Review Essay

What Drives Derivability: Responses to *Responding to Imperfection*

RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT. Edited by Sanford Levinson.[†] Princeton, NJ: Princeton University Press, 1995. Pp. 330. $59.50, cloth; $18.95, paper.

Reviewed by Lawrence Lessig[*]

If you want to know about something serious, it sometimes helps to ask about it in a context where it doesn't matter. Where it doesn't matter, prejudices are more easily put aside, and when it is something very serious, prejudices abound.

American constitutionalism is shot through with extremely serious questions, questions for which we still have no good answers. Not questions like how far the Equal Protection Clause extends, or whether with due process, process is substance. These are no doubt important questions, but they are not the questions I mean. What I mean are questions like these: How do we read a constitutional text that is so old? Upon what does our practice of interpretation rest, if indeed upon anything? What makes some principles derivable from the existing legal materials and others not? Resolving these questions might well affect how constitutionalism would proceed. Yet such questions do not get answered. They do not get answered in large part because they get raised in conjunction with questions that really do matter, and somehow, stupidly, the resolution of the latter colors the resolution of the former.

Sanford Levinson has collected a series of essays by some of constitutionalism's best, focused on the topic of amendment theory. Essays on amendment theory fit this formula for success. For they plainly address

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a question that, for American lawyers at least, plainly doesn't much matter. If the Twenty-Seventh Amendment is law, then amendment theory does not matter.[1] But in the course of working through questions about amendment theory, these essays raise a common set of questions that lie at the core of constitutionalism more generally. Like the ideal conference, it is the collection that teaches, and what it teaches should echo far from the subject of the book.

The book focuses four questions. The first is really Levinson's: When is there amendment? Second, is Article V the exclusive mode of amendment? Third, are there substantive limits on what amendments may be ratified? And fourth, and in my view, perhaps the most interesting section in the book, how do amendment practices differ across constitutional democracies? These four parts are not really separate; answers from one area carry over to another. They are aspects of a common question—in Levinson's terms, what makes something "derivable" from within a constitutional order?[2] Four perspectives, that is, on what it is that gives some claim constitutional authority or, alternatively, what it is that might take authority away.

There is more here than any one review can cover. And indeed there is more in the essays that I will cover than my coverage will suggest. But the rich fullness of a complete account is the province of this (excellent) book; a ruthless simplicity focused on a single obsession is the privilege of this (short) review.

I. The Question of Change

The best introduction to the question that starts this collection may be the essay that ends the book, a piece by Noam Zohar about the Judaic practice of interpreting the Bible through the Midrash. The Bible is a text.[3] Like legal texts, it is a normative text designed to direct human action across time; unlike most normative texts, however, it cannot be

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1. *See* Sanford Levinson, *Introduction* to RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 3, 5-6 (Sanford Levinson ed., 1995).

2. *Id.* at 3, 9 (describing the book as focusing on the "problem of explaining change within practices that are derived . . . from certain specifiable foundational texts").

3. Though importantly, the Torah was not just a text. Originally the Torah comprised an oral and written text. *See* Noam J. Zohar, *Midrash: Amendment Through the Molding of Meaning*, *in* RESPONDING TO IMPERFECTION, *supra* note 1, at 307, 314 (referring to the "'double Torah': the 'written Torah,' which is canonized Scripture, and the 'oral Torah,' which refers to the body of rabbinic teschings"); *see also* Z.H. CHAJES, THE STUDENT'S GUIDE THROUGH THE TALMUD 1 (Jacob Shacter ed. & trans., 2d ed. 1960) ("Without [the unwritten law] the scriptural texts would often be unintelligible since many of them seem to contradict others, and it is only by the aid of oral elucidation that their contradictions can be straightened out.").

changed, in the sense that its words cannot be altered.[4] The words remain fixed, and the question is how to apply those words across a range of interpretive contexts.

The application is made through a practice and text called Midrash. We can think of each application as a "reading" of the biblical text, each an observance of the continuing "mandate" of the Sages "to determine continually the details of Torah law."[5] The question then is whether these readings are consistent, or whether later readings change earlier readings. The common account is that they are not consistent, that they do change over time and across contexts. As "acknowledged not only by modern critical scholarship, but also by medieval commentators as well as by the Sages themselves," "forced or arbitrary renditions are extremely common."[6]

Zohar presents two extreme examples. My favorite is the first. The Bible limits the economic and military power of the state. As Zohar describes,

> [I]t enjoins the king not to accumulate many horses or much gold and silver—two main elements of military power: "Only he shall not multiply horses to himself - - - neither shall he greatly multiply to himself silver and gold." (Deuteronomy 17:16-17)
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> The point of these prohibitions is to preserve reliance on God, preventing . . . the hubris of self-sufficiency.[7]

When Gideon comes to battle with thirty-two thousand troops, God demands that their number be reduced. Only when the number is reduced to three hundred does God give his blessing to the battle, and Gideon prevails.[8]

The Rabbinic Midrash, Zohar says, "radically changes this law, by introducing a distinction between the military and financial power of the state on the one hand, and the king's personal holdings on the other."[9] Now the law is only against personal aggrandizement; the state may have all the wealth and weapons it needs.

In this, as in other examples,[10] Zohar insists that later interpreters have simply changed what the Bible seems plainly to have said

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4. "Not one word of the divine Torah could be changed . . . ." Zohar, *supra* note 3, at 317.
5. *Id.* at 315.
6. *Id.* at 312-13.
7. *Id.* at 311.
8. *Judges* 7:2-8, 8:28.
9. Zohar, *supra* note 3, at 312.
10. Zohar's second extreme example focuses on Leviticus 25:3-7, which requires that land lie fallow every seventh year and that people and animals then consume only directly from the fields. The Midrash allows for early gathering and storage of crops, thus circumventing the biblical mandate. *Id.* at 313.

originally.[11] And the question is how to understand these alterations within a tradition committed to "fidelity to the given Law."[12]

Of course there is no way that lawyers can properly enter the world of Judaic interpretation through a single essay, even one as fine as Zohar's, especially through a review by someone who knows nothing about Judaic interpretation. But I do not think Levinson collected this essay to help us understand Jewish law.[13] Instead, the essay raises a question that the essay itself does not directly answer. The question is Levinson's and the question is this: Are all these changes in the Bible's readings really changes in the Bible? Could some of them be changes in a nominal sense—substantively not really changes at all? Is there a distinction between "interpretation" and "amendment" of the biblical text?

The question might seem odd, but this is the oddness at the core of this book. In its plain and direct descriptiveness, Zohar's essay might force even the most nominalist to ask the question that drives the first section of this collection: Is it possible that some changes in interpretation are merely nominal rather than real? And if so, how could we tell the difference?

The point might be made like this. My copy of the Torah, edited by W. Gunther Plaut and published by the Union of American Hebrew Congregations, reports the first words of Genesis as אֵת הַשָּׁמַיִם וְאֵת הָאָרֶץ בְּרֵאשִׁית בָּרָא אֱלֹהִים.[14] When the New Jewish Translation then reports the same words as "When God began to create the heaven and the earth,"[15] the translators have plainly *changed* the original text. ("בְּרֵאשִׁית בָּרָא אֱלֹהִים אֵת הַשָּׁמַיִם וְאֵת הָאָרֶץ" is not the same as "When God began to create the heaven and the earth.") But we know that this "change" does not count as a change. This change is a translation, and translations are among the class of changes that are "permissible." But why? What makes translation plainly permissible, but other changes not?

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11. Zohar is not a literalist, and he is not advocating a plain-meaning account. Within the Judaic tradition, it was the Kara'ites who, like the modern Protestants, believed that the meaning of the holy text was to be found from such a "plain reading" of the text. *Id.* at 314. Zohar claims simply that however one reads the text first, the second reading changes the text's meaning.

12. *Id.* at 309.

13. Levinson intends the piece as an attempt "to place the theory of constitutional amendment within a comparative perspective." Levinson, *supra* note 1, at 8. But I want to use it here for a different comparative purpose. Levinson himself used the subject of Judaic law elsewhere to ask the question that I want to ask here: "How is it that we distinguish those constitutional (or *halakhic*) changes that are . . . 'genuine amendments' from those other changes that can be described more modestly as principle unfolding organically . . . from the foundational predicates of the legal system?" Sanford Levinson, *On the Notion of Amendment: Reflections on David Daube's "Jehovah the Good,"* S'VARA, Winter 1990, at 25, 26.

14. THE TORAH: A MODERN COMMENTARY 18 (W. Gunther Plaut ed., 1981) [hereinafter THE TORAH].

15. *Id.*

Think of how translation functions: a text is written in a context that gives that text meaning. That context includes the language within which that text is to be read, as well as all sorts of other facts and understandings that pragmatically situate this semantic device. We now want to read this text in a different language, which is to say that we want to read the text in a context in which at least one part of the original context (the language) is different. Enter the translator, who *changes* the original text, so that in the new context the new text has the same meaning as the old text in the old context. A change in the interpretive context, then, sanctions a change in the text read, so long as the resulting text has in its context the same meaning as the old text in its context.

The context changes (the "language" changes), and this sanctions the translator's change of the original text. But language is just one part of an interpretive context. It is just one part of the construction of (at least the pragmatic) meaning of a text. What about changes in context other than language? If there is a translation that accounts for changes of language, why can't there be a translation that also accounts for these other changes?

Of course, there can be, and on one view of translation, there always is.[16] No sharp line divides "language" from everything else. And if there is a practice that aims at preserving meaning when language has changed, then there is also a practice that could aim at preserving meaning in the face of nonlinguistic changes. At some point, perhaps, the coherence of the practice might give way; at some point, texts become untranslatable. But this does not deny the possibility of a practice that strives to preserve as much of the original meaning as possible in a new context.

This understanding of translation is broader than linguistic translation.[17] Like linguistic translation, it aims at preserving meaning

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16. As George Steiner has written,

> When we read or hear any language-statement from the past . . . we translate. . . . The schematic model of translation is one in which a message from a source-language passes into a receptor-language via a transformational process. The barrier is the obvious fact that one language differs from the other, that an interpretive transfer . . . must occur so that the message 'gets through'. Exactly the same model—and this is what is rarely stressed—is operative within a single language. But here the barrier or distance between source and receptor is time. [T]he tools employed in both operations are correlate: both the 'external' and 'internal' translator/*interprète* have recourse to lexical historical grammars, glossaries of particular periods, professions, or social milieux, dictionaries of argot, manuals of technical terminology. In either case the means of penetration are a complex aggragate of knowledge, familiarity and re-creative intuition.

GEORGE STEINER, AFTER BABEL 28-29 (2d ed. 1992). Indeed, the Plaut edition of the Torah explains that the changes in the translations of the Torah were due in part to better understandings of "the political, social, and economic circumstances to which the text refers." W. Gunther Plaut, *Introduction* to THE TORAH, *supra* note 14, at xxiv-xxv.

17. By "linguistic translation," I mean the ordinary understanding of "translation," meaning changes in languages, such as from French to German.

across contexts; unlike linguistic translation, it is not limited in the changes that it can track. In this sense of translation, there could be translation across languages as well as translation within a language. This idea of translation looks to whatever in the interpretive context might affect the meaning of the text read; its focus is on how to accommodate changes in that context to preserve the meaning of the text read.[18] A changed reading, then, could be a way to accommodate changes in context, so as to preserve the original meaning of the text.

Which brings us back to Zohar's examples: for what they draw out is just this question of translation. Perhaps the extremes[19] that he selects are examples of change, not translation. But they drive us to ask whether there aren't other examples of change that we can understand better as translations rather than amendments. Are there some readings of the Midrash that differ from earlier readings but that have the same meaning as the original text in its interpretive context? Put again: if the relevant dimension of "sameness" is sameness in meaning, do these changes always evince a new meaning, or do some simply render the old meaning in a new context?

