, even if Article V does not affirmatively grant such a right. If so, I fail to discern the import of his efforts, assuming they are successful. If, as Wilson claims, "no positive institution can ever deprive" the People of their right to "change [their] constitutions whenever and however they please," then it is simply irrelevant what Article V (or the rest of the Constitution) does or does not say about that right. A right that is "supreme, absolute, and uncontrollable" cannot be taken away by Article V; by the same token, such a right needs no (silent) help from Article V either. In any case, even this more modest thesis would appear to founder on Madison's statement in *The Federalist* No. 39. See supra note 20 and accompanying text.

CONCLUSION

After all this, one might ask, what is the American *Grundnorm* with respect to the constitutional amendment process? In perhaps the finest essay in *Responding to Imperfection*, Donald Lutz posits that all political systems need periodic alteration, such that constitutions (or, to use Schauer's more precise term *Grundnorms*) inevitably evolve over time, if not by formal amendment then by interpretation (pp. 242-46). If, as Lutz argues, the United States Constitution is comparatively difficult to amend by formal means and has thus been amended comparatively rarely by such means (p. 265), then it should be obvious that our amending *Grundnorm* now accepts de facto amendment-by-interpretation as a matter of course. Indeed, as I noted briefly at the beginning of this review, this point is the thrust of Stephen Griffin's essay.

Perhaps our reluctance to change the text of the Constitution derives from a kind of quasi-religious reverence for the document—or at least what the document has come to symbolize. (Consider our nation's almost paralyzing fear of a constitutional convention, even though that mechanism for change is explicitly authorized by Article V.) Is our amending *Grundnorm* consistent with the Constitution that we purport to revere? Ackerman and Amar purport to give affirmative answers. In my view, Ackerman's theory of higher lawmaking (as applied to the twentieth century at least) is correct as a descriptive matter, and Amar's theory of majoritarian amendment is correct as a matter of natural law. Yet each theory depends on some value *external* to the Constitution, and each is, at some level, inconsistent with the text of Article V. (Yes, I am an exclusivist.) Even Dow, who superficially upholds this text, ultimately grounds his conclusions in "what we believe," not in the Constitution. In short, none of the supposedly "interpretive" theories reviewed here is sound as a matter of *constitutional* interpretation: it is, after all, not a *Grundnorm* we are expounding, but a Constitution.