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Judicial Popular Constitutionalism

Tom Donnelly

JUDICIAL POPULAR CONSTITUTIONALISM

WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION. By Bruce Ackerman.[1] Belknap Press of Harvard University Press, 2014. 432 pp. Hardcover, $35.00.

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INTRODUCTION

Bruce Ackerman's *We the People: The Civil Rights Revolution*—the third book in what will eventually become a *We the People* quartet—is a staggering achievement. In one sense, it's simply a continuation of a story that he began telling decades ago, one that valorizes popular sovereignty and the ongoing constitutional creativity of the American people.[3] Although not generally labeled a popular constitutionalist, Ackerman was an important forerunner of the movement, urging scholars to look outside both the courts and the formal constraints of Article V to find the real story of constitutional change in the United States.[4] In the end, both Ackerman and his popular constitutionalist counterparts agree on the one big thing that matters most: the American people are (and ought to be) the ultimate drivers of constitutional change.

In his new volume, Ackerman blesses another key era in American history as a period of higher lawmaking and explains, in something like common law fashion (p. 81), how the Civil Rights Revolution both fits with and builds upon the lessons and

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3. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) [hereinafter ACKERMAN, FOUNDATIONS]; Bruce A. Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1031 (1984).

4. *See* ACKERMAN, FOUNDATIONS, *supra* note 3, at 59.

achievements of the Founding, Reconstruction, and the New Deal (p. 5). (Spoiler alert: The Civil Rights Revolution is a constitutional moment!) Of course, the pattern of higher lawmaking isn't precisely the same and new legal resources—like landmark statutes—receive greater emphasis (p. 5), but much of the terminology is familiar to those who have spent time with Ackerman's previous volumes, as is this volume's overall normative thrust.

Taken at this level, *The Civil Rights Revolution* surely achieves much of what Ackerman sets out to accomplish, providing an illuminating, textured, and (at times) revisionist account of this key period of American history—an account that stands up quite well to his treatment of other constitutional moments in previous volumes. Notably, it's also a delight to read. In other words, it's pure Ackerman.

It should come as little surprise, then, that critics have already lodged a familiar set of complaints against this new volume—many of which have been recycled after the publication of each part of the *We the People* series. Some critics take dead aim at Ackerman's multistep process for identifying genuine acts of popular sovereignty.[5] Others quibble with certain aspects of Ackerman's historical narrative.[6] I leave those well-worn paths to others. Instead, in this Book Review, I focus on the relationship between Ackerman's new volume and the theory of popular constitutionalism.

The most enduring criticism of popular constitutionalism is that the literature offers few clues about how to make it work, especially as an approach to judicial decisionmaking.[7] While some scholars have sought to respond to these criticisms,[8] a great deal

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5. *See, e.g.*, Randy E. Barnett, *We the People: Each and Every One*, 123 YALE L.J. 2576 (2014); David A. Strauss, *The Neo-Hamiltonian Temptation*, 123 YALE. L.J. 2676 (2014).

6. *See, e.g.*, Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014).

7. *See* Tabatha Abu El-Haj, *Linking the Questions: Judicial Supremacy as a Matter of Constitutional Interpretation*, 89 WASH. U. L. REV. 1309, 1316 (2012); Michael Serota, *Popular Constitutional Interpretation*, 44 CONN. L. REV. 1635, 1646 (2012); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1602 (2005) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)).

8. *See* Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197 (2013); Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66 (2013); Brad Snyder, *Frankfurter and Popular Constitutionalism*, 47 U.C. DAVIS L. REV. 343 (2013); Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 159 [hereinafter Donnelly, *Work*].

of work remains to be done. To that end, popular constitutionalists should pay close attention to the parts of Ackerman's new volume devoted to constitutional interpretation. While previous volumes have provided glimpses of how Ackerman's approach might work, *The Civil Rights Revolution* provides even fuller treatment of this issue. In short, Ackerman's new volume should serve as the starting point for any robust account of (what I refer to as) *judicial popular constitutionalism*.

In this Book Review, I seek to offer an approach to popular constitutional analysis that keeps faith with Larry Kramer's groundbreaking scholarship, while also remaining as consistent as possible with the role that public opinion already plays in judicial decisionmaking. My goal here isn't to argue that judicial popular constitutionalism is the best approach to constitutional analysis. Instead, I simply wish to explore whether a coherent approach is even possible, and, if so, to begin to sketch what it might look like.

This Book Review proceeds in three Parts. Part I provides a general overview of Ackerman's new volume, situating it within the framework of his entire *We the People* series. Part II uses Ackerman's insights about constitutional interpretation to sketch a preliminary account of judicial popular constitutionalism. Part III uses the issue of marriage equality to demonstrate how judicial popular constitutionalism might work.

I. ACKERMAN'S THEORY OF CONSTITUTIONAL CHANGE AND THE CIVIL RIGHTS REVOLUTION

Bruce Ackerman's big idea is that popular sovereignty is (and ought to be) the driver of constitutional change within our system. The main challenge for constitutional theorists and, more importantly, for judges, is to identify when the American people have spoken (p. 32-47). For Ackerman, the answer lies in "a reflective study of the past."[9]

In Ackerman's view, American history teaches a simple, but profound lesson. When the American people speak, our tradition permits them to shatter conventional legal barriers and change our constitutional baselines—whether by establishing a new constitution (*e.g.*, the Founding), re-founding our republic through transformative amendments (*e.g.*, Reconstruction), or reshaping foundational ideas without altering the words of the

9. ACKERMAN, FOUNDATIONS, *supra* note 3, at 17.

Constitution (*e.g.*, the New Deal) (p. 3). For Ackerman, this is the very core of the American constitutional tradition.

To promote legitimate constitutional change, each constitutional proposal must traverse a multistep, multiyear process, which includes a series of public debates, political fights, elections, and court battles (pp. 44-47). However, if the new proposal survives this process—if its adherents win a series of political victories, if its opponents acquiesce, and if the judiciary codifies the new constitutional understanding in transformative decisions—the proposal earns the right to alter our constitutional order (p. 42). This is what Ackerman means by his famous label, "constitutional moment" (p. 43-47). It's not really a moment at all, but a series of tests that a new set of constitutional revolutionaries must pass in order to earn the right to speak for the American people (p. 51).

Ackerman introduces and develops these ideas in two previous volumes, *We the People: Foundations* and *We the People: Transformations*.[10] In his new volume—*We the People: The Civil Rights Revolution*—Ackerman puts the achievements of the Civil Rights Era to the test.