What is important about this question is not what it says about Judaic law. Again, that is an extremely rich debate that would draw us far beyond the focus of this book.[20] What is important is how the question helps focus the same question in constitutional interpretation: when we see changes in the reading of a text—when the Court, for example, reads a clause one way once and then a different way later—do these changes always manifest a new meaning, or do they sometimes manifest an old meaning rendered in a new context?

We could put the point most generally like this: "change" is an inherently ambiguous term; it always implies a measure against which the difference is to be compared. One must always work, therefore, to specify the standard against which change is being measured. Thus, to say that a reading of an old text has "changed" is ambiguous between two very different meanings: one could be saying that the changed reading yields, in context, the same meaning as the old text in its context; or one could be saying that the changed reading changes the meaning of the old text in its context. The former we can call "nominal" change; the latter, "real."

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18. For a helpful example of a similar point on comparative constitutional law, see Maureen B. Callahan, *Cultural Relativism and the Interpretation of Constitutional Texts*, 30 WILLAMETTE L. REV. 609, 610 (1994) ("The difficulty for the American reader in interpreting the Indian Constitution . . . lies in understanding the Indian text's core values and in being sensitive to other contextual differences, such as differing meanings of shared terms or concepts.").

19. The examples that Zohar selects are, as he puts it, "samples of the more radical sort." Zohar, *supra* note 3, at 310.

20. For an excellent introduction to the sources, see AARON M. SCHREIBER, JEWISH LAW AND DECISION-MAKING: A STUDY THROUGH TIME (1979).

The same question is behind Levinson's question, presented in the first essay of the collection, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change*.[21] If change can be either nominal or real, then before we start worrying about theories for justifying changed readings of the Constitution, we need to know *whether* there has been a change in the Constitution, in the relevant sense. To say that "the reading has changed" alone is not enough.

Levinson raises his question in the context of amendments to the Constitution. I take it there are at least two ways to understand the question Levinson presses, one near the surface of amendment theory and the other at the core of constitutional theory generally. The understanding near the surface tries to get us to stipulate to a view about when amendment is necessary; under this view, amendment is necessary when it adds something "new."[22] Consequently, the number of amendments has no necessary link with the number of textual snippets that may have been added to the Constitution's text. Some snippets may have been added when they were not really necessary, and some snippets may have been necessary but not finally added.

I find this view of Levinson's question not very interesting. "Necessity" is a pragmatic as well as a logical question. It might be that an amendment is necessary when something new is added, but, as Levinson acknowledges, there may be other reasons why it is necessary as well.[23] A constitutional text is significant not just because of its particular substantive content; it is significant as well for its democratic pedigree. Even if the substantive content of an amendment's text is the same as the substantive content of the unamended Constitution, there may still be a need for that amendment—in particular, when there is a need to link that substantive content to a properly democratic pedigree.

Why would this be? An analogy might help. Imagine a judge in a small-town court, the only judge for miles around. Her job is to apply the law fairly to the cases that come before her. Imagine a certain dispute comes before her involving whether the government may properly condemn certain land. If the government succeeds in condemning the land, then the value of the land next to the condemned land will rise substantially. Imagine the judge concludes that the land can be legally condemned. But imagine as well that the judge owns land adjacent to the condemned land.

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21. Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change*, *in* RESPONDING TO IMPERFECTION, *supra* note 1, at 13.

22. *Id.* at 15.

23. *Id.* at 20-21.

Obviously, she must recuse herself from deciding the case, even if the substantive result is plain, because there is a reason to question her judgment in the case. To erase that question, someone else must decide the substantive question at issue. What is important in this institutional setting is not just the substance of the result, but also the status of the person making the judgment.

An analogous problem may confront a constitutional interpreter. The problem is not that the judge's integrity would be questioned—the point is not about financial conflicts. The problem is instead that the foundations of a constitutional judgment might be so contestable that even if the judge is convinced that she is right substantively, there may be good reason for an amendment to ratify the decision with a stronger political pedigree.

The Nineteenth Amendment may be an example of this.[24] One might well have concluded in 1920 that, under the best theory of constitutional interpretation, women could no longer be denied the right to vote. That conclusion notwithstanding, one might also have thought an amendment to the Constitution necessary. The necessity would not be because the substantive content of the Amendment was different from the substantive content of the Constitution—for again, by hypothesis, we have assumed that the Amendment did not contribute to the substantive content. The necessity instead has to do with institutional costs: the result may have been correct but fundamentally contested. If fundamentally contested, then it would be a result that a court could adopt only with significant institutional burden. Many would view the court's decision as politics, not following from anything "in" the Constitution. And if enough so viewed the decision, this could undermine the court's position. If institutional cost can be reckoned in a constitutional theory—and I believe it must—then there could plainly be cases in which snippets of text are added when they add nothing to the substantive content of the Constitution. These may not be Levinson-amendments, but they are "amendments" nonetheless.

The real point of Levinson's question is, I believe, deeper. It is about a gap in our thinking about constitutional theory. We can see this gap when we push the question against the other two other essays in this section, one by Stephen Griffin and the other by Bruce Ackerman.[25] Read against these other two essays, Levinson sounds like the patient teacher who asks a question that two excellent students seem obsessed with ignoring.

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24. *Cf. id.* at 31 ("[F]ew contemporary lawyers believe that the . . . Nineteenth [Amendment is] 'necessary,' given contemporary interpretations of the Fourteenth Amendment.").

25. Bruce Ackerman, *Higher Lawmaking*, *in* RESPONDING TO IMPERFECTION, *supra* note 1, at 63; Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, *in* RESPONDING TO IMPERFECTION, *supra* note 1, at 37. Ackerman's essay straddles what I have called the first two questions of the book.

Griffin's essay struggles in part with the impossibly obscure question whether the Constitution is working well.[26] I confess, I don't get the meaning of the question.[27] Or rather, I don't get the meaning of the question when asked in this historical fashion. It's like asking whether the geological evolution of the earth is working well, to which the answer is, I take it, "well enough just now in many places, even though for most of the history of the earth it was quite an unpleasant place."

The picture that seems to hold Griffin captive is that a well-functioning constitution would in some sense sustain a certain social peace. He says as much early in the essay, when he writes: "amendments, radical shifts in interpretation, and constitutional crises are prima facie evidence that the Constitution is not working well."[28] But not working well for what? One need not be Ungerian to believe that sometimes fairly radical changes are quite good,[29] and if the Constitution did something to bring about such radical change, then all the better for the Constitution.

Slavery for example. Let's say that "America" in 1789 was constituted by thirteen states, in the majority of which most people thought slavery was basically okay. Perhaps not moral or deeply human, but still permissible enough to allow it to continue as a mainstay of social life. There were Jeffersons, of course, who condemned the inhumanity of slavery;[30] but there were also Jeffersons who continued to keep slaves, the inhumanity notwithstanding.[31]

Now I imagine that a constitution could have been written ratifying these moral norms, in the sense that this constitution would have established and sustained a peace about this question. This constitution could have, for example, explicitly entrenched slavery in perpetuity, or explicitly made unamendable the constitutional right of a state to choose slavery, or allowed disunion rather than renunciation of slavery. These entrenchments conceivably could have better kept the peace with respect to slavery. And if keeping the peace is the measure of success, this constitution would have been a more "successful" constitution than our own.

But if this is success, then failure has its own virtue. For the question of success might not be about peace, but about justice. And then the question whether a constitution is successful might be whether it has facilitated

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26. Griffin, *supra* note 25, at 37-39.

27. And neither does he. As Griffin writes, "any assessment of the Constitution as working well or badly is relatively meaningless." *Id.* at 45.

28. *Id.* at 44.

29. *See, e.g.*, ROBERTO M. UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK 7-8 (1987) ("A central thesis of *Politics* is that all the major aspects of human empowerment or self-assertion depend on our success at diminishing the distance between context-preserving routine and context-transforming conflict.").

30. WILLARD S. RANDALL, THOMAS JEFFERSON: A LIFE 592 (1993).

31. *Id.* at 593.

the reconstruction of a society that was, in this way at least, fundamentally unjust. Reconstructions take time; they are not the product of constitutional decree. Our Constitution put the question of this injustice off the political table for twenty years.[32] Whether this was the best thing to do at the time is a difficult question; those most committed to the view that slavery was unjust could well have concluded that it would be better first to secure a stable and in some ways just constitutional structure before attempting the social self-surgery necessary to eliminate the pathology of slavery. Such a judgment could have been made long before the cotton gin added the power of capitalism to the injustice of slavery; it could well have been more than self-serving apologetics.

But my point is not that deferring the question was the right decision; instead, it is the claim that the fact that the decision led to the Civil War does not make the decision wrong. If the question of success is whether the decision was just, that turns upon a world of counterfactuals at the time of the decision, the resolution of which strikes me as hopelessly difficult. Again, this makes the project of judging the "success" of the Constitution hopelessly obscure.

To say that health is stasis is to say that there is something healthy about the condition one is in. But if constitutions are as much for the unhealthy as the healthy, then at least for the unhealthy we might hope that constitutions succeed in bringing about radical change. How success might map on that aspiration, Griffin does not say. It is enough, he believes, simply to point to radical changes and to changes without proper procedures to conclude that the claim "that the Constitution has worked fairly well . . . begins to look quite fraudulent."[33]

Levinson's watch over this essay, however, presses a different question. A second theme in the essay is that most constitutional change—in the twentieth century, at least—has been change without Article V procedures.[34] Levinson asks what we mean by "change." There have no doubt been "changes," but how do we know which of these changes are changes in a constitutionally relevant sense? Griffin tells us that "the federal Constitution underwent massive changes in the twentieth century"[35] without constitutional amendment—indeed, that all of the "significant constitutional changes initiated by the national government" occurred without constitutional amendment.[36] But Levinson's discipline forces us to probe deeper. Even if there were many "changes" that

32. *See* U.S. CONST. art. I, § 9, cl. 1 (allowing until 1808 the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit").

33. Griffin, *supra* note 25, at 59.

34. *Id.* at 53.

35. *Id.* at 50.

36. *Id.* at 53.

occurred without amendment, what theory do we have to account for these changes? Which were "changes" that needed Article V, and which not?

The Levinson question is more pressing against Bruce Ackerman.[37] Ackerman has spent the better part of a decade and a half developing a theory of justification about the changes reported by constitutional history. There are three such changes, he tells us, for which we need to account. The first is the change of the founding, the second is the change after the Civil War, and the third is the change after the New Deal.[38] On the surface, the justifications for these changes seem to move from the least problematic to the most problematic. Our civics-book history is quite confident about the ratification at the founding, a little less sanguine about the changes after the Civil War, and most skeptical about the changes in the New Deal. After all, the Constitution was ratified by the state ratifying conventions; however troubled the context, three amendments were added to the eonstitutional text after the Civil War; but no new constitutional text justified the changes of the New Deal. After the New Deal, we have a dramatic shift in the scope of federal power without the sanction of the Constitution. However closely earlier generations kept to the principles of proper constitutionalism, this surface account seems to suggest that the New Deal has moved us far from those principles.

But as Ackerman quite forcefully argues, this historical account is the product of ignorance. All of these changes are, in fact, from the perspective of amending procedure, problematic. The framing of the Constitution flew directly in the face of a requirement in the Articles of Confederation that any amendment must be unanimous,[39] while the Constitution effectively permitted the amendment of the Articles with just over two-thirds of the thirteen states.[40] The framing therefore presented a plain conflict between the texts of the two constituting documents.[41] The Civil War was a little less blatant; though no text was violated, the procedures of the

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37. We can tell this in part because of the subtle shift in the footnote in Levinson's first essay. *Compare* Sanford Levinson, *A Multiple Choice Test: How Many Times Has the Constitution Been Amended? (A) 14; (B) 26; (C) 420±100; (D) All of the Above*, *in* PRAGMATISM IN LAW & SOCIETY 295, 302 (Michael Brint & William Weaver eds., 1991) ("This is obviously the crux of Bruce Ackerman's magnificent work, and I do not want to steal too much of his thunder even as I suggest some prohlems with it.") *with* Levinson, *supra* note 21, at 26 n.41 ("This is obviously the crux of Bruce Ackerman's extraordinary work, though, as shall be indicated below, I helieve that he has failed to confront the importance of the interpretation-amendment distinction for his own enterprise.").

