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The People Against Themselves: Rethinking Popular Constitutionalism

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ACKERMAN, BRUCE. 2014. *The Civil Rights Revolution*. Cambridge, MA: Belknap Press of Harvard University Press.

SHUGERMAN, JED HANDELSMAN. 2012. *The People's Courts: Pursuing Judicial Independence in America*. Cambridge, MA: Harvard University Press.

In the course of reviewing Jed Shugerman's The People's Courts: Pursuing Judicial Independence in America *and Bruce Ackerman's* The Civil Rights Revolution, *we argue for a reassessment of the way that scholars think about popular constitutionalism. In particular, we urge scholars to resist the tendency to create a dichotomy between judicial interpretation of law and a set of nonjudicial venues in which popular constitutionalism supposedly takes place. Popular constitutionalism is temporally and contextually bound, reflected in different forms and forums at different times in US political history and always dependent on the interactions between these institutions. By implication, this suggest that judges, rather than serving as obstacles to popular understandings of law, can and have used various forms of democratic authorization to strike down legislation violating both state and federal constitutions, thus bridging judicial review and popular constitutionalism with explicit support from the citizenry.*

Just more than a century ago, legislators sitting in Phoenix's copper-domed capitol building proposed a range of what were at the time considered quite radical and—to some—antidemocratic amendments to Arizona's new state constitution. The state's charter was already controversial, proposing many features of direct democracy, including ballot initiatives. It was the state's notorious provisions on the judiciary, however, that generated the most sustained and public controversy. Arizona's founders engaged in a lengthy campaign to allow for the recall of state judges. Initially, President William Howard Taft condemned such recalls as "legalized terrorism" and vetoed Arizona's initial statehood request. In response, the territory's legislators removed the controversial provision to procure statehood, enabling Arizona to enter the union as the forty-eighth state on February 14, 1912. Shortly after statehood, however, the Arizona Legislature reinstituted the recall, passing an amendment by overwhelming margins in both houses. Other proposals were even more aggressive in clamping down on the authority of judges: legislators passed a provision holding recalls for *federal* district judges—a provision that was nonbinding and advisory, to be sure, but nonetheless an attempt to control Article

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III judges. Henry F. Ashurst, one of Arizona's two inaugural US senators, endorsed an advisory election that would ostensibly inform President Woodrow Wilson whom the voters wanted as their soon-to-be-appointed federal judge. In Arizona, it would seem, federal judges would be appointed by the people, with the advice and consent of the president and Senate in Washington, DC.

Arizona provided the most direct and visible challenge to older constitutional forms of judicial independence, but its political activities were also a reflection of broader debates shaking US political order at the time. California's Progressive Governor Hiram Johnson similarly implemented judicial recall provisions in his state, and Robert Owen of Oklahoma joined Senator Ashurst in proposing the recall of federal judges in Congress (Ross 1994, 110–14). Judicial recall efforts received the most vocal support in western states, but these were not merely reflective of isolated anger from remote provincial territories. Former President Theodore Roosevelt had gradually increased his anti-Court rhetoric, expanding attacks on controversial Supreme Court decisions of the time such as *Lochner v. New York* and *E.C. Knight* to a broader and more systematic critique of judicial power, a critique that would eventually culminate in his endorsement of Arizona's judicial recall and a proposal to recall federal decisions (Ross 1994; Engel 2011). In so doing, Roosevelt—who was in the midst of his own presidential campaign as the head of the Progressive Party ticket—alienated many of his closest allies, including leading progressives who feared assaults on the Madisonian constitutional system of clear checks and balances and separation of powers. Taft, Elihu Root, and Henry Cabot Lodge all found themselves in opposition to their former champion, waging an impassioned effort to keep the Republican Party as the party of the rule of law (in their minds), even if doing so meant electoral calamity in 1912 (Miller 2009, 28–31; Schambra 2012).