A. ACKERMAN'S CIVIL RIGHTS STORY

Ackerman's civil rights story begins with *Brown v. Board of Education*. In his account, this landmark decision defines a new constitutional baseline—the "anti-humiliation principle"—and signals the beginning of a new period of sustained constitutional debate over the meaning of equality (pp. 128-129, 137-143, 307-310). In this sense, the Civil Rights Revolution differs from Ackerman's three previous constitutional moments—the Founding, Reconstruction, and the New Deal—all of which were initiated, not by the judiciary, but by political leaders of varying stripes (p. 5). Nevertheless, constitutional leadership during the Civil Rights Revolution soon passes from the Warren Court to the elected branches—and, ultimately, to the American people.

With the *Brown* decision and the rise of the civil rights movement, the American people soon awake from their civic slumber. Suddenly, neither the President nor Congress can safely ignore the legacy of Jim Crow and the civil rights movement's push for a new vision of equality. Instead, all three branches work

10. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998) [hereinafter ACKERMAN, TRANSFORMATIONS]; ACKERMAN, FOUNDATIONS, *supra* note 3.

together to extend *Brown*'s anti-humiliation principle from public education to other spheres like voting and housing, endorsing a vision of equality that differs greatly from the one that the American people inherited from Reconstruction (pp. 222-223).

Ackerman's post-*Brown* narrative begins with President Johnson and Congress. Johnson works with congressional leaders to push through the Civil Rights Act of 1964, blowing past the limits set by the state-action doctrine and requiring an end to private discrimination in the workplace and in various public settings like hotels, restaurants, and theaters (pp. 175-176, 223). Johnson then wins a landslide victory over Barry Goldwater, an election that engages the American public and provides them with a clear choice on the issue of civil rights (pp. 6, 41, 72-84). And, finally, Johnson puts his broad electoral mandate to the test, working with Congress to pass additional landmark statutes—including the Voting Rights Act of 1965 and the Fair Housing Act of 1968—statutes that codify the new constitutional understanding of equality endorsed by the American people (pp. 5, 92-95, 120-121, 200-210).

From there, the Warren Court translates this new constitutional understanding into doctrine through a series of transformative opinions. While supporters of the old constitutional regime rely upon well-established case law to challenge the new landmark statutes in court, Chief Justice Warren and his colleagues turn aside each of these challenges. In the process, the Warren Court joins the civil rights movement and its supporters in recognizing an increased role for the federal government in securing equality (pp. 13, 121, 313-315).

Finally, Ackerman's civil rights narrative ends with the most unlikely of heroes, Richard Nixon. For Ackerman, Nixon plays a key role in consolidating the gains made by President Johnson, his congressional allies, and the Warren Court. During the 1968 election, Nixon largely embraces the emerging bipartisan consensus on civil rights. Furthermore, as president, he signs new laws and supports new administrative actions that both supplement and strengthen the Civil Rights Era's landmark statutes (pp. 6, 241-252).[11] According to Ackerman, by supporting the core of the "New Deal-Civil Rights regime," Nixon gives "it a bipartisan basis that place[s] its legitimacy beyond serious

11. Ackerman calls such administrative action "government by numbers," a form of administrative constitutionalism (pp. 155, 199).

question"—the final step on the path from mere constitutional proposal to fully realized constitutional moment (p. 6).

B. HEEDING THE CALL OF "WE THE PEOPLE": ACKERMAN'S APPROACH TO CONSTITUTIONAL INTERPRETATION

In this Book Review, I'm interested in exploring the lessons that Ackermanian constitutional interpretation holds for popular constitutionalists. To that end, I attempt in this Section to deconstruct Ackerman's approach to constitutional interpretation, disaggregating it into its component steps. While Ackerman doesn't present his account in quite this way—indeed, we must await his next volume, *We the People: Interpretations*, for his full-blown theory of constitutional interpretation (p. 336)—I believe that the description that follows generally tracks with what he's written about constitutional interpretation so far and is faithful to the overall normative thrust of his *We the People* series.

From the perspective of popular constitutionalism, Ackerman gets the big things right. Constitutional change ought to be driven by the American people. Courts ought to be bound by genuine acts of popular sovereignty even if they don't satisfy Article V. Judicial review ought to, at its core, promote the considered judgments of the American people. Furthermore, some of the details of his approach also offer concrete clues for how judicial popular constitutionalism might work.

Within Ackerman's system, the constitutional interpreter must first identify *when* the American people have spoken (p. 337). Indeed, the very core of Ackerman's approach to constitutional interpretation is concerned with distinguishing between genuine acts of popular sovereignty—when "We the People" have spoken—and normal acts of everyday politics. The former are infused with constitutional importance, the latter not so much. This is where Ackerman's famous theory of constitutional moments comes in. To serve as a catalyst for legitimate constitutional change, a given movement and its proposal must run Ackerman's gauntlet (the multistep, multiyear process discussed in Part I, *supra*) and secure the American people's "broad" and "sustained" support (p. 224). However, even when a proposal has survived this process and the interpreter has gone on to identify it as a genuine act of popular sovereignty, that's only the beginning of Ackerman's process of constitutional interpretation.

Second, the constitutional interpreter must determine *how* the American people have spoken. To decide constitutional cases, judges traditionally draw upon some mix of constitutional text, history, structure, doctrine, and (at times) prudential concerns.[12] Ackerman urges the constitutional interpreter to privilege whichever constitutional materials best capture the commitments made by the American people—whether that's a piece of constitutional text, a transformative Supreme Court decision, a landmark statute, or an important political speech (pp. 28-33, 317). These materials are what Ackerman has in mind when he talks about the "legal canon." For instance, to capture the commitments of the Civil Rights Revolution, the faithful interpreter must heed the words and deeds of Martin Luther King, Jr., Lyndon Johnson, Hubert Humphrey, and Everett Dirksen—not just those of the Warren Court and those endorsed by the Article V amendment process (p. 7).

Third, the constitutional interpreter must determine *what* the American people have actually said. The task here is to parse the materials identified in the previous step and determine the key constitutional principles endorsed by the American people. When the faithful interpreter tends to these canonical sources, certain foundational principles emerge—in the case of the Civil Rights Revolution, principles like the "eradication of institutionalized humiliation" and "equal treatment in public accommodations" (p. 224). These principles should serve as important reference points when analyzing specific constitutional controversies—reference points that may only be superseded by successful constitutional revolutions (pp. 33, 225, 317).

Finally, the constitutional interpreter must seek to *synthesize* the constitutional principles of the most recent revolution with those of our constitutional past—preserving some old principles and either altering or disposing of others (p. 336). Ackerman refers to this interpretive task as intergenerational synthesis (p. 336).[13] For instance, the Civil Rights Revolution is only our most recent constitutional moment, but the achievements of previous generations remain. It is the lawyer's (and judge's) task to "fit" any new principles endorsed by the American people into a "larger pattern of constitutional development" (p. 1). Some new principles (like ending discrimination by private businesses) will

12. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

13. *See also* Bruce Ackerman, *De-Schooling Constitutional Law*, 123 YALE L.J. 3104, 3122 (2014) [hereinafter Ackerman, *De-Schooling*].

supersede old ones (like the state-action doctrine), while other traditional understandings will remain unscathed (p. 336). Importantly, Ackerman reserves a key role for lawyers and judges—and their professional judgment—in working out these problems on a case-by-case basis, as the principles endorsed by different generations combine to address the constitutional problems of today (p. 336).