38. *See* Ackerman, *supra* note 25, at 67-71 (criticizing current understandings of these three transformations).

39. ARTICLES OF CONFEDERATION art. XIII.

40. U.S. CONST. art. VII (providing that ratification by conventions in nine of the thirteen states "shall be sufficient for the Establishment of this Constitution").

41. *See* Ackerman, *supra* note 25, at 69 ("The Federalists responded to [the] textual demand [for unanimity] by rejecting it.").

Rump Congress to amend the Constitution were plainly troubling.[42] Finally, the New Deal should be least troubling, for there was no constitutional text involved at all. The Court simply repudiated earlier judicial readings of the Constitution.[43]

However one ranks these changes, the first point Ackerman makes is that there is trouble shot through them all. Each reveals gaps in the traditional account of constitutional history; in important ways, each deviates from the conventional account of just how change is, or should be, effected.[44] His aim then is to find a theory that explains and justifies these changes.[45] And his account is the theory of dualism.[46]

Dualism is a special kind of theory. Its aim is not purely descriptive; it is part descriptive, part constructive. It aims not only at telling us what people thought; it also aims at giving us an account that justifies most of what they did. The question is how we can understand the twists of our constitutional past so as to make the most sense of the most that has occurred.[47]

Levinson asks whether the changes that Ackerman reports are real or nominal, at least with respect to the changes surrounding the New Deal. For if they are not real, if they are fully understandable as "derivable from the existing body of accepted legal material,"[48] then these swings of theory are unnecessary appendages to the best account of our constitutional past. If there is an account that makes the change of the New Deal

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42. The Rump Congress changed the counting rules necessary to ratify the amendments simply to assure that the amendments would be ratified. *Id.* at 76.

43. *See, e.g.*, Mary C. Porter, *That Commerce Shall Be Free: A New Look at the Old Laissez-Faire Court*, 1976 SUP. CT. REV. 135, 138-40 (noting that the "switch in time" signaled little more than a return to the favorable treatment of government regulation that the Court sustained in 1877 but abandoned a decade later).

44. Ackerman, *supra* note 25, at 71 ("[B]oth Reconstruction Republicans and New Deal Democrats refus[ed] to follow the path for constitutional revision set out by their predecessors; like the Federalists before them, . . . they were perfectly aware of the unconventional bootstrapping operation in which they were engaged.").

45. *Id.* at 86. ("I want to establish that these fascinating efforts to modify the rules in midstream, to bootstrap the movement to constitutional legitimacy, were not themselves lawless. This claim, of course, supposes that there is more to law than rules.").

46. Ackerman describes America as a "dualist democracy" involving "two lawmaking tracks." *Id.* at 65. "The normal lawmaking track is designed for the countless decisions made in the absence of mobilized and politically self-conscious majority sentiment. The higher lawmaking system imposes specially rigorous tests upon political movements that hope to earn the heightened sense of democratic legitimacy awarded to spokespersons for the People." *Id.*

47. The approach is similar in attitude to Dworkin's. *See* RONALD DWORKIN, LAW'S EMPIRE 227, 227-32 (1986) ("[Law as integrity] does not aim to recapture, even for present law, the ideals or practical purposes of the politicians who first created it. It aims rather to justify what they did . . . ."); *see also* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 179-80 (1995) (describing a theory to resolve the inherent tension between "community" and "responsive democracy" that tracks Dworkin's approach).

48. Levinson, *supra* note 21, at 16.

understandable without Ackerman's structural amendment, then, on Ackerman's own view of theory, this would be a better account. What is the theory, Levinson's implicit question presses, that shows that the New Deal is indeed an "amendment" that needs ratification, rather than a change "derivable" from the legal material?

This is a strong attack. If the contours of Ackerman's account are driven by the changes that need justification, these contours would shift if some of these changes disappeared.[49] The elaborate theory, the rich history, the troubling implications for present constitutionalism—all these would disappear if we could determine that the changes (of the New Deal, at least) were "derivable" from the legal material.[50] So it would seem that the question should focus on what is in fact derivable—on an understanding of what makes an argument valid within the legal order.

This, I suggest, is the more fundamental point pressed by Levinson's initial question. If the question of what amendments are necessary turns on what is "derivable," that drives us back to consider who makes the derivations. To say that a change is "derivable" from the legal materials is to say as much about the change as about the legal culture within which the change must be justified. "Derivable" must refer to a practice of derivation, and a social practice of derivation is local and changing. What is "derivable" in one world may not be "derivable" in another. To ask whether changes in the American context are amendments, then, is to ask what, in the American context, makes an argument derivable, and what not.

We can draw the point together like this: the essays by Griffin and Ackerman ask how we can justify the changes our Constitution has seen; Levinson asks how we can know whether they are changes in the relevant sense of that term. Whether they are changes turns, Levinson suggests, on whether the new is "derivable" from the old. But this leads us back to the question of what makes something "derivable" within a particular legal culture—a question this first section of essays doesn't purport to answer, but only raises.

It is also the question that underlies the second set of essays. The first cycle leaves us with the problems of understanding just what makes legal moves possible and of accounting for changes in what makes legal moves possible. The same question tracks the question of exclusivity in part two of the book.

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49. *Cf. id.* at 34 (arguing that Ackerman's account would be unnecessary if the New Deal decisions were "genuinely new developments . . . legitimized by their accordance with generally accepted principles of constitutional interpretation").

50. Griffin reports that Roosevelt "believed the Constitution already authorized his reforms," Griffin, *supra* note 25, at 52, though knowing just what Roosevelt believed is difficult.

II. Exclusivity and Limitations

The second question of these essays is whether Article V is the exclusive mode of amending the Constitution, or whether alternative modes are implied or presumed.

The debate here really begins at Yale, though it grows out of a puzzle that has long troubled constitutional scholars. The puzzle is this: America's first constitution-like document was the Articles of Confederation. It was replaced by the Constitution in 1789. Article VII of the Constitution states the rules recognizing the replacement—the Constitution will be considered valid, Article VII says, whenever *conventions* in *nine* states ratify it.[51] Article XIII of the Articles of Confederation, however, said that the confederation was to be permanent and perpetual and could be changed only with the unanimous consent of the *legislatures* of the original *thirteen* states.[52] There is no doubt that the Constitution amended the Articles of Confederation. But it amended the Articles with procedures inconsistent with those required by the Articles—both in the number of ratifications necessary, and in whether conventions or legislatures would do the ratifying. From this perspective, then, the Constitution was adopted unconstitutionally.[53]

It says a lot about a constitutional theorist when one asks just what she does with a fact like this. One response is to ignore this hiccup of legality. So what, the response impatiently insists, if the founding was in this sense illegal. The Articles had failed, there was no reason to perpetuate them, and any claim to the contrary has long since gone stale.

A different response—the response at the core of the question here—tries to understand how we could understand this founding as constitutional, hiccups notwithstanding. On its face it appears illegal, or unconstitutional, or at a minimum, as Amar insists, inconsistent with the

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51. U.S. CONST. art. VII.

52. Article XIII stated:

> And the articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to by a congress of the United States, and he afterwards confirmed by the legislatures of every state.

ARTICLES OF CONFEDERATION art. XIII; *see also* Charles Fried, *The Supreme Court, 1994 Term—Foreword: Revolutions?*, 109 HARV. L. REV. 13, 21 (1995) ("Not only did [Article VII of the Constitution] disregard the requirement of unanimous consent of the state legislatures in the Articles of Confederation, but the reference to conventions was also a way of going over the heads (or under the feet) of the state legislatures to the people." (footnote omitted)).

53. *See* Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1047 (1988) ("[I]t is now almost commonplace for constitutional scholars to observe that Article VII obviously violates Article XIII of the pre-existing Articles of Confederation."); *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 532-33 (1969) (noting that the federalista necessarily had to circumvent the Articles of Confederation in order to accomplish their revolution).

terms of the original constitution.[54] But is there a way to understand this inconsistency as nonetheless legal, or constitutional? Is there a theory of derivability that makes what happened here derivable?

The first effort is Amar's. In an article appearing in the *University of Chicago Law Review*,[55] Amar argued that this founding was legal because of two ideas that stood in the background of both Article XIII of the Articles of Confederation and Article V of the Constitution. The less interesting of these two ideas is a principle of international law that said that within a confederation, the breach by any member of the covenants of the confederation makes the confederation voidable with respect to every other member.[56] Under this theory, what made the Articles amendable outside of the provisions of Article XIII was that for a long time they were violated by the members to the confederation.[57] And hence, under the law governing confederations, Article XIII was voidable.[58]

The significance of this principle as a principle governing legal thought at the founding has been questioned quite recently by Ackerman and Neal Katyal.[59] Their evidence at least suggests that few mentioned the argument, which might make one question its salience.[60] But for our purposes, the salience of this rule about international law is not especially important.

Far more significant is the second theory, which, Amar argues, was also latent in the political context and also relevant for understanding exactly what the founding was about. This second principle finds its voice most fully in the words of Locke,[61] echoed by Jefferson in the Declaration of Independence: that among the "unalienable" rights of man is the "Right of the People to alter or abolish" a government destructive of other inalienable rights;[62] that the People retain this right regardless of what

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54. Amar, *supra* note 53, at 1047-49.

55. Amar, *supra* note 53. Amar expanded the article in *The Consent of the Governed*, 94 COLUM. L. REV. 457 (1994). The piece in *Responding to Imperfection* is an abridged version of the later article.

56. Akhil R. Amar, *Popular Sovereignty and Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION, *supra* note 3, at 89, 94-95.

57. *Id.* at 93.

58. *Id.* at 94-95; *see also* WOOD, *supra* note 53, at 355 (noting that "whatever the limitations the Confederation may have placed in fact on the individual sovereignty of the states, few believed that their union . . . contravened that sovereignty").

59. *See* Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 476 (1995) (casting doubt on Amar's attempt "to establish that the founding was consummately legal").

60. Might, but not necessarily. If the idea "went without saying," Amar, *supra* note 56, at 101, then it might be salient even though silent.

61. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 404-05 (Peter Laslett ed., student ed. 1988) (3d ed. 1698) (advocating force to oppose "unjust and unlawful" rule which endangers the population's "Estates, Liberties, and Lives").

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

mode of amending any particular constitutional text specifies; and that it was this right to which the people appealed when they abolished the Articles of Confederation.[63]

The form of this argument is quite straightforward, and yet, apparently, quite difficult for many to account. Though its foundings are certainly driven by conceptions of natural law, it is not an argument that is necessarily inconsistent with a mature positivism. It is simply an argument about what goes into understanding the meaning of a text—an argument drawn as easily from a first-year contracts course as from a debate about constitutionalism. If it is the product of the "Yale School"[64] of interpretation, then it is the Yale School of Corbin,[65] not Amar. It is just the claim that background understandings constitute the meaning of a foreground text, and that one cannot understand what a text means unless one understands these background understandings as well.

Consider an analogy: suppose that the law of a state said that, regardless of the provisions of any corporate charter, a majority of stockholders always retain the right to amend a corporate charter. A company from that state then puts in its charter a rule that says that members of the board of directors can initiate an amendment to the charter, and that the amendment is valid if it is ratified by two-thirds of the stockholders. Is the second method an exclusive method of amending the corporate charter?

Obviously, if the law specifies a mandatory alternative of majority amendment, the answer is no. Obviously, there is retained a method of amending outside that specified in the corporate charter. But then why specify a method in the charter? What purpose would it serve if there were always this background provision that specified just how the charter could be amended?