Arizona and Roosevelt's challenge to many of the core principles of judicial autonomy and the' US political order in 1912 is just one of many moments in US history of leading public figures promoting the cause of popular constitutionalism (Ackerman 1993; Kramer 2004; Siegel 2008; Thomas 2008, Milkis 2009; Eskridge and Ferejohn 2012; Yarbrough 2012). As it is typically invoked, popular constitutionalism has tended to mean more direct interpretations and understandings of the nation's legal structure, which in turn means weakened courts and chastened judges who ought to be prevented from asserting judicial review over popular opinion, particularly when that opinion is passionate, sustained, and mobilized. Given the politics specific to the early twentieth century, a time that pitted progressives proposing economic regulations on behalf of the working classes against judges defending the economic rights of corporations and other economic elites, popular constitutionalism was frequently valorized by those representing workers and criticized by those defending constitutional formalism and fundamental economic freedoms (Gillman 1992).

Today, popular constitutionalism remains a contested notion, particularly within the legal academy. On one side, some judicial scholars invoke the importance of the rule of law, the meaning of the Constitution as a longstanding document, and the necessity of procedure and constitutional consistency. On the other side, another group of legal academics invoke the equally powerful constitutional

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language of "We, the People," and the continuing expansion of democratic norms deriving from the ground up and not from the judge down. It is a debate about many of the nation's foremost political traditions, with the historical details of different foundational moments from the initial writing of the Constitution to the twentieth-century rights revolution at the center of many leading texts. It is also a debate that is very much about today, and in particular, the degree to which the current Roberts Court can and should shape US constitutional meaning and participate more broadly in national policy making.

Two new books are notable not only for both expanding and complementing this debate, but for importantly complicating some of its essential terms and dichotomies. Bruce Ackerman's *The Civil Rights Revolution* offers the distinguished professor's third volume of his foundational *We the People* series; his first two books from the series have arguably done more to revitalize popular constitutionalism in the academy than any other scholarly work. In his latest account, Ackerman both revisits and importantly evolves his canonical claims. Most directly, he wishes to claim the civil rights era of the 1960s as a popularly constructed constitutional moment—joining the New Deal as eras in which public activism arose to merit the substantive (if not formally procedural) standards of Article V constitution making. More broadly, Ackerman pushes those scholars interested in popular constitutionalism to more carefully integrate both courts and elected officials so as to better understand the dynamics of constitutional development. In turn, Jed Shugerman's *The People's Courts: Pursuing Judicial Independence in America* does exactly what Ackerman promotes: in his excellent history of judicial elections in the United States from the founding to the present day, Shugerman avoids artificially formal boundaries between popular and legal institutions. His account is valuable not just for illuminating an overlooked area of popular constitutionalism, but because, with careful and detailed attention to the historical record in the particular arena of state constitutional politics, he offers a quite nuanced illumination of the relationship between judicial independence and constitutional enforcement. One of his importantly counterintuitive claims, for instance, is that the people have often promoted judicial elections to enable judges to be *more* autonomous, not more beholden to the people. We cannot simply assume then, Shugerman argues, that popular constitutionalism should be equated with less judicial activism and authority.

Both books join an expanding literature in popular constitutionalism that continues to further our understanding of who ought to speak for the people and through the Constitution. Whereas earlier accounts of popular constitutionalism had a tendency to gloss over the complexities of what constitutes "the people," too often relying on overly formal dichotomies such as elected legislators versus appointed judges, both books offer important correctives by expanding the spheres of democratic actors and incorporating judges within these accounts. We argue that future efforts in this literature would do well to go still further in carefully dissecting what constitutes "the people" and offering greater awareness of many of the political and structural limitations that frequently limit such a peoples' ability to adequately articulate their voice and mobilize behind their claims. Popular constitutionalism is little more than a platitude without a more careful delineation of the realities of "popular politics," and formal institutions of democracy do not equate

necessarily with democracy in substance. We need to pay more attention to the details and intricacies of political institutions—those filled by elected and appointed officials alike—recognizing that all of these are sites of continuous contestation with rules and processes that importantly change over time and provide different opportunities to different strands and coalitions of "the people." Furthermore, we need to be more sharply attuned to the structural features involved in public mobilization and, in particular, the variety of collective action dilemmas that exist for popular expressions of the public will. Illuminating these complexities within the workings of democratic politics by consequence rejects any claims for a straightforward dichotomy between popular constitutionalism and the courts and suggests we need to pay more attention to the details of these democratic structures in order to ensure that democracy is not just formal but meaningful and substantive.