In the end, Ackerman's account provides several clues for how judicial popular constitutionalism might work.

II. POPULAR SOVEREIGNTY, CONSTITUTIONAL INTERPRETATION, AND THE POSSIBILITY OF JUDICIAL POPULAR CONSTITUTIONALISM

Since popular constitutionalism's inception, critics have attacked it as an elusive concept—one lacking a precise definition or a discernible core.[14] This is especially true in the context of constitutional interpretation.[15] While some scholars have begun to respond to these criticisms,[16] there's little use in denying that these critics have hit upon a serious problem. The question is whether it's somehow fatal to the entire project. I think not.

As I have explained elsewhere, despite disagreements over methodology, constitutional history, and specific prescriptions, popular constitutionalists do share one key attribute, a populist sensibility—a common belief that the American people should play an ongoing role in shaping contemporary constitutional meaning.[17] Furthermore, with respect to constitutional interpretation, in particular—an area that popular constitutionalists have largely neglected—Ackerman's new volume offers several clues for how judicial popular constitutionalism might work.

Of course, popular constitutionalism itself is often associated with the anti-court attacks of its most famous proponents—whether in the form of diatribes against judicial supremacy, praise

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14. *See* Serota, *supra* note 7, at 1646; Keith Werhan, *Popular Constitutionalism, Ancient and Modern*, 46 U.C. DAVIS L. REV. 65, 67 (2012); Alexander & Solum, *supra* note 7, at 1602; Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 676.

15. *See* El-Haj, *supra* note 7, at 1309, 1316; Serota, *supra* note 7, at 1659; Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1214 (2010); Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 CONST. COMMENT. 461, 463 (2009); Alexander & Solum, *supra* note 7, at 1621–22.

16. *See* Eyer, *supra* note 8; Rosen & Schmidt, *supra* note 8; Snyder, *supra* note 8; Donnelly, *Work*, *supra* note 8.

17. *See* Donnelly, *Work*, *supra* note 8, at 161–62.

for court-curbing measures like jurisdiction-stripping, or calls to end judicial review altogether.[18] Therefore, the very idea of judicial popular constitutionalism may, at first, sound oxymoronic. Wasn't the whole idea of popular constitutionalism—at least as envisioned by Larry Kramer, its Founding Father—to address the problem of judicial supremacy? If so, shouldn't popular constitutionalists try to reduce the role of judges in our constitutional system? Not necessarily.

To be sure, Kramer's account is rooted in an anti-court attitude shaped by a certain reading of American history.[19] However, even as Kramer calls upon the American people and their elected representatives to curb an elitist Supreme Court, he still leaves a large role for judges within his system.

Stripped of its anti-court rhetoric and court-curbing prescriptions, Kramer's account is fundamentally concerned with promoting a system of deliberative democracy—one guided not by "the fleeting passions . . . of the moment," but by the considered views of the American people.[20] Within this system, each branch of government is tasked with "slow[ing] down" our political process.[21] In the case of constitutional disputes, in particular, this is meant "to force the kind of public debate needed for 'the reason of the society' to emerge."[22] And once that "reason" emerges—once the American people reach a considered judgment about a given constitutional issue—that judgment is decisive.

Importantly, the judiciary remains a key part of this process, empowered to enforce such judgments and, in turn, check unconstitutional acts by the President, Congress, and the states. However, Kramer offers few clues about how judges should go about deciding individual cases. For those seeking to keep faith with Kramer's groundbreaking account, perhaps the best clue lies in his overall normative vision for our constitutional system, a system where "questions of constitutional interpretation" are "authoritatively settled only by 'the people'"[23] and even the Supreme Court "yield[s] to" their "judgments about what the

18. *See* Snyder, *supra* note 8, at 347.

19. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 229 (2004).

20. Larry D. Kramer, *"The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 730 (2006).

21. *Id.* at 733.

22. *Id.* at 736.

23. KRAMER, *supra* note 19, at 31.

Constitution means."[24] It is precisely this vision that guides the account of judicial popular constitutionalism that follows.

A. JUDICIAL POPULAR CONSTITUTIONALISM AS A RULE OF CONSTITUTIONAL CONSTRUCTION

Both Ackermanian constitutional interpretation and judicial popular constitutionalism begin with a shared premise. Whenever the American people speak, judges should listen. However, whereas Ackerman limits periods of genuine popular sovereignty to a few pivotal decades in American history—leaving it up to judges to elaborate on their deeper meaning during long stretches of constitutional silence—a popular constitutionalist may be open to following the commands of the American people on a more consistent basis. Sometimes these constitutional commands will be profound, requiring genuine transformations like those following from the New Deal and the Civil Rights Revolution. Other times, they may lead to smaller-scale changes, like the recognition of a new constitutional right or the disposal of an outdated line of precedent. Either way, the American people remain the popular constitutionalist's lodestar—the constitutional text that *they* ratify, the constitutional revolutionaries that *they* endorse, and the new constitutional understandings that *they* reach.

While the Constitution's text answers some of the popular constitutionalist's questions (*e.g.*, whether a 29-year-old may be President), the text alone fails to resolve many others. This is especially true of "abstract, general, and vague" pieces of text like "due process of law" and "the privileges or immunities of citizens of the United States"—indeed, the very phrases and passages on which the most important constitutional questions often turn.[25]

As I envision it, judicial popular constitutionalism may be understood as a rule of constitutional construction—one that the committed popular constitutionalist may apply whenever the Constitution's text is vague or irreducibly ambiguous.[26] Put

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24. *Id.* at 247–48.

25. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 108 (2010).

26. Here, I'm borrowing from the familiar distinction between interpretation and construction advanced by scholars like Lawrence Solum, Keith Whittington, Randy Barnett, and Jack Balkin, among others. *See* JACK M. BALKIN, LIVING ORIGINALISM (2011); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409 (2009); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); Solum,

simply, when the semantic meaning of the Constitution's text is clear, it ought to control even the committed popular constitutionalist. However, when that meaning is unclear and the American people have reached a considered judgment about how best to give that text life, the popular constitutionalist should grant considerable weight to that judgment as a default rule.[27] When I refer to the American people's "considered" views or judgments, I mean something approaching a deep, durable, sustained consensus on a given constitutional issue—one that's the product of widespread public deliberation and, in turn, signals a certain amount of individual-level reflection by the average citizen.