Here again, reasons should be obvious. One might be to facilitate a management mode of amendment, which, though permitted, is not favored under the state's law. The way to read the two as consistent, then, is to see the charter as specifying a way for *ordinary* management to amend the charter but imposing a higher burden for that form of amendment. The charter allows insiders to initiate charter change, but only when insiders have succeeded in establishing supermajority support for their position.

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63. Amar, *supra* note 56, at 92-103.

64. This is Laurence Tribe's label. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1246 (1995); *see also* Fried, *supra* note 52, at 28.

65. *See* Arthur L. Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 622-24 (1944) (stating that the meaning of a writing is determined by the process of interpretation, for which the court must consider "[a]ntecedent and surrounding factors").

This is how Amar wants us to understand the form of amendment specified in Article V. If there is a background right of the people always to alter or abolish their constitution, then Article V merely sets out the ways in which ordinary government can go about altering the Constitution. Its burden is higher under Article V than the people's burden under this background right, but this difference reflects a suspicion about amendment by ordinary government. A higher showing is required when foxes amend, since foxes should not guard henhouses.

This seems to me a perfectly straightforward argument. And while there might be some fairly straightforward replies to it, the most common reply simply misses the point. Return to the analogy of the corporate charter: if one pointed to the plain language of the charter, invoked the rule of *expressio unius* or the necessities of logic, and said that it is clear from the text that that mode of amending the charter is exclusive, one would be missing the point. This, it seems to me, is what David Dow does in his otherwise thoughtful contribution. Dow tells us it cannot be the case that this understanding lurks behind the "plain text" of Article V; that if it did, "then the notion of rights collapses of logical necessity"; and that we must therefore understand Article V to mean what it plainly says.[66] Stop thinking, we are told, with the authority of the great Wittgenstein; just look.[67]

But looking is just what Amar is doing. He is looking at a historical event and at a practice surrounding this historical event. And he is giving us an account of a background understanding that makes sense of what he sees—his solution dissolves the apparent oddity of the Founders' behavior. But dissolving conflict seems a cardinal sin for Dow. We should instead come to know, and love, our internal oddities, rather than finding some way to make sense of them.

Dow's concern reaches much deeper than what we need to understand Amar's claim.[68] Against Amar's argument that a background rule of

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66. David R. Dow, *The Plain Meaning of Article V*, *in* RESPONDING TO IMPERFECTION, *supra* note 1, at 117, 127.

67. *Id.* at 143 (citing LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 134-37, at 51e-53e (G.E.M. Anscombe trans., 3d ed. Basil Blackwell 1968) (1953)); WITTGENSTEIN, *supra*, § 66, at 31e ("Don't say: 'There *must* be something common, or they would not be called "games"'—but *look and see* whether there is anything common to all. . . . To repeat: don't think, but look!" (emphasis in original)).

68. The central thrust of Dow's essay raises an interesting and difficult interpretive question. He argues (convincingly, I believe) that Americans take for granted both that "[f]ollowing the majority because it is the majority is sometimes obligatory" and also that "resisting the majority even though it is the majority is sometimes required." *Id.* at 119 (emphasis omitted). From this he concludes that there is no reason to "resolve" the Bickelian countermajoritarian difficulty. *Id.* at 118-19. I am not sure this conclusion follows from the premise. I also agree with Frank Michelman that Dow oversimplifies Ackerman's account of dualism when he concludes that Ackerman is a "simple" majoritarian. *See* Frank I. Michelman, *Thirteen Easy Pieces*, 93 MICH. L. REV. 1297, 1310 (1995) (book review).

interpretation renders any mode of amending nonexclusive, the only responsive argument is one that either denies the background rule or asserts a rule of interpretation that disallows one from considering that background rule—a parol evidence rule, as it were, applied to constitutional law. No matter how many degrees of dogmatism and ridicule one peppers the argument with, no "plain language" argument is ever complete when considering the plain language alone.[69] Even the plainest one-hundred-year-old text—indeed, especially the plainest one-hundred-year-old text—takes for granted understandings that give it its meaning, and any argument that attempts to avoid what this possibility might raise must talk about what stands in the background.

As a descriptive matter, the Amar argument relies upon the existence of a set of views understood, or taken for granted, in the context of the founding. It is a claim about a particular historical understanding that would have governed the reading of this constitutional text. It follows, then, that to argue against this position, one must show something in the original understanding that undermines Amar's claim—something from the original context that shows that in fact the Framers did understand Article V to be exclusive or did not believe that the Lockean rule applied to the Constitution, the Declaration of Independence notwithstanding.

Amar's question is wonderful because it allows us to see one text in two ways—constitutional law's duck/rabbit. We can look back to this foundation of the Enlightenment in our constitutional past and understand what the Framers did either as an attempt to domesticate revolution in a wonderfully enlightened way,[70] or as the opposite—as a specification of one mode of revolution without the pretense of specifying the only mode.

But Amar wants to use this historical fact for something more than history or interpretive curiosity. He wants to use it to tell us something about what the Constitution must now be read to allow. As he says, his understanding entails the view that "Congress would be obliged to call a convention to propose amendments if a majority of American voters so petition; and that an amendment could be lawfully ratified by a simple majority of the American electorate."[71] Curious, this: A fact of history, Amar wants to argue, entails a normative conclusion about how our Constitution ought to be understood today. How?

The arguments about the nature of our self-understanding of constitutionalism are extremely suggestive, though beyond the scope of this Essay.

69. *Cf.* Mark E. Brandon, *The "Original" Thirteenth Amendment and the Limits to Formal Constitutional Change*, *in* RESPONDING TO IMPERFECTION, *supra* note 1, at 215, 220 ("[T]exts are not neatly self-contained but require something 'outside' themselves to give them meaning.").

70. Compare Gordon Wood's description: "Americans had in fact institutionalized and legitimatized revolution." WOOD, *supra* note 53, at 614.

71. Amar, *supra* note 56, at 89 n.1.

When we see the argument this way, we see why it links with the question that we left off with in the first section—the question of what makes something "derivable." Here we could put the question more precisely: would the validity of an amendment, ratified by popular convention outside the procedures of Article V, be derivable from the legal materials of our constitutional democracy? Amar assumes that this historical understanding makes it derivable. The question is whether these in fact are our rules of derivation.

The claim is certainly not absurd, even within the context of modern, successful constitutional democracies. Indeed, there is a wonderfully apt example from France that has somehow gotten lost in the various American accounts of Article V nonexclusivity.[72] The French Constitution specifies a mode of amendment; it is, in effect, quite restrictive. In 1962, de Gaulle wanted to amend the constitution to allow for direct presidential elections. So he held a referendum to that effect. The only problem was that the referendum, purporting to amend the constitution, was plainly inconsistent with the mode of amendment specified in the constitution. The French Constitutional Council upheld the change nonetheless. Said the court, because "the people" had ratified the amendment, it was beyond the jurisdiction of the Council to question the people's action.[73] Their ratification would be treated as a constitutional amendment, and de Gaulle, and presidents since, would be popularly elected. Amar is arguing that the same understanding would have been derivable from the legal materials at the founding, and he wants to use that fact to say the same about us today.

Ackerman's argument is similarly originalist. In Ackerman's view, what justifies the founding is certainly not some rule of international law; nor is it anything so fixed or simple as the Lockean right to revolution. What justifies that illegality, and others as well, is something in between—an understanding that there is a form of legitimacy, or democratic justification, that is beyond the words of a constitutional text, but which is also not simply anarchy.[74] This is Ackerman's theory of dualism. Dualism teaches that at times the sustained political attention of the people is enough to transform what would otherwise be illegality into sustaining

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72. Holmes and Sunstein briefly advert to the event in their essay, but their purpose is not to engage this exclusivity debate. *See* Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, *in* RESPONDING TO IMPERFECTION, *supra* note 1, at 275, 283 n.17 (using the event to support an argument favoring flexibility in constitutional revision). For a description of the events, see JOHN BELL, FRENCH CONSTITUTIONAL LAW 133-34 (1992).

73. BELL, *supra* note 72, at 134. Thus was France able to recognize a power to amend the French Constitution outside of its text without, as Dow argues, "the notion of rights collaps[ing] of logical necessity." Dow, *supra* note 66, at 127.

74. As Ackerman puts it, "While they played fast and loose with the existing rules, they did not break entirely with the preexisting institutional matrix." Ackerman, *supra* note 25, at 69.

constitutional politics.[75] The three constitutional changes that focus Ackerman's account all share this common form, and it is this common form that is the formula for justified amendment outside of Article V.

Facts from history, therefore, tell us that Article V is nonexclusive. But is this right? As a matter of constitutional fidelity, does the fact that the Framers, or different framers, presupposed some background theory of justification mean that we too must follow this same background theory? Are we finished with establishing the derivability of some constitutional conclusion once we point to the fact that a proper set of framers would similarly have found the argument established?

In this era of originalism, one might be forgiven for passing so quickly over this question of entailment. A legal culture such as ours encourages warm—we might say fuzzy—thinking about fidelity, and fidelity ordinarily means that pointing to some fact about what the Framers believed—some fact presupposed by the constitutional text—is sufficient to establish that that same fact is currently binding.

Forgivable, but I believe false. While it is the case that some beliefs presupposed by the Framers and left unstated in their text continue to be binding, obviously not all such beliefs continue to be binding, or, more importantly, *would* continue to be binding under the best theory of interpretive fidelity. All should agree that some beliefs are; all should also agree that some beliefs are not. But then we need a way to distinguish the

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75. The point might best be made by comparing the institution of amendment to the institution of marriage. As an institution, marriage is constituted in part by a series of rules of recognition. Read romantically, these rules are all about assuring that marriagea are expressions of a higher commitment of fidelity. Ideally, the institution's structure helps assure that commitments sanctioned by "marriage" are genuine expressions of the will of each actor. There is a difference, this dualist theory would assert, between a marriage and a car rental agreement, even though both are in an important sense contracts.

Now of course not all marriages are expressions of such commitments. Many people go through the ritual of marriage without really meaning to express anything of such signifieance. Shotgun marriages, marriages of convenience, marriages to circumvent immigration laws, and the like: all are examples of what we might call false positives on the dualist theory of marriage; all are examples in which people engage in the ritual without invoking this higher commitment.

If there are false positives, we can also imagine false negatives: cases in which people have imperfectly engaged in the ritual, but in which their relationship really does express the highest order of commitment. A technical error in registration, a failure to establish residence, two candidates of the same sex—each of these is a case in which the commitment between the candidates for marriage might be as sincere and extreme as any imaginable, but in which the technical rules of marriage have not been satisfied.

Ackerman's theory attempts to figure out which of these imperfect marriages we should nonetheless count as marriages. Unlike Levinson, who might say that a particular "amendment" was not really an amendment, and by analogy that a particular "marriage" was not really a marriage, Ackerman does not seem concerned with denying the validity of insincere marriages; his main concern is to find a justification for sincere but imperfect marriages. What makes it possible, he asks, for us to look beyond the technical rules to recognize a technically imperfect marriage as yet a marriage?

two types of belief—a theory for helping us know which of those presuppositions continue to be derivable and which not.

The point cuts against Amar most directly. Assume with Amar that the Framers took this right of revolution for granted. Thus, Article V when written was not exclusive. I take it as uncontroversial that today the average lawyer would think the contrary—that he or she would believe the text exclusive.[76] Whatever the Framers thought about the right of revolution, we have our own, quite different thoughts about the matter.

What can we say about this common modern response? Perhaps that it is wrong and unprincipled: taking what we might call the extreme originalist view, we might say that a constitution constitutionalizes not only what it speaks about, but also what it presumed, or what was taken for granted, in the context in which it spoke. Perhaps a constitution constitutionalizes *all the way down*. If, because of the political theory upon which the Constitution rested, it was taken for granted at the founding that Article V was nonexclusive, then fidelity demands that we always read Article V as nonexclusive.