I. WE THE PEOPLE

The "countermajoritarian difficulty" (Bickel 1962) has long been a part of both political and legal dialogue involving court activism, dating back to the first efforts of British jurists and political theorists attempting to legitimate the contours of common law between judges, people, and political actors. Debates over court packing and the litigation explosion prompted by the Warren Court and the rights revolution of the mid-twentieth century brought these concerns even closer to the forefront. The latest wave of popular constitutional arguments has evolved from a combination of factors, but perhaps most notably from a rising disenchantment among progressive law professors with the legacy of the rights revolution. This disenchantment is itself a product of many things but, in particular, popular constitutionalists tend to view the Warren Court's legacy as hollow and misleading. The judicial activism of the Warren Court, they argue, failed to produce substantive and meaningful results, and they claim in turn that the Supreme Court has been falsely vaulted to a position in US politics that is dangerous, unsustainable, and with significant democratic deficiencies. Critical legal scholars in the 1970s and 1980s criticized normative theories of judicial activism, even those of political process scholars such as John Hart Ely who attempted to create a representational roadmap for judges seeking to make determinations regarding when to intervene in governmental affairs, and bemoaned the rights revolution as substantively empty and elitist, criticizing models of judicial activism (see, e.g., Kennedy 1981; Olsen 1984; Tushnet 1984). Later accounts by Michael Klarman (2004) and Gerald Rosenberg (1991) have illuminated how deeply unhelpful decisions such as *Brown v. Board of Education* were to the success of the civil rights movement. This disenchantment with court activism led many judicial scholars to pursue other institutional avenues and venues where the Constitution's democratic aspirations could be more meaningfully fulfilled. As Gerald Rosenberg (1991) has argued, it was Congress, not the Warren Court, which provided the institutional weapons necessary to remedy racially segregated schools. As William Eskridge and John Ferejohn (2010) have argued, it was a set of political activists segueing between social movements and

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executive bureaucracies that set in motion a series of events that served to substantiate and entrench antidiscrimination law. As Reva Siegel (2008) has argued, populist conservative social movements have succeeded in the reinterpretation of judicial doctrine in a number of areas from the Second to the Fourteenth Amendment.

In 1993, Bruce Ackerman published *We the People*, a book that would quickly become a seminal document of the new popular constitutionalism era. Challenging strictly formal constitutional processes such as Article V's procedure for amending the Constitution, Ackerman argued that there are certain historical moments in which public agitation for change is at such a concentrated and intensified pitch, that these demands—followed by significant and lengthy institutional capitulation from each of the three branches of government—ought to signify and be equated with the formal language in the Constitution. In particular, he argued that there were three such constitutional moments when the people mobilized with the veracity necessary to overcome and negate their opponents: the Founding era and Reconstruction, both periods punctuated by the formal altering of the Constitution, and the New Deal, a time when President Franklin Roosevelt relied on statutes but not Article V revisions of the Constitution while revolutionizing the substance of governance through a series of statutory interventions into the national economy. Because Roosevelt's proposals were driven by a mobilized public that both directly confronted and eventually defeated sustained opposition from the preexisting status quo, Ackerman argues that judges should treat the statutory entrenchment of the era as equivalent to the formal requirements of prior eras.

Ackerman's claim was immediately provocative and powerful: major constitutional moments, he argued, occurred largely (but not entirely) outside of the courtroom and that a range of political actors diligently worked to shape constitutional meaning through an interactive assembly line of activists that promoted new ideas, a public that actively debated its meaning and importance, legislators and officials in the executive branch who authorized and implemented these ideas through statutes and orders, and judges who interpreted and upheld them. In making such claims, Ackerman expanded the boundaries of constitutional interpretation far beyond both the formal Article V process and the Supreme Court judges who commonly find themselves in the middle of statutory debates, invoking the language of "regime" to encompass such a broad campus of participants.