While this general rule is simple enough to state, the practical challenges of applying it are considerable. Public ignorance runs high,[28] and public consensus is rare.[29] And even when such a consensus is possible, how should we define it? Should we look to polling data, the political rhetoric of our major parties, social movement activism, the laws on the books, recent election returns, or some other talismanic source? Should we require evidence of super-majority support for a given position or a mere majority?[30] Should our approach differ for different constitutional provisions,[31] and when, if ever, should public consensus yield to an

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supra note 25; Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013). As Solum explains, vagueness "refers to the existence of borderline cases: a term is vague if there are cases where the term might or might not apply"—for example, the descriptor "tall." Solum, *supra* note 25, at 98. Ambiguity refers to a situation in which a word "has more than one sense." *Id.* at 97–98. For instance, "cool" can mean "low temperature" or "hip or stylish." *Id.* at 97.

27. *See* Solum, *supra* note 25, at 104–05; Solum, *supra* note 26, at 438; Whittington, *supra* note 26, at 404.

28. *See* Alexander & Solum, *supra* note 7, at 1625; Serota, *supra* note 7, at 1656–59; Ilya Somin & Sanford Levinson, *Debate, Democracy, Political Ignorance, and Constitutional Reform*, 157 U. PA. L. REV. ONLINE 239, 240–41 (2009), http://www.pennlawreview.com/online/157-U-Pa-L-Rev-PENNumbra-239.pdf; . *But see* Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 361 (2011) (concluding based on empirical research that the American public may "have nontrivial levels of legal and political knowledge").

29. *See* Richard L. Hasen, *Political Dysfunction and Constitutional Change*, 61 DRAKE L. REV. 989, 992–93 (2013); Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1, 8 (2007) [hereinafter Primus, *Double-Consciousness*]; Primus, *supra* note 15, at 1209. When there is no public consensus, the popular constitutionalist may turn to other modalities of constitutional analysis, or she may simply resort to judicial restraint as a secondary rule of constitutional construction, one that might serve as the next best proxy for the constitutional views of the American people.

30. *See* Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1777–82 (2011).

31. There may be certain provisions that the committed popular constitutionalist excludes from popular constitutional analysis. *See* David A. Strauss, *The Modernizing*

individual interpreter's own sense of fairness and good social policy?[32] And finally, are judges even competent to decipher the public's constitutional views in the first place, or should we simply call upon them to defer to the elected branches as the soundest way of combating judicial supremacy and respecting popular sovereignty?[33]

These are vexing questions, and different popular constitutionalists with different sensibilities may answer them differently. For now, I'm not interested in adjudicating all of these intramural disputes. Instead, my goal in this Book Review is to build a useful framework for channeling ongoing disputes between committed popular constitutionalists (and their critics) over the feasibility, desirability, and administrability of judicial popular constitutionalism—drawing upon Ackerman's account of constitutional interpretation throughout as a useful guide and foil.

Before I begin to develop this account, a couple of caveats. First, I recognize that judicial popular constitutionalism is in tension with traditional conceptions of judicial review as a safeguard against majoritarian tyranny. As a result, there may be certain constitutional provisions worth excluding from popular constitutional analysis—in particular, minority-protective provisions like the First Amendment. Second, the committed popular constitutionalist must remain sensitive to the danger of false positives—perhaps because key indicators of public opinion are merely the product of either an inattentive public or the actions of elected officials without a genuine popular mandate.[34]

Mission of Judicial Review, 76 U. CHI. L. REV. 859, 901 (2009) (providing the First Amendment as an example). Furthermore, there may be certain provisions that are more populist in nature, such as the Eighth Amendment's ban on "cruel and unusual punishment," the Ninth Amendment's protection of rights "retained by the people," or the Fourteenth Amendment's Privileges or Immunities Clause. *See* Amar, *supra* note 30, at 1762–63.

32. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 38 (2010).

33. *See* J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 22 (2012); Strauss, *supra* note 31, at 893; Primus, *Double-Consciousness*, *supra* note 29, at 8; Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 267 (2008).

34. Ackerman warns against this danger in his account of "normal politics." Ackerman's theory is a response to two related insights in *The Federalist*. First, and most importantly, "the ultimate authority" in the American constitutional system "resides in the people alone." THE FEDERALIST NO. 46, at 315 (James Madison) (Jacob E. Cooke ed., 1961). Second, "[t]he representatives of the people . . . seem sometimes to fancy that they are the people themselves." THE FEDERALIST NO. 71, at 483–84 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). With these insights in mind, Ackerman's system is an attempt to distinguish between decisions made "by the American people" (in times of "higher lawmaking") and those made "by their government" (in times of "normal lawmaking").

Ackerman's demanding rule of recognition guards against this danger. If the committed popular constitutionalist wishes to craft a more lenient rule, she must develop similar safeguards.

B. JUDICIAL POPULAR CONSTITUTIONALISM: REJECTING THE EASY ANSWERS

As a starting point, the committed popular constitutionalist should reject two possible approaches—simple judicial restraint and traditional living constitutionalism.

1. Judicial Popular Constitutionalism Isn't Judicial Restraint

In its simplest form, judicial popular constitutionalism could call upon judges to defer to the elected branches when resolving constitutional questions, therefore channeling constitutional deliberation back towards democratic politics.[35] And, indeed, some scholars have suggested as much.[36] Of course, this approach has a deep historical pedigree, linking back to legal giants like James Bradley Thayer and Felix Frankfurter.[37] This alone may make it appealing to some. Nevertheless, if the central goal of popular constitutionalism is to promote popular sovereignty, judicial restraint simply won't do.

Ackerman was onto this issue decades ago. Indeed, his entire theory of dualist democracy is aimed at addressing the famed countermajoritarian difficulty. And in typical fashion, Ackerman turns this alleged difficulty on its head. Rather than viewing judicial review as a "deviant institution in the American democracy,"[38] Ackerman presents it as an important agent of popular sovereignty.[39] Recent scholarship reinforces these insights, confirming both the democratic shortcomings of our elected branches and the democratic promise of judicial review.

Many factors make it difficult for the President and Congress to secure transformative legislation that matches majoritarian

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ACKERMAN, FOUNDATIONS, *supra* note 3, at 6. For Ackerman, "during normal politics, the People simply do not exist." *Id.* at 263. And, on certain occasions, judges are called upon to check the actions of elected officials acting without a genuine popular mandate.

35. *See* Snyder, *supra* note 8, at 350.

36. *See, e.g.*, Snyder, *supra* note 8, at 347–50; Brad Snyder, *The Former Clerks Who Nearly Killed Judicial Restraint*, 89 NOTRE DAME L. REV. 2129, 2151–52 (2014).

37. *See* Timothy P. O'Neill, *Harlan on My Mind: Chief Justice Roberts and the Affordable Care Act*, 3 CAL. L. REV. CIR. 170, 172–73 (2012); ; Snyder, *supra* note 8, at 345, 367; Snyder, *supra* note 36, at 2130, 2133.

38. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 18 (1962).

39. *See* ACKERMAN, FOUNDATIONS, *supra* note 3, at 6, 17, 192, 289.

preferences. These factors include our divided system of government, our hyperpolarized parties, the committee system, the filibuster, special-interest groups, and the insulation of incumbents.[40] The end result is a political system that's often dominated by partisan pandering, with insulated incumbents courting base voters who are largely out of step with the wider public's views, and legislative gridlock, with our major parties unwilling to compromise on proposals, both big and small.[41] At the same time, an avalanche of recent scholarship confirms that judicial review—though driven by unelected judges—often promotes majoritarian preferences, with constitutional doctrine often tracking public opinion, especially on high-salience issues.[42] The Supreme Court's recent decision in *United States v. Windsor* is a prime example, with the Court enforcing majoritarian preferences and effectively repealing an unpopular law, above and beyond the contrary wishes of many Members of Congress.

Of course, there *are* influential scholars associated with popular constitutionalism (like Mark Tushnet and Jeremy Waldron) who want to take the Constitution out of the courts altogether.[43] For these pioneering scholars, any form of judicial popular constitutionalism beyond simple judicial restraint is an obvious non-starter. However, even radical court skeptics like Larry Kramer reserve a key role for the courts in a robust system of popular constitutionalism. And this should come as no surprise.

Consistent with Kramer's account, popular constitutionalism is committed, not to an anti-court outlook, but instead to giving life to the considered views of the American people—full stop. Sometimes this will happen through the political process. However, other times the best vehicle for translating these views into concrete constitutional action is the judiciary.

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40. *See* Hasen, *supra* note 29, at 992–93; Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 15, 148–52 (2012).

41. *See* Hasen, *supra* note 29, at 992–93; Lain, *supra* note 40, at 152–53.

42. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); Lain, *supra* note 40.

43. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

2. Judicial Popular Constitutionalism Isn't Living Constitutionalism

There's no use denying that judicial popular constitutionalism bears a resemblance to living constitutionalism. Both theories argue that contemporary values should influence constitutional meaning, and both rely upon judges to help realize this goal. Nevertheless, judicial popular constitutionalism isn't simply living constitutionalism with a flashy new label. To see why, let's turn first to the traditional account of living constitutionalism.

Living constitutionalists are a methodologically eclectic bunch, relying upon all of the traditional modalities of constitutional interpretation (*e.g.*, text, history, structure, doctrine, and prudence),[44] as well as each interpreter's own sense of fairness and good social policy, to ensure that the Constitution "keep[s] in touch with contemporary values"[45] and "adapts to changing times and conditions."[46] The living constitutionalist's ultimate goal is to "update and affirm" the meaning of the Constitution's text in a way that presents a normatively attractive vision for *this* generation of Americans.[47]

Because of this amorphous goal and the theory's methodological flexibility, critics have long attacked living constitutionalism as barely a theory at all, describing it as more of a loose metaphor, licensing judges to read their own views into the Constitution.[48] While this criticism may fairly apply to certain accounts of living constitutionalism, theorists like David Strauss have managed to develop sophisticated versions of the theory that conform with current judicial practice and, in turn, constrain judicial discretion.[49] However, even in Strauss's famous account of common law constitutional interpretation, judges—with their

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44. *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 437 (1986); Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 358 (2007).

45. Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM. L. REV. 545, 569 (2006).

46. BALKIN, *supra* note 26, at 277.

47. Leib, *supra* note 44, at 359.

48. *See* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1755 (2007) [hereinafter Ackerman, *Living*]; BALKIN, *supra* note 26, at 277; William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 693 (1976); WILKINSON, *supra* note 33, at 11.

49. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) [hereinafter Strauss, *Constitutional Interpretation*]; STRAUSS, *supra* note 32; David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

reliance upon judicial precedent, legal craft, and sound judgment—still take center stage. And, importantly, when on-point precedent fails to settle a given constitutional dispute (which is often the case), it's the judge who ultimately "decide[s] what to do," "often . . . on the basis of her views about which decision will be more fair or is more in keeping with good social policy."[50] This is a defensible constitutional vision. However, it's *not* judicial popular constitutionalism.

Rather than following her own constitutional wisdom, the popular constitutionalist judge must commit herself to the difficult task of identifying the public's considered views whenever possible and translating them into constitutional doctrine.[51] This approach constrains judges by actually forcing them to ground their analyses in concrete indicators of public opinion[52]—not vague impressions of the "evolving" constitutional understandings of the American people or an individual judge's own sense of fairness and sound policy. In other words, judicial popular constitutionalism—like Ackermanian constitutional interpretation—offers the possibility of a genuinely principled, constrained form of living constitutionalism.

C. MAKING JUDICIAL POPULAR CONSTITUTIONALISM WORK: IDENTIFYING WHEN THE AMERICAN PEOPLE HAVE SPOKEN

Contrary to a strong form of Thayerian judicial restraint, the popular constitutionalist judge may exercise judicial review to help realize the constitutional views of the American people. And contrary to the traditional account of living constitutionalism, she must actually seek out those views by identifying objective indicia of public opinion. For the committed popular constitutionalist, the key question is always whether the American people have reached a considered judgment about a given constitutional issue.

During periods of heightened constitutional engagement—in other words, periods like Ackerman's constitutional moments—this question is relatively easy to answer, and for precisely the reasons Ackerman states. However, at other times, a popular constitutionalist judge may be inclined to look beyond the traditional patterns of constitutional change that Ackerman outlines and, in turn, recognize other examples of public constitutional consensus. The challenge for the popular

50. STRAUSS, *supra* note 32, at 38.
51. *See* Ackerman, *Living*, *supra* note 48, at 1755.
52. *Id.* at 1801.

constitutionalist scholar is to be able to provide that judge with the methodological tools necessary to identify when the American people have reached a considered judgment—tools that are, at once, more flexible than Ackerman's rule of recognition, yet still stringent enough to avoid mere judicial policy-making. This is no easy task.[53]

In this Section, I catalogue various indicators of public opinion available to the committed popular constitutionalist, drawing upon insights from Ackerman's new volume throughout. These are the building blocks of powerful popular constitutional arguments, available alone or in combination to help judges determine whether the American people have reached a considered judgment about a given constitutional issue. All told, the popular constitutionalist judge may probe at least *five* distinct indicators of public opinion.