This is a possible theory of fidelity, but it should be plain that it is not the only plausible theory of fidelity. More importantly, when one considers what else it might entail, it becomes clear quite quickly that stated so extremely, the theory is quite implausible as an account of our own constitutional practice. If reigning theories of sovereignty are constitutionalized what else is constitutionalized? Were theories of physics constitutionalized, such that we must judge what is "necessary" under the Necessary and Proper Clause according to what science would have said was necessary at the time of the founding? Is reasonableness under the Fourth Amendment to be governed by what would have been reasonable at the founding, given the state of technology reigning then? Does the Fourteenth Amendment constitutionalize theories of economics,[77] or theories of equality,[78] which stay fixed until changed by explicit constitutional text?

My point is not to deny that Amar's framing theory was constitutionalized; it is to argue simply that whether it was constitutionalized is not an easy question, or better, it is to argue that *whether* it was constitutionalized is the question that Amar should be pressing. That

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76. In 1961, Amar's thesis got George Anastaplo rejected from the Illinois Bar, though the fear there was linked more with communists than with the right to revolution. *See* In re Anastaplo, 336 U.S. 82, 99-101 (1961) (Black, J., dissenting).

77. For a description of these ever-present background theories, see HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-1937, at 94, 93-96 (1991) (proposing that the Fourteenth Amendment was "economic by design" and included "a set of distinctly economic civil rights").

78. *See* Harper v. Virginia Bd. of Educ., 383 U.S. 663, 669 (1966) ("[T]he Equal Protection Clause is not shackled to the political theory of a particular era.").

question depends upon a theory of how much of the background adheres to the foreground text, or of what we must carry over to preserve fidelity.

The point gets raised most directly in the essay that stands at the center of this book. This is the contribution of Fred Schauer, *Amending the Presuppositions of a Constitution.* A constitution, Schauer argues, is a system of justification.[79] Any system of justification rests upon presuppositions, themselves external to the system and hence, themselves not justified within the system. Justification, as it were, is internal. While stuff within the Constitution can be justified or unjustified, the presuppositions upon which the Constitution rests are not justified or not. They are instead the *Grundnormen,* or the rules of recognition (pick your favorite positivist term)—"social facts" or "social practices"[80] that make everything else justified, but that do not themselves admit of justification. They come into existence and pass away without suffering the rigors of justification; they just are, and however they are, they give systems of justification life—or headaches.

This story has a particular salience in the context of this debate about exclusivity. For while these presuppositions are not regulated by these rules of justification—while they stand outside the limits of justification—they nonetheless have an effect on the constitutional systems they support. The presuppositions color—or tinge—the meaning of the constitutional systems that they support. This means that as presuppositions change, as they evolve, or are transformed, the constitution that they support also changes, or evolves, or is transformed.

The problem with this argument comes in the next step. From two perfectly true premises—(1) that the Constitution rests upon presuppositions themselves not subject to justification, and (2) that these presuppositions affect the meaning of the Constitution—Schauer tries to draw a conclusion that I suggest does not follow: namely, (3) that changes in the Constitution's meaning due to the changes in presuppositions not subject to justification are also changes that themselves are not subject to justification.[81] Put another way, Schauer's positivist story urges a kind of passivity upon us. We cannot help but accept the effect of these changes in presuppositions, and so we cannot help but accept as justified changes in the Constitution's meaning that derive from these changes in presuppositions. As Schauer says, amendment of the Constitution can come from

79. Frederick Schauer, *Amending the Presuppositions of a Constitution, in* RESPONDING TO IMPERFECTION, *supra* note 1, at 145, 149-50.

80. *Id.* at 150.

81. As Schauer says, "Constitutions are thus necessarily always subject to amendment as their supporting presuppositions are amended, even though it cannot be the case that the amendment of those supporting presuppositions can be thought of in anything other than factual or other prelegal terms." *Id.* at 148.

changes in "these underlying presuppositions—political and social, but decidedly not constitutional or legal[, and] it cannot be the case that the amendment of those supporting presuppositions can be thought of in anything other than factual or other prelegal terms."[82]

I suggest that this conclusion no more follows than does its opposite, urged upon us by Amar and Ackerman—the conclusion that historically located presuppositions continue to be binding upon us. For the question that constitutionalists are interested in is the internal question—it is whether certain change is consistent with an obligation to interpretive fidelity. This is a question of fidelity theory, not political theory.[83] It asks whether, internal to the system of constitutionalism, these changes in "political or social" presuppositions *should be recognized.* That question is quite permissible and intelligible, even if the answer is: "No, this kind of change should not be recognized, but nonetheless it has occurred." The latter is a statement about power, not legitimacy, and, as Dow puts it, "[s]tatements about power are statements about physics, and I am not concerned to address them here."[84]

An example should make the point. Schauer points to the presuppositions underlying the Second Amendment,[85] which is an unfortunate choice, since we really know so little about what that Amendment is about, or how it should be carried into the current interpretive context.[86] Let's take an easier amendment—say, the Fourth Amendment. I take it all will agree that a presupposition of the Fourth Amendment was, as Justice Scalia puts it, a "fiercely proud"[87] independence that demanded that the government interfere in private spaces only with good cause. This judgment, then, rests upon what we might call judgments of value and also judgments of fact, both presuppositions in the founding political order. The

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82. *Id.* (footnote omitted).

83. Walter Murphy is making the same point when he speaks of limitations on the Constitution's amending power:

> Can the people agree to this transformation? The answer is obvious: Of course they can. Might may not make right, but it can establish national borders, create national institutions, and coerce much outward conformity. There are, however, other relevant questions: *May a people who accepted constitutional democracy democratically or constitutionally authorize such a political transmutation? May the new system validly claim to draw its authority from the consent of the governed?* My answer is no to these questions.

Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity, in* RESPONDING TO IMPERFECTION, *supra* note 1, at 163, 175 (emphasis added).

84. Dow, *supra* note 66, at 123.

85. Schauer, *supra* note 79, at 156-57.

86. For a helpful collection of views, see Symposium, *Second Amendment*, 62 TENN. L. REV. 443 (1995), especially Glen H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995) (discussing the various theories that have been offered to explain the historical justifications for the Second Amendment).

87. Minnesota v. Dickerson, 113 S. Ct. 2130, 2140 (1993) (Scalia, J., concurring).

Amendment expresses this pride, or independence, subject to the technology of the time. As the technology changes, no doubt how this pride is to be expressed should change as well.[88] But regardless of that change, it is possible, at least in theory, to imagine relocating the original value in this new technological context.

Now it is possible (sadly, I would say quite likely) that the pride that Scalia suggests that the Amendment stood for has disappeared in American society today. Security, not liberty, has replaced it. Security from other citizens, rather than security from the government, has induced many to think that the special constitutional protections of the Fourth Amendment are quite unnecessary today. And if we follow Schauer, then we would say that because the presuppositions of this original period have changed, because the Constitution depends upon these presuppositions, and because presuppositions are not themselves subject to justification, it is also not subject to justification if the Court simply recognizes these new reigning presuppositions, and in effect reads out of the Constitution the Fourth Amendment protections. We the People don't believe in liberty from the police anymore, so we the Court, Justice Schauer might write, need not recognize this right of liberty anymore.

I think this moves too quickly. Within our admittedly internal system of justification, I believe that we have a principle of interpretive fidelity that says that changes like that need democratic affirmation. These presuppositions have been constitutionalized, and recognizing changes in them without pointing to ratifying political action would be improper. The Court might say that the Constitution, whether in its text or not, constitutionalized these values, and if they are to be changed, something other than an evolving set of presuppositions must change them. Evolution should not be allowed to vitiate the promise of constitutional government, which in part is the promise to erect barriers to such evolution and to require self-conscious change about some matters, when change is desired.

Schauer has made the opposite mistake of Ackerman and Amar. While they presuppose the continuing validity of earlier presuppositions, Schauer presupposes their constant remaking. But whether in fact they are remade or not—whether the people believe now what they believed then—is a distinct question from the question of what a principle of interpretive fidelity should do, given what the people believe. The people could believe that we should become a fascist nation, and that might be a strong reason why we will become a fascist nation, but fidelity might say nonetheless that we read the Constitution improperly if it accommodates our becoming a fascist nation.

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88. *Cf.* County of Riverside v. McLaughlin, 500 U.S. 44, 62 n.1 (1991) (Scalia, J., dissenting) (arguing that "reasonable" time limits for bringing a person arrested without a warrant before a judicial officer are now a function of helicopters and telephones).

I am speaking quite tentatively here, and I should have spoken tentatively when reviewing Ackerman and Amar, because I think that the three theorists have drawn out a gap in constitutional theory that has yet to be filled. All three, and Levinson as well, are pointing to understandings in the background; all are making arguments about the extent to which constitutional law should, or should not, depend upon shifts in these understandings. But we do not have an account that makes it possible to speak usefully about these understandings. The presuppositions are of many kinds, but how they should be dealt with is not clear. What is needed is an account that would make this clear.

Such an account would turn, I suggest, upon a distinction that is easy to suggest yet hard to define. Elsewhere I have suggested the distinction is between matters contested and matters uncontested.[89] The contested are the matters about which there is actual and substantial debate, even if people have clear views about the matter contested. Views about abortion are the easiest example: we all may have fairly strong views about whether women should have the right to choose whether to carry a fetus to term, but we all equally well understand that that question is contested. The uncontested, or taken for granted, are matters that are treated as off the table, not subject to contest or question. It is not that these matters cannot be questioned or that there are not those who question them; they could be questioned, and there are those who question, but here questions die quickly. One might argue, for example, that if abortion is permitted, then infanticide should be permitted as well, pressing the relevant similarities and the insignificance of any differences. Yet such an argument would change little. The justifiability of infanticide stands off the table of moral debate. It is an uncontested domain of our moral discourse.

The notion then is that some matters stand off the table of debate, others on the table, and that one cannot simply stipulate to move an item on or off the table. If a matter is off the table, it will take extended debate to pull it on the table; if a matter is on the table, certainty about the answer to the matter in question alone will not move it off the table. Certain matters are foregrounded and others backgrounded, and this foregrounding or backgrounding is not done by an individual alone.[90] Foregrounding a matter for debate is a social action that requires the acknowledgement or acquiescence of the relevant community, just as backgrounding a matter from debate is a social action.

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89. *See* Lawrence Lassig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 410-11, 410-14 (1995) (noting that when an "interpreter of fidelity seeks readings of legal texts in the current interpretive context that preserve the meaning of an earlier reading in an earlier context," the interpreter must distinguish between the two aspects of interpretive context—those that "at any one time are contested, or up for grabs, or political, and [those] that are at the same time taken for granted, uncontested, given" (emphasis omitted)).

90. I am grateful to Abner Greene for help with this idea.

It is not just moral questions that are in this sense foregrounded or backgrounded. The same might be said of views in science, economics, or government. As with questions of morality, these questions get drawn onto the table and pushed off. What distinguishes fields of discourse is not that some have contested and others uncontested matters; what distinguishes fields of discourse is the structures of authority that determine whether a matter is foregrounded or backgrounded.

Obviously—and this is what makes this point interesting—to say that a matter is contested or uncontested is not to say that it will remain contested or uncontested. The domains of the foreground and limits of the background are each constantly shifting in ways and for reasons that are not fully accountable. But while the line will never be clear at any one time, we all will clearly understand that some matters stand open to debate and others do not.

The point of the distinction is to help us understand the presuppositions that Ackerman, Amar, Levinson, and Schauer seem keen to focus. Put another way, the point is to understand what a constitution might be constitutionalizing, where constitutionalizing means just what a constitution might be making a choice about, and therefore, just what fidelitists should be respecting when attempting to be faithful to what the Framers did.

We can array the possibilities like this:

(1) There are matters that were contested and that the Framers of the Constitution made a choice about. For example, it was contested whether the president should be one person or a committee. The Framers debated this, and then they made a choice. Their choice was reflected in the text of the Constitution, but whether it was recorded in the text is an interpretive matter. This was a contested matter about which a choice was made.