Ackerman's account of constitutional activism immediately inspired a wealth of differently argued accounts for popular constitutionalism, although most have focused more directly on specific institutions of popular representation, with different arguments being made for the democratic foundations of each institution under inquiry. For instance, Larry Kramer (2004) centered his attention on the quasiconstitutional national party system as the critical institutional mechanism by which constitutional rights are defended. Kramer argued that because national parties serve to connect the public and its representatives from local communities and states to the federal government, that actions by national legislatures could be presumed in accounting for popular preferences. Other scholars have looked to the executive branch, given the president's centrality to modern political governance (Graber 2006; Whittington 2007; Purdy 2009). Progressive era presidents certainly

aspired to be the singular embodiments of the people's constitutional (or anticonstitutional) vision, a vision finally implemented with the election of Franklin Roosevelt. Because of the president's importance not just to the nation, but also to the political party he represents, the lines frequently blur between arguments that emphasize parties as the central organizational vehicle for popular constitutionalism, and the president himself (Tushnet 1999b; Franklin 2006; Purdy 2009). This is because, as Stephen Skowronek (1993) has well argued, the president is a singularly transformative actor who does not simply represent the public will but redefines it and, in doing so, often has the opportunity to reconfigure the organizational apparatuses of which he is a part. As such, presidents have—at least in certain historical moments—been able to actively redefine their party organizations, turning their own agendas into those of the party they represent.

Congress has also been put forward as a site of constitutional discussion (Waldron 1999, 2006; Devins and Fisher 2004; Pickerill 2004; Young 2008). In an article refining his popular constitutionalist theory, Kramer argued that Congress has a critical role not only reflecting, but also shaping, popular engagement through persuasion and education with constitutionalism (Sheehan 2004; Kramer 2007). Both Mark Tushnet and Jeremy Waldron have argued that self-aggrandizing courts have crowded Congress out of the field of constitutional debate, and thus removing the authority of the courts to promote judicial review could well reinvigorate Congress on matters of rights and justice (Tushnet 1999a; Waldron 1999, 2006). Members of Congress, increasingly mobilizing campaigns around the Constitution, seem to believe that citizens care about it (Busch 2007), and experimental evidence further suggests that citizens can consider constitutional values (like federalism) alongside substantive ends, suggesting the possibility of popular enforcement (Kam and Mikos 2007; Mikos 2007). Still others have looked for examples of popular constitutionalism from the bottom up, looking to political activists who put pressure on government agencies (Eskridge and Ferejohn), interest groups, and social movements (Balkin 2005; Siegel 2008). For that matter, even state legislatures and state constitutions have been mobilized to give popular constitutionalism some institutional teeth, with, for example, amendments protesting Obamacare, insisting on more rigorous protections of gun rights, and prohibiting affirmative action—in 2011 and 2012 alone (Schmidt 2011, 539; Dinan 2012; Beienburg 2014).

Bruce Ackerman's "regime-centered" account, however, retains an expansive power over these other proposals, focusing not on a single institution, but on the broad interactiveness of the political system that involves "institutional relationships and public values affirmed by the constitutional system as a whole," of which the courts are part (2014, 2). In the third volume of his *We the People* series, he stresses that popular constitutionalism is a result of a broader institutional conglomeration that demands the efforts and support of elected officials and popular movements. In writing *The Civil Rights Revolution*, Ackerman wishes to enshrine extrajudicial documents as a part of the canon to ensure that future generations of legal practitioners do not lose the real substantive import of that societal transformation through an overly myopic set of sources. He conclusively demonstrates the breadth of those contributing to the civil rights revolution, built not only by court liberals or New Deal Democrats like Hubert Humphrey or activists in the NAACP

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and SCLC, but by establishment Republicans like Representative William McCulloch, Senator Everett Dirksen, and President Richard Nixon.