First, she may look to a variety of actions and activities associated with the President (p. 69).[54] Echoing Ackerman's account, she may consider a President's claim to a popular mandate following a critical election (p. 223). She may study a President's use of the bully pulpit to advance his constitutional vision (p. 7). And, most importantly, she may analyze any concrete actions taken by the President to make that vision a reality, including any coordination with Congress on key legislation (p. 100), any arguments advanced by the President's legal team,[55] and any supportive actions taken by administrative agencies (pp. 69, 106).[56]

Concededly, when considered in isolation, these factors may say relatively little about the constitutional views of the wider public. Indeed, a President's electoral victory, as well as his various words and deeds while in office, may simply reflect the constitutional vision—or even bare policy preferences—of a single political party. However, when considered in tandem with other elements of the constitutional regime, these presidential

53. *See* Lain, *supra* note 40, at 117, 118; Snyder, *supra* note 8, at 373; Strauss, *Constitutional Interpretation*, *supra* note 49, at 929.

54. *See also* WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 16 (2010); Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 FORDHAM L. REV. 1837, 1837–40 (2009).

55. *See, e.g.*, Snyder, *supra* note 8, at 383, 416 (detailing the Eisenhower Administration's support for the NAACP in the *Brown* litigation).

56. *See also* ESKRIDGE & FEREJOHN, *supra* note 54, at 16 (noting the importance of administrative constitutionalism).

indicators may serve as a sturdy foundation for a broad, compelling popular constitutional argument.[57]

Second, a popular constitutionalist judge may look to a variety of actions and activities associated with Congress (pp. 8-9).[58] She may scrutinize a congressional party's claim to an electoral mandate following a wave election.[59] She may examine the text and principles embodied in landmark statutes (p. 100).[60] She may look for any larger patterns in congressional lawmaking[61] (pp. 150-151) and practice.[62] She may study the legislative history leading to the enactment of key statutes, including notable speeches delivered by congressional leaders (pp. 150–51).[63] And she may consider the legal arguments advanced by key Members of Congress in court, including in *amicus* briefs filed in important constitutional cases.[64]

Once again, these factors—considered in isolation—may do little to aid the popular constitutionalist judge. Congressional elections rarely capture the public's attention, and congressional leaders rarely build a following that extends far beyond their own

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57. Ackerman provides a great example in his analysis of Justice William Johnson's landmark decision in *United States v. Hudson & Goodwin*. *See* BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 224–40 (2005). There, the Jefferson-appointed Johnson declared common-law crimes unconstitutional based, in part, on "settled . . . public opinion," *Hudson & Goodwin*, 11 U.S. 32, 32 (1812)—"settled" presumably by a series of Jeffersonian electoral victories that allowed Johnson to write key Jeffersonian principles into early constitutional doctrine.

58. *See also* ESKRIDGE & FEREJOHN, *supra* note 54, at 16; Amar, *supra* note 30, at 1752; Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1985–86 (2003) [hereinafter Post & Siegel, *Policentric*]; Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003) [hereinafter Post & Siegel, *Juricentric*].

59. *See, e.g.*, ACKERMAN, TRANSFORMATIONS, *supra* note 10, at 160–207 (examining the Republican Party's mandate after the congressional elections of 1866).

60. *See also* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 41 (2003) (examining various landmark statutes along similar lines); Post & Siegel, *Juricentric*, *supra* note 58, at 2, 14, 30–34 (same). *Cf.* Katzenbach v. Morgan, 384 U.S. 641, 654–56 (1966) (applying an analysis that resembles this approach).

61. *See also* Frontiero v. Richardson, 411 U.S. 677, 687–88 (1973) (examining the flurry of statutes passed in the 1960s and 1970s addressing gender discrimination); Post & Siegel, *Juricentric*, *supra* note 58, at 32.

62. *See, e.g.*, Town of Greece v. Galloway, No. 12–696, slip op. at 10 (U.S. May 5, 2014) (using Congress's longstanding use of legislative prayer to justify the practice's constitutionality at the local level).

63. *Cf.* South Carolina v. Katzenbach, 383 U.S. 301, 308–09, 315 (1966) (relying upon legislative history as part of a larger constitutional argument).

64. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 789 (2010) (relying, in part, on an *amicus* brief signed by Members of Congress to support an individual rights reading of the Second Amendment).

constituents. Furthermore, as a multimember, multi-chamber body, Congress rarely takes actions that advance a unitary constitutional vision. Nevertheless, these congressional indicators may still serve as key elements in broader popular constitutional arguments. Indeed, congressional constitutional arguments are perhaps most compelling when they help to show that the House, the Senate, *and* the President have all united behind a single constitutional vision (pp. 99-116, 149-151).[65]

Third, the popular constitutionalist judge may study the contours of public debates over high-salience constitutional issues and search for any evidence of constitutional convergence. This is a key theme of Reva Siegel's scholarship,[66] as well as an important component of Ackerman's rule of recognition (p. 6). Nevertheless, it requires a bit of explanation.

Constitutional issues that draw genuine public interest (like marriage equality, abortion, and gun rights) often inspire large-scale social movement activism, as well as mobilization by major political parties. Predictably, these issues often split us along both ideological and partisan lines, with increased activities on one side of a debate frequently leading to backlash by opposing activists.[67] Social movement conflict often deepens the divisions between the opposing sides; however, that's not all that it does—and this is Siegel's key insight. These patterns of mobilization and backlash often also spur widespread public deliberation—deliberation that extends beyond the activist community and engages the general public. To win this broader debate, each side must then come to terms with its opponents' strongest arguments, often co-opting parts of them in an attempt to stake out a position that appeals to the wider public.[68] Over time, this dynamic may lead the two sides to converge over certain constitutional baselines.[69] For the popular constitutionalist judge, this convergence may signal broad

65. Ackerman provides valuable models in his rewrites of *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), in his new volume.

66. *See* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008) [hereinafter Siegel, *Dead or Alive*]; Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001) [hereinafter Siegel, *Text in Contest*].

67. *See* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1362–63 (2006).

68. *Id.* at 1330–31.

69. Siegel, *Dead or Alive*, *supra* note 66, at 193–94 (describing the constitutional convergence between feminists and social conservatives on a gender equality reading of the Equal Protection Clause in the 1970s).

public consensus—a consensus that's worthy of codification in constitutional doctrine.[70]

Of course, constitutional convergence isn't the only pattern of interest to the popular constitutionalist judge. For instance, while studying the dynamics around a certain conflict, she may discover evidence of key defections from one side's coalition, possibly signaling a crumbling consensus on one side of the debate.[71] Alternatively, she may find evidence of large-sale acquiescence by one of our major political parties—or, at least, by a critical mass of its mainstream leaders—therefore signaling a certain issue's demise as a flashpoint of large-scale *constitutional* conflict between our major parties.[72] Regardless, by tending to the contours of these public debates (including any evidence of social movement activism, political mobilization, and public deliberation), the popular constitutionalist judge may gain key insights about both the breadth and depth of public support for a given constitutional position—key elements of any successful popular constitutional argument.[73]

Fourth, the popular constitutionalist judge may look to actions and activities taken at the state and local level.[74] This is already a well-established part of current judicial practice and, therefore, requires relatively little explanation.[75] For instance, the popular constitutionalist judge may examine the rights enshrined

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70. We see examples of such convergence during the struggle over women's rights in the 1970s and the battle over gun rights in the 2000s. *See* Reva B. Siegel, Heller & *Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1414 (2009); Siegel, *Text in Contest*, *supra* note 66, at 308–13. In both of these instances, the Supreme Court codified the areas of constitutional convergence in landmark decisions. *See* Siegel, *supra* note 70, at 1414; Siegel, *supra* note 67, at 1331, 1406.

71. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 576 (2003) (using "substantial and continuing" criticism of *Bowers* by notable conservatives like Charles Fried and Richard Posner to gesture towards a growing bipartisan consensus against laws criminalizing same-sex sodomy). Similarly, a popular constitutionalist judge could look at conservative defections on marriage equality, including establishment Republicans like Jon Huntsman and Ted Olsen.

72. *See, e.g.*, ACKERMAN, TRANSFORMATIONS, *supra* note 10, at 355–82 (explaining how the post-New Deal Republican Party came to terms with the constitutionality of the New Deal use of federal power).

73. *See* Ackerman, *De-Schooling*, *supra* note 13, at 3110.

74. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 97 (2012).

75. *See, e.g.*, Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 367–68, 375–405 (2009) (noting that the analysis of state-level action is used not only in the Eighth Amendment and substantive due process contexts, but also on a range of other issues, including procedural due process, equal protection, religious liberty, free speech, Fourth Amendment "reasonableness," and takings).

in state constitutions,[76] state and local participation in constitutional litigation,[77] the enforcement (or non-enforcement) patterns of state and local law enforcement,[78] and the everyday practices of ordinary Americans and their key institutions.[79] Furthermore, and most familiar of all, she may look to any related state laws on the books, using the widely accepted method of state-legislation-counting to support a given construction of a vague piece of constitutional text (*e.g.*, "cruel and unusual punishment"),[80] recognize a new unenumerated right as fundamental (*e.g.*, the right to privacy),[81] or incorporate a provision of the Bill of Rights against the states (*e.g.*, the Second Amendment).[82]

Of course, state legislation is often a poor proxy for public opinion—for instance, when old, unrepresentative laws sit on the books or when public opinion is changing rapidly.[83] Nevertheless, a state legislation count may serve as a useful component of a

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76. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 769 (2010) (relying, in part, on state constitutional provisions to incorporate the Second Amendment against the states); Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7 (2008); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92 (2013).

77. *See, e.g.*, *McDonald*, 561 U.S. at 789 (2010) (relying, in part, on an amicus "brief submitted by 38 States" to incorporate the Second Amendment against the states); Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 HARV. L. REV. F. 108, 108 (2011).

78. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 569–70, 573 (2003) (relying, in part, on state and local non-enforcement of sodomy laws to strike down a Texas law criminalizing same-sex sodomy).

79. *See, e.g.*, Town of Greece v. Galloway, 134 S. Ct. 1811, 1818–20 (2014) (looking to the practice of legislative prayer in state legislatures to uphold the practice at a local town board meeting); Dickerson v. United States, 530 U.S. 428, 443 (2000) (upholding *Miranda* based, in part, on the fact that the decision "has become embedded in routine police practice to the point where the warnings have become part of our national culture"); Amar, *supra* note 30, at 1750, 1755 (noting that the right to counsel for all felony defendants "was already settled practice in every federal court and in forty-five of the states" before *Gideon*).

80. *See, e.g.*, Hall v. Florida, 134 S. Ct. 1986, 1996–98 (2014); Atkins v. Virginia, 536 U.S. 304, 307, 310–17 (2002); *see also* Riley v. California, 134 S. Ct. 2473, 2497 (2014) (Alito, J., concurring) (noting that the "reasonableness" of a warrantless search of an arrestee's cell phone under the Fourth Amendment may be informed by legislation passed by state legislatures).

81. *See, e.g.*, *Lawrence*, 539 U.S. at 570–73 (striking down a Texas law criminalizing same-sex sodomy); Washington v. Glucksberg, 521 U.S. 702, 719, 723 (1997) (rejecting a constitutional right to die). The Ninth Amendment and the Fourteenth Amendment's Privileges or Immunities Clause may authorize such an inquiry. Amar, *supra* note 30, at 1762–63.

82. *See* Lain, *supra* note 75, at 367–68, 375–405.

83. *Id.* at 404; Lain, *supra* note 40, at 173.

broader popular constitutional argument—as may state constitutional consensus, widespread state and local involvement in constitutional litigation, clear patterns in state and local law enforcement, and well-settled practices by ordinary citizens and their key institutions.

Fifth, the popular constitutionalist judge also has at her disposal a quantitative means of approximating when the American public has reached a constitutional consensus—the public opinion poll.[84] Recent polls may offer her a snapshot of public opinion at a given moment. And tracking polls may provide her with a sense of the public's views over time. Both pieces of information may be valuable when assessing the breadth and depth of the public's views on a given issue. Nevertheless, the popular constitutionalist judge should approach public opinion data with the appropriate level of caution.

For instance, she should be skeptical of a single snapshot offered by a single poll on a given issue.[85] Furthermore, she should remain attentive to concerns about polling methodology like poorly worded questions.[86] Finally, even a properly constructed (and administered) poll leaves open certain questions about whether the survey results represent the *considered* judgments of the American people or just a shallow snapshot of public opinion.[87] However, the popular constitutionalist judge shouldn't ignore consistent results in several polls showing public consensus on a given issue.[88] Those consensus views—especially when sustained over a period of time and reinforced by other evidence of public engagement—should be a part of her decisionmaking calculus.[89]

In the end, no single indicator of public opinion is perfect. However, collectively, the indicators outlined in this Section are intended to help the popular constitutionalist judge determine when the American people have reached a considered judgment about a given constitutional issue. Furthermore, even for a judge

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84. To date, the Supreme Court's lengthiest discussion of public opinion polling was in *Atkins*, 536 U.S. 304.

85. *See* Strauss, *supra* note 31, at 863.

86. *See* BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY 7 (2004); Lain, *supra* note 40, at 117, 118; Benjamin J. Roesch, *Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine*, 39 SUFFOLK U. L. REV. 379, 420 (2006).

87. *See* Roesch, *supra* note 86, at 404.

88. *Cf.* Primus, *supra* note 15, at 1227 (arguing that "stable public consensus, not shifting majority preference," may guide constitutional decisionmaking).