(2) There are matters that were contested but about which the Framers made no choice. The ultimate status of slavery in America is an example. The question was pressed, and the decision at the framing was ultimately not to resolve it.

(3) There are matters that were not contested, perhaps because not thought possible of contest, yet the truth or status of which the Framers recognized or endorsed. The Lockean view about the inalienable rights of man may be an example. These were views that the Framers believed to be *true*, not merely good. And they recognized and relied upon their truth in establishing the Declaration of Independence.

(4) There are matters that were not contested and that were not on the screen of the Framers' focused attention. Nonpolitical laws of nature are an example. These were uncontested views, but not really endorsed one way or the other. That all people die is a view that none would have

denied or contested, yet this is hardly a view the Framers would have bothered to endorse.

How fidelity theory should respond to changes in these four kinds of presuppositions is the question—an open question, I should think. But it should be clear at least that it would be an odd theory that treated them all in the same way. Type one presuppositions, for example, deserve a kind of respect that it would be odd to accord type four. Type one represents political choice, and in the context of constitutional decisions, political choice of the highest order. Type four represents no choice at all. Thus, if we are devising a theory to respect choices made, then the demand to respect choices of the first type might be much stronger than the demand to respect choices of the fourth type.

Just this sort of discrimination is missing both in the originalism of Ackerman and of Amar (though in different degrees) and in the positivism of Schauer. Consider Schauer first. Schauer treats all presuppositions in the way we might rightly treat type-four presuppositions: though taken for granted, though presupposed, he treats all presuppositions as unchosen and thus as deserving no entrenching effect. But while fidelity theory might be quite indifferent to changes in presuppositions of type four, there may be good reason for fidelity theory to insist upon entrenching, or recognizing as entrenched, presuppositions of type one. Schauer gives us no way to see the difference.

The same point applies, perhaps less forcefully, against Ackerman and Amar. In differing degrees, both treat the presuppositions that they rely upon as we might treat type-one presuppositions. Both, that is, accord the presuppositions that they identify as deserving of the highest interpretive respect—deserving to be recognized or given effect regardless of whether these presuppositions continue to be presupposed by the body politic. But why treat ideas not actually chosen with the same respect that one accords values directly chosen?

Both extremes help us see the gap in our understanding that a theory of fidelity must fill. As a normative matter, we need a way to sort out which of these presuppositions fidelity requires that we recognize. (And must it be a normative theory the Framers would have recognized?) As a positive matter, I suggest that we already have something like an account of which do get recognized. Or at least, we have an account of how courts treat presuppositions.

This is not the place to articulate this theory fully. But I can sketch its conclusions. First, matters that were both contested and constitutionalized (type one) continue to be binding, regardless of whether they are contested today. This is the minimal requirement of fidelity. It requires loyalty to choices made. Second, matters that were contested but not constitutionalized (type two) continue not to bind, though not regardless of whether they are contested, as we will see just now.

For the balance—for presuppositions not constitutionalized but present at the time a constitution was enacted—I suggest we have followed a fairly simple pattern. When these presuppositions are presently uncontested, or in Greene's terms, backgrounded, courts track the uncontested view, *whether or not this view was the uncontested view originally*. And when these presuppositions are presently contested, courts will not decide cases resting or depending upon these contested views, again, whether or not these views were originally contested. In both cases, I suggest, our practice has been to track the current status of these presuppositions, not their original status, and to defer or not depending upon this present status. Derivability for us has been about whether conclusions can follow from the legal text and from presuppositions taken for granted by those who apply the legal text today.

As a purely positive matter, then, this account would give us a way to think about both Ackerman's and Amar's arguments. Consider Amar's argument first. The exclusivity presupposition that Amar relies upon, if it exists at all, exists uncontested in the original founding context. There are no debates about whether this presupposition ought to be recognized in our constitutional structure; indeed, it is most striking that the debates hardly mention the idea at all. Here is the clearest example of a presupposition that exists, if at all, wholly in the background of the constitutional context. Thus, the presupposition falls into the class in which the court is present-ist oriented, meaning that this positive theory would predict that whether the court would recognize the presupposition turns on whether the presupposition is presently contested. If it is presently contested, the positive theory I have offered here would suggest that the court would defer to the political branches (meaning simply that the court would not go against political branches in recognizing the judgment). If it is presently uncontested, then the positive theory would suggest that the court would decide the case according to the presently uncontested view, regardless of whether this view was the original view.

I take it that the exclusivity presupposition Amar points to is presently uncontested, and it is uncontested in just the opposite way that Amar argues it was at the founding. It is uncontested, that is, that an amending clause presenting itself as exclusive is indeed exclusive—that there is no reserved right to alter or amend *this constitution* and thus that *this constitution* can be amended or altered only within the terms presented. And hence it would follow that the court would not recognize an amendment secured through the Amar procedure of amendment.

Ackerman's claim is more complex. Unlike Amar, he does claim that the view he is pushing was contested each of the three times it was advanced. No historically determinate presupposition about extra-constitutional means of amendment was constant throughout these three

moments of constitutional change; instead, there was constant constitutional creativity. In each, there was a pattern with changing elements but with a deep structure that remained constant.[91] To the extent that a constant was contested throughout these periods but later became recognized as constitutional, one might argue that the presuppositions Ackerman points to have been constitutionalized. The contest and ratification might have placed these presuppositions in the class of type-one presuppositions, and it is clear that this is the thrust of Ackerman's argument.

Yet the dimension of change that Ackerman acknowledges throughout the period undercuts this view. For the same presupposition does not operate throughout; the presupposition evolves, or grows, in different historical periods. Because of this change, the content of what is constitutionalized is less clear. The change suggests that not any particular pattern of change is constitutionalized, but rather that there is a thin structure of legitimacy that has different forms at different periods. There is, as it were, an envelope of legitimacy, within which each of these changes just barely stands.

The positive theory operates against Schauer's positive account as well. For presuppositions that were uncontested and hence not constitutionalized, the positive account accords with Schauer's account: what matters is a current perspective, not the original perspective, though how it matters under the positive account is a bit different from how it matters under Schauer's. But for contested, constitutionalized presuppositions, the positive account would differ from Schauer's. Even if presuppositions that were contested are now uncontested, fidelity theory would argue against recognizing the current, uncontested view. Fidelity theory would require us to respect deals struck, and any changes made must be made expressly.

Now I do not offer this positive theory here to resolve the normative question of how we should think about these changed presuppositions in the background of the constitutional text. Indeed, my aim is precisely the opposite. It is to flag a hole in the theories we have. What is striking about originalism in any form is that it simply ignores the question of how to select among the range of views background to the founding text. The positive account is an effort to describe what we have done, whether consciously or unconsciously. But a positive account is certainly not enough. What is needed is a normative account that helps us understand which of these presuppositions a theory of fidelity should respect.

The beginnings of a normative theory might be suggested in a recent essay by Cass Sunstein. We might say, following Sunstein, that the theories underlying a constitutional regime are incompletely theorized, or

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91. *See* Ackerman, *supra* note 25, at 73 n.4 (criticizing Amar for failing to account for "intervening efforts by the American People to exercise their popular sovereignty").

that constitutions themselves are incompletely theorized agreements.[92] What this does not mean is that these theories do not function or have an effect in a particular political context. This they clearly do. What it does mean is that their shape, or contour, across individuals purportedly holding the same theory may be radically different. Theories always reach beyond the particulars at issue, yet agreement is only ever found over the particulars at issue. Hence beyond the particulars, differences among theories can be quite great.

The point is not to belittle the significance of theory. No doubt theory is extremely important in guiding the battles of a particular day. The point is instead to highlight a particular problem that a court faces when it attempts to rely upon earlier theories. For to rely upon them, the court must finish an agreement that is only partially complete. It must take an incompletely theorized agreement and complete the deal, at least with respect to a particular issue. This act of completing the deal will always appear contestable. The act of articulating the theory implicit in the moment will always be an act of construction. There is nothing in the theory to report, but the court must proceed as if there is a reality to report.

Amar's argument makes the point well. Again, Amar argues that "Congress would be obliged to call a convention to propose amendments if a majority of American voters so petition; and that an amendment could be lawfully ratified by a simple majority of the American electorate."[93] Why a simple majority of the American electorate? No doubt those holding Amar's theory at the founding would have been majoritarians—as Amar puts it, the idea "went without saying."[94] But they were majoritarians for a wildly different "electorate"—for an electorate, that is, that excluded the poor, or women, or blacks, or Native Americans. No doubt today's electorate would extend to these groups and to any person able to become a citizen, but then why would we expect that "majoritarianism" would extend to these groups?[95]

In Sunstein's terms, this agreement about a "simple majority of the electorate" was incompletely theorized; when we extend it to unforeseen contexts, it is no longer plain exactly how this original agreement should

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92. *See* Cass Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

93. Amar, *supra* note 56, at 89 n.1.

94. *Id.* at 101.

95. Amar adverts to the complexity of the question of which presuppositions are built into the notion of majoritarianism. He argues that the majority cannot act with "whim." *Id.* at 110. But again, these ideas (how the majority may act; what is the majority; and who comprises the majority) bang together, and the question is how we understand the relationship among them and, more particularly, how we extend this relationship across time. For a much more skeptical view of Amar's majoritarianism, see G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787, 791-98 (1994).

be extended. And when one accounts for the institution making the extension—here a court—the suggestion is that that extension should be in accord with *currently* backgrounded views. These views, the argument goes, could well require a supermajority of the American electorate before an amendment could be considered ratified.

This is different from Schauer's point, for I am selecting a class of presuppositions that evolve, or change, and against which a court might be powerless to fight. These presuppositions of theory evolve, but because they are never completely theorized at any one time, they never provide a way to preserve themselves. They transform as they evolve, and since this evolution is never complete, they never provide a ground upon which to fix the debate. This might provide a good normative account for why a court should follow the present view about the status (whether contested or not) of these theoretical presuppositions. But I differ from Schauer in believing that these remain normative, not positive, questions. The question is one of fidelity theory, not political science; it is about what a legal system should recognize as derivable, not what it actually derives.

To portray a result as "derivable from the legal materials" is in some sense to report on the status of these presuppositions.[96] It has both a positive and normative cast. The positive cast is simply the question whether this legal culture would recognize something as derivable; the normative cast is whether, given the nature of the presuppositions at issue, it ought to recognize something as derivable.[97] From either perspective, it is to report whether certain ideas, once held as certain, are now understood as contested; likewise, it is to report on whether ideas once held as contested are now held as certain. "Exclusivity," then, is simply an application of this more general point.[98]

So too, I would suggest, is the question of limitations—the third question raised by this collection of essays. This section is comprised of three essays by the leading authors to have addressed the question of whether there are limits to the substance of the amendments that can be ratified as part of our Constitution. I do not intend to discuss this section of the book, except to suggest how it links with the question of exclusivity.

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96. As Levinson puts it, it is to report on "what most persons at any specific time within a given interpretive community will, on the one hand, accept as 'legitimately assertible' or, on the other, reject as 'off the wall' and indicative of an inability to understand the working conventions of our constitutional system." Levinson, *supra* note 21, at 18 (footnote omitted).

97. Thus, while I agree with Dow about the "empirical assumptions" about whether Article V would be considered exclusive, Dow, *supra* note 66, at 119 n.8, I do not agree that this is the whole of the argument whether it should be considered exclusive.

98. I, therefore, do not agree with Dow that the "answer lies in history and on the battlefield." *Id.* at 138. It depends instead upon an understanding of what presuppositions of a constitutionsl culture should be recognized as binding.

The debate about limits is simply the mirror-image of the debate about exclusivity: exclusivity is about whether the procedures that appear to be exclusive are exclusive; limitation is about whether the substance of amendments, which—with one or perhaps two exceptions[99]—appears to be unlimited, is unlimited. Both questions are about whether there are "presupposition[s] of our constitutional structure"[100] that the constitutional text merely confirms.