The Civil Rights Revolution continues Ackerman's project of moving beyond the Article V amendment process to propose an alternative means of constitutional change structurally rooted in the electoral machinery of national politics. He lays out a six-part sequence to diagnose the presence of these constitutional moments and distinguish them from the basically pluralistic, often divided government of normal politics. The first step in a constitutional revolution is signaling, in which elements of the government gesture toward a new constitutional vision; this can be a combination of state-level policy entrepreneurship or federal activity frequently deriving from grass roots activism—with *Brown* and Martin Luther King's "I Have a Dream" speech most prominently serving this role for the era's rulings and statutes, respectively (56). Second is the proposal stage, in which, after elections, the coalition puts forward the core of its concrete plans for change—in this case, the Civil Rights Act of 1964 and Voting Rights Act of 1965. This proposal of landmark legislation launches the third step, what Ackerman calls triggering elections, in which voters have a chance to reject the plan, especially if the opposition party takes a strong stance against the constitutional vision such that the two are in conversation with one another and the election looks something like a referendum. If vindicated in that election, the constitutional coalition begins a "mobilized elaboration" that expands the basic vision into broader applications (such as the Fair Housing Act). Another "ratifying" election, in which voters have a chance to repent of their earlier support and create a repealing coalition, must follow; in this case, Ackerman argues that Richard Nixon embraced the core of the civil rights revolution against the counterthreats coming from vocal southern Democrats and the "silent majority" alike. Finally, in the sixth step, members of the old order make their peace with and try to shape the new constitutional vision as best as possible.

By building in multiple possibilities for a popular veto by requiring the concession of those defeated, Ackerman argues that his model ensures popular sovereignty and consent. Furthermore, relocating the constitutional amendment process from its formal delineations must be done, Ackerman argues, because the centralizing forces of US political development have made Article V obsolete and unrepresentative. The United States is "a nation-centered people stuck with a state-centered system of formal revision" (28). Whereas the early Constitution envisioned the amendment process coming from the vertical "division of powers" and thus the Framers situated it primarily within the states, now Ackerman argues change occurs through the horizontal "separation of powers" in which "all three branches repeatedly endorse the legitimacy of the breakthroughs that initiated the new regime" (4).

Ackerman employs an extended case study of the elimination of the poll tax to demonstrate that the actors themselves agreed on the obsolescence of formal constitutional change. Populist governors extending the New Deal's defense of the working class had wiped out poll taxes in all but five states, but squashing those last few would require the infusion of federal power. The NAACP had long opposed a federal anti-poll-tax federal amendment on the grounds that it conceded the federal government did not currently have the power to do so, a dangerous and

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potentially crippling precedent for other voting rights controversies like literacy tests (85–91). While Attorney General Nicholas Katzenbach favored an Article V solution, the Johnson Administration as well as activists such as Martin Luther King, and, armed with their imprimatur, racial liberals, instead backed a congressional *declaration* that held state poll taxes to be unconstitutional and authorized lawsuits to confirm that fact (97–104).

Subsequent cases ratified this change in the constitutional order with the Warren Court seeming to condone such changes outside the purview of Article V. Arthur Goldberg's unpublished *Harper* opinion apparently would have endorsed and acknowledged congressional action as the cause of constitutional change, but his removal to the United Nations delayed this revelation (115). In Ackerman's framing of *Katzenbach v. Morgan*, both Brennan and Harlan agreed that Congress had been acting as an agent of constitutional change; Harlan only dissented because he failed to recognize that it had earned the right to do so through the 1964 election (119). Indeed, *South Carolina v. Katzenbach* infuriated Hugo Black, who accused its preclearance section of again treating the South as "conquered provinces"; Justice Brennan, however, approved of the idea of servile states seeking federal approval, something that Ackerman insists was "perfectly consistent with the spirit of the Constitution—but only because Americans had fundamentally changed that" (163). Even President Nixon became a coconspirator against Article V because he proposed statutory rather than amendment counters to busing, although Ackerman acknowledges that Nixon made textual defenses of his proposal from preexisting powers (265).

At first glance, Richard Nixon seems like a surprising hero throughout Ackerman's account: "Nixon—dare I say it?—was a man of principle" (77). Nixon, he argues, played a pivotal role in securing the civil rights revolution and instituting affirmative action as a public policy. Likening domestic race policy to foreign policy, he argues that just as only Nixon could go to China (250–52), so could an icon of the countercounterculture serve as an ambassador of racial liberalism to the nation's conservatives. The president did not go as far as Ackerman might have liked—for example, Nixon consistently opposed busing—but Ackerman gives him a pass on the grounds that this was an extension of the civil rights revolution and Civil Rights Act, not the thing itself (77). Ackerman is less forgiving, but still understanding, of the Supreme Court's decision in *Miliken v. Bradley* to block northern busing on grounds that it was equivalent to the "switch in time that saved nine." Just as the Court's turning toward upholding New Deal legislation foreclosed further attacks on it, so did the Burger Court's decision to confine busing to *de jure* segregation ward off a coming, electorally validated tidal wave of Court curbing that might have seen Gerald Ford mobilize a hardline campaign (231, 260–82)