89. *See* Lain, *supra* note 40, at 121, 135.

who isn't a full-blooded popular constitutionalist, these indicators may help supplement the traditional tools of constitutional analysis or, alternatively, provide a fresh way of thinking about the analytical tools that she's already using.[90]

III. PUTTING IT ALL TOGETHER: A QUICK LOOK AT MARRIAGE EQUALITY

Popular constitutionalists seeking to construct powerful popular constitutional arguments will draw upon several indicators of public opinion and take full account of the various contours of the current constitutional regime (p. 2).[91] This type of analysis will help not only to identify the considered judgments of the American people, but also to assess their depth and stability. To see how this approach might work, I conclude by turning to the issue of marriage equality. In particular, I contrast Ackerman's treatment of this issue with a plausible application of judicial popular constitutionalism. While both approaches seek to keep faith with principles endorsed by the American people, their respective reference points differ, as do the roles that they each reserve for individual judges.

For Ackerman, the issue of marriage equality calls for an application of *Brown*'s anti-humiliation principle (pp. 307-310). While judges initially limit the reach of a new constitutional revolution to its core applications—for instance, in the case of *Brown* and the Civil Rights Revolution, the anti-humiliation principle to the question of race in our public schools—it is up to future judges to extend each revolution's core principles to new factual contexts, moving from (what Ackerman calls) particularistic synthesis to comprehensive synthesis.[92]

For instance, consider a legal challenge to a state's same-sex marriage ban. In this context, it's up to the Ackermanian judge to apply her own independent judgment—her own "situation-sense"—to this new set of facts and determine whether the state ban violates *Brown*'s anti-humiliation principle (pp. 131-132, 308). If the answer is yes, then the ban must fall. If the answer is no, then it may stand. In short, the answer lies in principles endorsed

90. *See, e.g.*, Shelby County v. Holder, 133 S. Ct. 2612, 2632–2652 (2013) (Ginsburg, J., dissenting) (using a story of sustained, bipartisan consensus to critique Chief Justice Roberts's majority opinion striking down a key component of the Voting Rights Act).

91. For good examples of this type of analysis, see Rosen & Schmidt, *supra* note 8, at 129–31; Snyder, *supra* note 8, at 416–17; Lain, *supra* note 40, at 121–25; Sunstein, *supra* note 33, at 266–71.

92. *See* ACKERMAN, FOUNDATIONS, *supra* note 3, at 94–98.

by the American people decades ago and a twenty-first century judge's common-sense application of those principles to new contexts (p. 308).

To be clear, I don't want to exaggerate either the magnitude of the dead-hand problem or the amount of judicial discretion permitted in Ackerman's account. While the anti-humiliation principle *is* a product of the 1950s and 1960s, each judge's situation-sense—the very engine of comprehensive synthesis—will be shaped by today's societal attitudes (pp. 131-132, 308). Furthermore, each judge is tasked with uncovering the original understanding of each constitutional revolution and applying *its* principles—*not* each judge's own preferred principles (p. 329). Therefore, in Ackerman's account, old principles are mediated by contemporary values, and each judge's policy preferences are tempered by well-established constitutional principles. Nevertheless, for Ackerman, the answer *does* ultimately lay in each judge's independent conclusion—her own attempt to keep faith with the constitutional tradition—*not* that judge's assessment of contemporary public opinion. This is, of course, in contrast with judicial popular constitutionalism.

For the popular constitutionalist judge, contemporary public opinion *is* a key (and explicit) part of her decisionmaking calculus, as she seeks to use the various tools at her disposal to reach a textured understanding of the public's views on a given issue. Of course, she will turn first to the text, history, and principles enshrined in the Constitution. However, if she determines that those sources are inconclusive, she will then seek to understand the contours of public opinion. When analyzing the issue of marriage equality, the popular constitutionalist judge might begin by noting that this issue has been the topic of sustained public debate for over a decade—in elections, in the halls of Congress, in state and local legislative bodies, and at various kitchen tables, water coolers, and neighborhood barbecues throughout the nation. Therefore, any public views on marriage equality—whether offered by public figures or evident in public opinion polls—are likely to represent well thought-out positions rather than unreflective snapshots.

From there, the popular constitutionalist judge might then work her way through the various indicators of public opinion. For instance, she might first turn to public opinion polls to assess the public's current views on the issue, as well as to note any related trends. If so, she will have a number of polls from which to draw, as marriage equality has been the subject of endless

polling since the issue was first placed on the public agenda over a decade ago. She might then turn to any actions and activities associated with the President, including President Obama's public endorsement of marriage equality before the 2012 election, the Department of Justice's refusal to defend the federal Defense of Marriage Act in court, its participation in *Obergefell v. Hodges* this Term, and any actions taken by administrative agencies to promote LGBT rights. She might then examine any related legislation at the federal, state, and local level, cataloguing any state and local laws on the books and noting any patterns (or lack thereof) in congressional lawmaking. She might also examine the litigation decisions made by state attorneys general, as well as federal, state, and local lawmakers, in various marriage-equality cases. Finally, she might look for any evidence of bipartisan, cross-ideological support for (or opposition to) marriage equality.

Of course, different popular constitutionalists may reach different conclusions based on these indicators. For instance, some popular constitutionalists may choose to strike down same-sex marriage bans, leaning heavily on evidence of majority support for marriage equality and a clear trend continuing in that direction. Others may reach the same conclusion, but instead emphasize the crumbling consensus *against* marriage equality, with former marriage-equality opponents—including leading Democratic politicians (like President Obama) and establishment Republicans (like Jon Huntsman)—now expressing support for the idea, and public opinion polls showing a diminishing minority opposing it. When there *was* a strong consensus *against* marriage equality, these popular constitutionalists may have been inclined to uphold laws prohibiting same-sex marriage. However, now that such a consensus has dissolved, they may feel freer to use the trend in favor of marriage equality and other tools of constitutional analysis to strike down same-sex marriage bans.[93]

Of course, other popular constitutionalists may look at the same indicators and conclude that marriage equality is still an area of ongoing conflict where neither side has secured a sustained constitutional consensus. Therefore, at least for now, they may be inclined to defer to the elected branches and permit a variety of approaches to marriage in the states. Finally, still others may view constitutional equality as an area (like free speech) that should fall outside of the domain of popular constitutional analysis altogether and, therefore, decide to apply other methods to the

93. *See* Primus, *supra* note 15, at 1228.

issue. Regardless of the conclusion drawn by any individual interpreter, the indicators of public opinion outlined here provide the popular constitutionalist judge with the methodological tools necessary to analyze important constitutional issues.

CONCLUSION

Bruce Ackerman's *We the People: The Civil Rights Revolution* is a rich, textured, engrossing account of one of the most important periods in American history. However, it's also a call to action for lawyers to finally place the American people—and not just the Supreme Court and our mythical Founders—at the center of our constitutional story.

Answering Ackerman's call, I've used this review of his new volume to offer a preliminary account of judicial popular constitutionalism. While a detailed description of this approach is beyond the scope of this Book Review, I hope that this account is of some use to those interested in making popular constitutionalism work.