Frank Michelman has made the very nice point that there is an interesting asymmetry of positions that one can draw from the authors collected here.[101] If one can be a formalist or nonformalist as a matter of method (where, following Michelman, "formalist" means a reading that "follows the line of least resistance whenever there is one, cleaving to what the great preponderance of lawyers would undoubtedly see as the plain and reasonable meaning of the law," and "nonformalist" means a reading that, "because it gives the law a prima facie unexpected reading, depends for persuasiveness on a transtextual theory about the deeper aims and premises of American government"[102]) and if one applies these two methods to the two questions of procedure and substance—whether Article V is the exclusive mode of amendment and whether there are any implied limitations on the substance of the amendments that can be ratified respectively—then we should have a fairly straightforward matrix of possibilities.

	Procedure	Substance
Formalist	Dow	Ackerman[103]
Nonformalist	Ackerman, Amar	Amar[104]

99. The clear exception is the equal representation in the Senate requirement of Article V. U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate."). The second possible exception is the First Amendment, which might he read to mean that, because constitutional law is law and the First Amendment speaks of "law," no amendment could abridge the rights of free speech. *Cf.* Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1084-86 (1991) (arguing that if free speech rights guaranteed in the First Amendment are natural rights, the proposed Flag Burning Amendment would have to be struck down as unconstitutional because Article V is limited in the extent to which the Constitution can be amended to abolish laws based on natural rights).

100. Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991).

101. Michelman, *supra* note 68, at 1306-07. I change his terminology a bit in my use of his idea below.

102. *Id.* at 1305.

103. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 14-15 (1991) (using a hypothetical involving the establishment of a state religion through the Article V amendment process to argue that there are no prohibitions on the substance of amendments).

104. Amar, *supra* note 56, at 110 (arguing that the People when using their sovereign power to amend the Constitution have "duties as well as rights" and "could not simply do whatever they pleased if doing so would indeed trench on inviolable rights").

As a logical matter, then, we might say that Amar is the "consistent" nonformalist.[105] Ackerman is a nonformalist with respect to procedure but a formalist with respect to substance.[106]

This is a helpful way of thinking through the problem, but my sense is that the consistency or inconsistency operates at the wrong level of abstraction. In my view, the question of whether there are substantive limits on the amending power beyond those articulated in the text resolves in the same way as the question of procedure. That is, one might well be convinced that at one time constitutionalists believed that a certain principle could not be eliminated or added to the Constitution's design without negating our Constitution as "our Constitution." But whether that presupposition continues to be binding is both a positive and a normative question. As a positive matter, the question is whether the presupposition would be recognized as backgrounded enough to trump the normal reading. As a normative matter, the question would be whether the presupposition is of the sort that we ought to insist on preserving, contrary views or understandings notwithstanding. The former is an empirical question about which I have no real sense. The latter is just the same question that stumped us about exclusivity. We are still left with a hole in the theory that might account for derivability. Nothing about the problem with limitations seems to fill that hole.

III. Comparisons

The fourth part of this book is the shortest and perhaps the most productive. This is a section of comparisons, one general and empirical, and two others particular and interpretive. I have already discussed one of the two—the essay by Zohar about Judaic interpretation.[107] In this Part I want to focus on the other two.

The general and empirical study is the work of Donald Lutz,[108] not a lawyer but a political scientist, and it is perhaps the difference in disciplines that makes his work so stand out in this collection. (I confess perhaps too much if I confess this essay was my favorite.) Lutz has tried to do something more than theory; he has tried to provide an empirical account of the amending phenomenon. Through a survey of thirty countries and the fifty states of America, Lutz describes normal amending be-

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105. John Vile, who argues that there are no substantive limits beyond those specified in the text of the Constitution, is the consistent formalist. John R. Vile, *The Case Against Implicit Limits on the Constitutional Amending Process*, *in* RESPONDING TO IMPERFECTION, *supra* note 1, at 191, 197.

106. Walter Murphy is perhaps the other way around. Michelman, *supra* note 68, at 1317.

107. *See supra* notes 3-20 and accompanying text.

108. Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION, *supra* note 1, at 237.

havior as a function of the different features of a constitution's amending structure.

The result is wonderfully rich. Lutz identifies twelve propositions that "form the core of a theory of constitutional amendment,"[109] and then using his data, he is able to confirm some, question some, and frame others for future research. These propositions range from the relatively mundane, such as the relationship between the frequency of amendment and the size of the constitution,[110] to the relatively interesting, such as the relationship between methods of constitutional interpretation and the frequency of amendment.[111]

The method is empirical. It is an effort to learn something from counting. One might wonder whether there is anything useful to learn about other constitutional structures by a method so ruthless and incomplete.[112] But the question is not whether empiricism teaches us everything. The question is whether it teaches us something. I am skeptical of methods that promise a complete understanding. No such method exists. Our aim should be to multiply perspectives, to search for different ways to look at the same question. Empiricism is a different way, in the sense of an additional way. It need not be imperialist; it is enough if it is merely suggestive.

Lutz offers his piece not as the only way to understand the structures he studies—just as one way. And as one way, the piece has lots to teach and more to test. We are given ways to understand patterns of constitutional design—a catalog of structures and a way to test the theory in other cases. The advantage of an empirical account is that its vulnerability is always on display. We can use the indices here to examine new regimes and see whether the predictions bear out. When they do not, we have a way of understanding the limitations of the approach. And when they fail systematically, we may have an understanding of what is missing from the model.

The question is whether the empirical approach can ever help us capture what a more hermeneutic approach would see quite directly. The working hypothesis of the empirical approach is that this thing, "amendment," is the same across constitutional structures. The question then is just how varying the structure of this thing called amendment might

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109. *Id.* at 273.

110. *Id.* at 243.

111. *Id.* at 273.

112. For the beginnings of a theory of comparative law, or comparative jurisprudence, that would be particularly aghast at an approach like this, see William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1896 (1995) ("Understanding a foreign legal system cannot—in a very strong sense of 'cannot'—be obtained solely by heaping up nuggets of information.").

vary its effect. The model is quite mechanical, almost Newtonian: it simply asks what happens to *Y* when you increase *X*.

This leaves out how these structures of amendment are understood internally, from within the regime at issue. In Ackerman's account, for example, it is quite significant whether the people consider amendment to be an expression of higher law or merely ordinary law by other means. In a dualist regime, Ackerman argues, amendments are the stuff of higher law; in a monist regime, there is no higher law.[113] Higher law bespeaks a commitment to values more fundamental and an entrenchment of those values against constitutional change. But the empirical account does not speak the language of expression; it doesn't usefully tell us what "amendment" means. It tells us what it can count, and it forces us to ask what of value this narrowness might leave out. Why, the empiricist might ask, does this self-understanding matter, or, more directly, why is it not just epiphenomenal upon what the numbers show? The hermeneut says that what distinguishes the dualist from the monist regime is not just the frequency of amendment, but what "amendment" means. The empiricist asks, what difference could "meaning" make?

An answer to the empiricist's question is precisely what the second comparative study in this section provides, a joint essay by Stephen Holmes and Cass Sunstein. Their focus is the amendment power in postcommunist Europe; the question they ask is whether that amendment power should be easy or difficult; they conclude easy.[114]

To say that the amendment power should be easy might be a way of saying that constitutional regimes in postcommunist Europe should establish monist constitutional democracies—places where constitutions are essentially political documents and represent nothing especially significant from a democratic perspective. If the rate of amendment was correlated with the monist-dualist distinction (high amendment rate means monist political culture, while low amendment rate means dualist political culture), then one might understand this recommendation as a suggestion that postcommunist Europe keep itself on the monist end of the continuum.

But Holmes and Sunstein do not offer easy amendment as a way to establish the insignificance of constitutionalism. Instead, they offer easy amendment as a way to achieve precisely the opposite effect—as a way to construct a constitutional culture within which the limits of a constitution are respected by both political and private actors. They claim that easy amendment is a tool to help reconstruct constitutional democracy in postcommunist Europe—that it is a device in *transformative* constitutional design.[115]

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113. ACKERMAN, *supra* note 103, at 7-10. For a description of dualism, see *supra* note 46.

114. Holmes & Sunstein, *supra* note 72, at 294.

115. *See infra* notes 120-22 and accompanying text.

To see the point, we must back up a bit. We can distinguish between two kinds of constitutions, or, better, two kinds of constitutional provisions. The first we can call "codifying," the second, "transformative." A codifying constitution or constitutional provision is designed to embrace or entrench a certain social or political practice; it aims at ratifying who a nation is and hopes to keep the nation as it is for some time to come. A transformative constitution or constitutional provision is designed to change, destabilize, or erode a certain social or political practice. It aims at remaking a nation's identity and hopes to make the nation different in times to come. The codifying provision is endorsing; the transformative provision, critical.

Examples of each type are easy to find. The American Constitution of 1791—the Bill of Rights—was codifying: it identified a set of understandings and practices that it wanted to entrench against the federal government.[116] It was a ratification of these practices—of this part of the constitutional past.[117] By contrast, the constitutions of postrevolutionary France and postrevolutionary Russia were transformative: they aimed at remaking the social practices and norms of the societies that they inherited. They rejected the patterns of thought with which they were born, and, in the case of Russia, sought to make postcommunist society capable of sustaining constitutional democracy.

Examples at the level of constitutional provisions are obvious as well. If the Due Process Clause of the Fifth Amendment was codifying,[118] then the Equal Protection Clause of the Fourteenth Amendment was transformative. The former aimed at continuing a practice already articulated by the common law, while the latter aimed at remaking a wide range of social practices of inequality that had become the common law. Indeed, the Civil War amendments in general were America's first effort at critical constitutionalism—using the Constitution as a therapy for a pathology of American life; the first confessions of disease recognized in the constitutional text; the first efforts at a constitutional cure.[119]

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116. *See* Levinson, *supra* note 21, at 30 (describing Amar's argument that the Bill of Rights was declarative, and that its purpose was "not to change the preexisting legal reality").

117. Murphy argues the same point about the 1787 text. *See* Murphy, *supra* note 83, at 166 (placing the 1787 Constitution squarely within political traditions dating back to the Mayflower Compact). Charles Fried makes a similar argument:

> Because the day-to-day governance of the lives of the colonists had been largely in the hands of local authorities anyway, the severing of the formal link to Westminster was neither a social nor a juridical upheaval. . . . With that, the colonists felt they had regained the basic liberties that all English citizens had won in the previous century.

Fried, *supra* note 52, at 19; *see id.* at 24 ("In . . . the actual adoption of our present Constitution, we have a juridical revolution but not a social (and perhaps not even a political) revolution.").

118. *See* Schad v. Arizona, 501 U.S. 624, 650 (1991) (Scalia, J., concurring) ("It is precisely the historical practices that *define* what is 'due.'" (emphasis in original)).

119. To describe a category of transformative constitutional design is not to assume that such transformation can be successful. Webster, for example, appears to have thought that a constitution

What follows from this distinction is just this: that as the objectives of a codifying constitutional regime are different from the objectives of a transformative constitutional regime, we might expect that the techniques or methods of the two will differ as well. That is, the same device might function differently in the two regimes, and likewise, different devices might function the same. The constitutionalist must ask first whether the constitutional design is directed primarily at reforming an existing social order (and hence is transformative) or at entrenching existing patterns of the social order (and hence codifying).

The theory of amendment illuminates this distinction well. If the regime is a codifying regime, then the dualist theory of amendment makes the most sense. Here the aim is to entrench and secure against transformation values that the society has and wants to preserve. But if the regime is transformative, then it is not clear what role amendment ought to play. Entrenchment here may well translate into entrenchment of precisely the patterns of thought that the regime sets out to change. For example, establishing an "independent judiciary" composed of judges from the communist era might just be a way to establish a judiciary that faces none of the pressure necessary to destabilize and erase the patterns of thought from the communist era.