Other examples from the book help establish this as a pattern and not an isolated example, and indeed Ackerman is consistently impressed that Nixon frequently defended the foundations of the civil rights era even when it was politically disadvantageous. Despite arguably having an electoral incentive to do so in 1968, Nixon refused to appeal to Wallace voters (77). He declined to veto, and instead praised, the renewal of the Voting Rights Act in 1972 (166–71); he approved of fair housing efforts (218); and, while squabbling over the best means to implement

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the EEOC, he nonetheless remained committed to it (188–94). While reviling its criminal law rulings, Nixon defended the Court's civil rights jurisprudence and even Abe Fortas (such support for which he was viciously attacked by the likes of George Wallace) (241–42). Although aggravated by the blocking of Carswell and Haynesworth and the Court's actions in *Alexander v. Holmes County*, which threatened a foreign policy negotiation with John Stennis, Nixon publicly resolved to back the Court; Pat Buchanan attempted to take advantage of Nixon's private frustrations by proposing to dispatch Spiro Agnew to the South to drum up resentment of the Court, but Nixon blocked the plan (246–48). Instead, he personally wrote an eight-page memorandum outlining his views on desegregation that closely followed the Court's holdings. In adamantly insisting on southern compliance, Nixon leaned on businesses to remind them government investment only followed acts of desegregation, enlisted Billy Graham to advance his cause, and continued to use Department of Justice lawsuits against recalcitrant southerners (248–50). While Nixon, unlike LBJ, did not use the bully pulpit of the presidency to extol a grand vision of civil rights, he did use its quiet machinery, such that by the end of 1970 the South was the most integrated part of the country (252).

But given Ackerman's broader theoretical goals, and specifically the necessity of acquiescence by the counterparty for the fulfillment of the civil rights era as a constitutional moment in order for his theory to be fulfilled, his seeming surprise at Nixon's actions are not so surprising. Ackerman needs Nixon to play this role of civil rights enforcer if he is to make a claim that the civil rights regime has the longevity and acceptance of key partisan opponents necessary to rise to the status worthy of warranting constitutional status. If Nixon is portrayed, as many historians are wont to do, as a reactionary to the goals of the civil rights era, then the trajectory of the civil rights agenda is shorter, more narrowly partisan, and arguably less durable. Although Ackerman is hardly on his own in interpreting Nixon in this manner (see, e.g., Skowronek 1993; Skrentny 1997; McMahon 2011), he is nonetheless emphasizing pieces of Nixon's presidential administration that fit rather tidily as opposed to more objectively analyzing and assessing Nixon's overall political project.

A. Saving *Brown*: Anti-Humiliation

In yet another somewhat surprising shift from his previous volumes, Ackerman spends a lot of time defending the Supreme Court, and particularly the Warren Court decision in *Brown v. Board of Education*. This is, in part, because in contrast to the Reconstruction and New Deal eras in which the president or Congress initiated the constitutional politics, in the civil rights era it was seemingly the Supreme Court that provided the first move. Although the Court was not enough—all three branches "engaged in a collaborative process that extended *Brown* far beyond the sphere of public education into an escalating series of initializations that revolutionized the constitutional meaning of equality"—it nonetheless "did catalyze an escalating debate" (5, 51). His excavations of internal Court deliberations lead him to recognize that the understated judicial opinions to which we currently look derive in part from strategic decisions of the Court. These casebook opinions avoided

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sweeping statements that would have recognized the constitutional revolution that Ackerman argues was widely recognized to have taken place in the other branches of the government. As Tocqueville long ago noted ([1840] 2003), courts have an institutional conservatism that, even when innovating, leads them to cling to old forms; as such, even in the hands of the Warren Court parts of the constitutional revolution were instead couched as minor, even mundane extensions that obscured their true meaning.