It is this ambiguity about the role of amendment that the Holmes or Sunstein piece brings out so well. Constitutionalism in postcommunist Europe is essentially transformative.[120] It is not about entrenching a set of habits inherited from communism; it is about changing them, whether through rediscovering a suppressed constitutional tradition or through identifying and pursuing a new future. The effort is to use constitutional structures to help reconstruct a society[121]—a society that came not from the fires of a revolution, but from the simple collapse of communism.[122] The question then from this perspective is what role amendment will play against the particulars of this constitutional past.

We might think of it like this. People often say that postcommunist societies must now establish democracy and the rule of law by *creating*

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could only reflect, not reform, the "habits of the people." As he wrote, government "takes its form and structure from the genius and habits of the people; and if on paper a form is not accommodated to those habits, it will assume a new form, in spite of all the formal sanctions of the supreme authority of a State." Griffin, *supra* note 25, at 41 (quoting Noah Webster as quoted in WOOD, *supra* note 53, at 377).

120. *Cf.* Holmes & Sunstein, *supra* note 72, at 281 ("It follows that the conception of constitutions as precommitment strategies—however helpful it may be for analyzing some constitutional processes and for conceiving of constitutionalism in general—is descriptively inaccurate for Eastern Europe.").

121. *See id.* at 285 (arguing that the change requires "the wholesale destruction of the old and the creation . . . of the new").

122. *See id.* at 286 (noting that the transition from communism "was *not* achieved by mass mobilization, and thus cannot, even now, be viewed realistically as an expression of the national will" (emphasis in original)).

institutions of democracy—such as courts, legislatures, and executives—with the hope that these institutions will carry these goals into effect. But the problem in postcommunist Europe is not the problem of creating new institutions: institutions called "courts" and "legislatures" and "executives" have always existed, no less during the communist period than before. The problem is instead the opposite—that because these institutions did exist in the past, people came to think of them in a particular way, and now democratic regimes must change how they think of these old institutions. A "court" had a meaning in communist society; it evoked a set of expectations in the minds of citizens. Those expectations were of an institution that was basically a tool of the party in power; the idea that a court would serve a checking function, on either the legislature or the executive, was anathema.[123] Neither judges on those courts, nor citizens using those courts, thought any such thing.

But if "courts" are to function in postcommunist Europe as they function in a constitutional democracy, judges and citizens must come to think of these "courts" differently. Attitudes about these institutions must change as much as the institutions themselves. The task, that is, must be to take a "court" or a "legislature" or a "president" as understood in the language of communism and change it into a "court" or a "legislature" or a "president" as understood in the language of constitutional democracy.

This is a problem in the regulation of social meaning.[124] There are institutions that have a certain social meaning; the question is how this social meaning can be changed. Courts under the old system were nothing more than tools of the state. They were petty bureaucrats, or rather bureaucrats with jails. And, like many European courts, they were populated by lawyers of the lowest rank. (While in America, some of the very best law students graduate to become law clerks, in communist Europe, law students—not even the best—graduated to become judges.[125])

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123. INGA MARKOVITS, IMPERFECT JUSTICE: AN EAST-WEST GERMAN DIARY 61 (1995) (observing that before judicial reform in Eastern Europe, there were no judicial controls over the executive).

124. By "social meaning," I simply mean the set of expectations and understandings built into these political cultures. I will confess, however, that there is some tension between this understanding of Holmes and Sunstein's piece and their own words. Some might understand "social meaning" as referring to culture, about which Holmes and Sunstein seem ambivalent. At one point they write: "But the concept of a constitutional culture, purportedly missing from the region for historical reasons, not only promotes unnecessary pessimism . . . it is also deeply unclear." Holmes & Sunstein, *supra* note 72, at 282. But later, after making an argument that plainly connects social meaning to culture, they say in an embarrassed afterthought: "So we are not wholly opposed to 'cultural' considerations." *Id.* at 300. My sense of their contribution is that they cannot in the slightest be opposed to cultural considerations, so long as those are simply the considerations of how past habits of the heart might make it difficult to construct constitutional democracies.

125. MARKOVITS, *supra* note 123, at 43 (noting that most East German law students preferred becoming attorneys to becoming judges because both the pay and professional independence were greater for attorneys).

The question is what can be done to change how people think of these "courts"? What techniques, that is, will change the ordinary way judges and citizens view the place of the court so that judges and citizens understand the court as an independent check on arbitrary power by the state?

The very same question can be asked both about the executive (whose power should in postcommunist Europe be decreased) and about the parliament (whose power should be increased). It is in relation to the parliament that Holmes and Sunstein ask the question about the role amendment ought to play: what techniques can be used to construct a parliamentary institution that thinks of itself as independent of the executive, that takes seriously its responsibility to govern as representatives of the broad range of interests in the people, and that, as an institution, takes seriously the limits of the constitution?

Here, Americans are tempted to offer a direct application of our own past. Enact, we might say, a strong constitution with clearly articulated limits on the branches of government and on government in general; establish a constitutional court to enforce such limits; finally, build direct links to the people through structures that make clear the government's ultimate subservience to the people.

But Holmes and Sunstein argue the opposite, and their argument can be understood as an argument about social meaning. Think first about their opposition to the institution of the referendum.[126] In the American context, this late addition to the political scene might be seen as the continuation of a long-standing ideal of popular sovereiguty—the notion that the ultimate power in American democracy is held by the people. But there is no suggestion in the American tradition that this ultimate power is in some sense above the law. And there is no general sense that referendum means that parliaments cannot function.

In postcommunist Europe, the meaning of referendum would be quite different. If, as Holmes and Sunstein write, "[t]he central task of the states of Eastern Europe today is the creation of legitimate democratic authority,"[127] then one aim of transformative constitutional design must be to help build the relative power of parliaments. Easy appeals to the people might be a way of saying that parliaments cannot be trusted.[128] It would also be a way of short-circuiting the process of directing democratic energy through parliamentary structures.[129] If a popular

126. Holmes & Sunstein, *supra* note 72, at 297-98.

127. *Id.* at 296 (emphasis omitted).

128. *Id.* at 297-98 (discussing how a "populist approach" using referenda might send the message that "the voice of the people is not adequately expressed through the representative process").

129. *Id.* at 298 (arguing that democracy should initially be "parliament-orientated" and that preemption of the decisionmaking role by non-parliamentary mechanisms would "ultimately damage the prospects of both democracy and limited government").

executive can use the referendum against the parliament, then parliament becomes a less central institution and the use of the referendum becomes a way of saying it is also a less successful institution.

A similar pragmatism guides Holmes and Sunstein when they think about whether provisions in a postcommunist constitution should be easily amendable. The practice of constitutions in communist regimes was ignorance. Neither parliaments, nor presidents, nor parties had any regard for constitutional limitations, since such limitations had no practical effect. Communist constitutions were "beautiful documents," but they played little role in existing practice.

How can postcommunist societies break this habit? Not, Holmes and Sunstein argue, by elevating the constitution to extraordinary heights of significance, for then, when practical necessity forces conflict with the constitution, the likely response will simply be to return to old habits and ignore the conflict.[130] The response, that is, will be to leave the constitution alone—by ignoring it rather than by respecting it.

This pathology links to a second problem endemic in the transitional context—what we might call misplaced Dworkinism. This is the idea that principles are not susceptible to compromise—that there is something unseemly about trying to find balance in constitutional ideals or principles.[131] This idea links with the notion of constitutions as sacred but ignored documents and to the history of the fall of communism in 1989. To the extent that we can say that there was a revolution, it was carried into effect not by politicians, but by idealists. And with their ideals came the idea, again strangely communist, that the principles of a constitution must be kept pure from the political bargain.

The therapy for this attitude, Holmes and Sunstein argue, is not further idealization. It is not to remove constitutionalism further from ordinary polities. It is rather to dirty up constitutionalism a bit. The therapy is to mix constitutional politics and ordinary politics, both to help constitutional politics become more political and also to help politics become more constitutional.

Put another way, what is needed is practice with constitutional ideals—a "long, drawn-out"[132] period of time when ordinary politicians struggle with ideals in the course of struggling with politics. As Holmes and Sunstein write, "Let constitutional politics collapse into ordinary politics

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130. *See id.* at 295 ("[I]f a constitution is too difficult to amend . . . , it is liable to break. An overly rigid constitution, based on a stringent amending formula, invites extraconstitutional solutions (or free-floating interpretation, which poses dangers of its own).").

131. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 27 (1977) ("[W]e cannot say that one rule is more important than another within the system of rules, so that when two rules conflict one supersedes the other by virtue of its greater weight.").

132. Holmes & Sunstein, *supra* note 72, at 287 (emphasis omitted).

. . . . Let the constitutional process drag on for several years, one pro tempore arrangement replacing another."[133] And to do this, amendment must be relatively easy.[134]

The Holmes and Sunstein argument, then, might suggest an underspecification in Lutz's model. If the general aim of constitutionalism is to establish a dualist attitude—one that identifies values as fundamental and forces them off the table of politics—then the structures that will help bring this attitude about depend upon the particular regime of thought being constitutionalized. It will depend, that is, upon the balance between the codifying and transformative modes of constitutionalism. To know what kind of amendment regime we need, we need to know how much of the constitutional culture we expect the constitution to change.

The general point merits emphasis. An empirical account of amendment lacks a sensitivity to the role that amendment in a particular political culture might play. When *we* think of amendment within our relatively stable political past, its meaning for us links with a culture already infused with the rule of law, with a tradition that understands the struggle and compromise within a constitutional structure and that takes for granted the habits of a political culture that for the most part understands and internalizes constitutional limitations. When we think of amendments, we think about dealing with *imperfection*, as if there is a small deviation from an optimal state and amendment is the device to return us to or establish the optimal state.

But amendments can have quite different meanings. In a political context in which constitutionalism does not exist, in which the aim is to help the transition to constitutionalism, amendment serves a more constructive role. It is not about achieving perfection within a practice of constitutionalism; it is about constructing constitutionalism. The Holmes and Sunstein essay helps us see quite directly that, given this different function, we cannot simply compare an accounting of the amendments in one system with an accounting of amendments in another.

Finally, the two essays together suggest one final spin on this problem of derivability. The Holmes and Sunstein essay reminds us that the very

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133. *Id.* at 295.

134. *Id.* at 294. Holmes and Sunstein are careful not to argue that all aspects of a constitution should be easy to amend. In particular, they argue that "two sets of rights should be most strongly entrenched":

> First, a specified list of individual rights should be made immune to revision. . . .
>
> Second, we suggest that some of the broad outlines of the institutional arrangements might be safeguarded against too easy change. . . .
>
> By contrast, the social and economic rights that one finds spelled out in a number of actual and proposed Eastern European constitutions should be easily amendable, especially if they are considered fit for judicial enforcement and not simply aspirational goals.

Id. at 297.

idea of the derivable within a particular legal culture is itself a construction of that legal culture. As a construction, it is capable of reconstruction. Determining what will be derivable, therefore, is also determining what we want to be derivable; there is a choice to be made here, and it is a choice that we make.

IV. Conclusion

Four questions about amendment theory each feed on the same underlying question in constitutional theory—what drives "derivability"? The first question—when is there eonstitutional change?—shows us that whether there is change depends upon what is derivable; the second two—about exclusivity and limitations—show us that what is derivable will depend upon presuppositions in the background of a legal culture; the final question—on the diversity of amendment practices—reminds us that these background presuppositions are themselves constructions of the legal culture. We make what is "derivable" as much as we report it, and so must we decide what sort of "derivability" makes the most sense.

As I said at the start, the appeal of this book has little to do with amendment theory. What recommends it is what it teaches about constitutionalism more generally. We need to understand the place of the background in ordinary interpretation, for these are the presuppositions constitutive of the "derivable" that define the province for amendment. Levinson has given us an exercise that, perhaps better than any direct account, reveals this hole in constitutional theory. It is an exercise of value, if only because it reveals how much is left to be done.