To use just one example: in upholding the Civil Rights Act's prohibition of discrimination in public accommodations, Justice Tom Clark situated it within Congress's power to regulate interstate commerce. In Clark's hands, this seminal law was not a constitutional revolution or even a restoration, but just the latest in an unremarkable line of economic rules affecting banks (*McCulloch*), crop regulations (*Wickard*), or wage laws (*Darby*)—in Ackerman's words, "humdrum commercial regulation" (148–49), "garden variety New Deal regulation of interstate commerce [that] treat[ed] its moral significance almost as an embarrassment" (315). This almost complete erasure was, Ackerman notes, the product of strategic behavior by risk-averse judges seeking a show of force that duplicated the lockstep support of *Brown* and *Cooper v. Aaron*, in which a united Court insisted both on state compliance with school desegregation and its own constitutional supremacy in the process. A more ambitious opinion rooted in the Fourteenth Amendment and overturning the *Civil Rights Cases* risked provoking a dissent from John Marshall Harlan, and unanimity was considered preferable to clarity. Thus, rather than offer an opinion like Ackerman's rewrite that would have upheld the statute on both grounds, the Court instead chose the least radical option (at least from the perspective of New Deal jurisprudence) (150–51). Ackerman notes that other key decisions like *Loving v. Virginia* (and the preceding series of miscegenation law cases) similarly took the path of least resistance, trading away the chance to issue decisive statements of egalitarian principle that better reflected what the nation's governing officials had done and that would better guide later—now contemporary—judges. This desire to more clearly establish the meaning of the 1950s and 1960s brings us to Ackerman's second objective, framing the civil rights revolution as a constitutional founding on par with or even exceeding 1787, 1868, or 1937.

Against the bipartisan consensus contending *Brown* was, for all its merits, both an analytical and political disaster (Rosenberg 1991; Balkin 2002), Ackerman pronounces it the "greatest judicial opinion of the twentieth century" (317). In Ackerman's hands, the lack of bright lines that so annoy legal professors is no bug but a feature, one that reflects the contextual nature of its true guiding principle, "anti-humiliation." "Anti-humiliation" is neither the "anti-classification" schemes of purportedly colorblind conservatives wrapping themselves in Harlan's *Plessy* dissent, nor the "anti-subordination" of progressives looking to group-based solutions to systematic injustices—why both camps largely talk past the opinion itself (128). Instead, the *Brown* principle seeks to combat humiliation, which Ackerman defines as a "face to face insult in which the victim acquiesces in the effort to impugn his standing as a minimally competent actor within a particular sphere of life" and that reaches a threshold of constitutional evil when "institutionalized by social practices that strip an entire group of this ongoing presumption" (138–39).

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Key to this definition, and Ackerman's high regard for the decision, is its contextual or "sphere by sphere" nature, which recognizes that this may take different forms in different spheres; an individual homeowner declining to rent out a room has a plausible deniability different than an a corporate decision that its hotels will not accept customers of a particular race. The Civil Rights Act, by distinguishing different spheres in different titles, each with different solutions, recognizes and statutorily constitutionalizes this understanding (142), as did subsequent cases. (Ackerman identifies only one outlying case, *Gaston County v. United States* [1969] that takes a more comprehensive, "anti-subordination" understanding than the narrower "sphere" framework he extracts from *Brown*, as the Court in *Gaston County* considered the county's school segregation record in hearing a voting rights case) (165). Fidelity to the "anti-humiliation" framework laid out in *Brown* and successor cases relies on prudential, contextual understanding (159–60), and thus, in borrowing a phrase from Karl Llewelyn, Ackerman holds that judges should be motivated by a "situation sense," akin to common law reasoning, in assessing whether the social meaning of differing treatment is "usually interpreted" as stratifying or dehumanizing (13–15, 131–33).

B. Historicizing Popular Constitutionalism

In advancing his argument that the true meaning of the constitutional revolution was not confined to the margins of judicial footnotes but embraced by the sovereign people, Ackerman discerns its rhetoric in key moments of the civil rights revolution, uttered by activists and pivotal elected officials alike. He finds it in Rosa Parks's explanation of her actions as "the very last time I would ever ride in humiliation," in Martin Luther King Jr.'s "Letter from a Birmingham Jail" (135), in Hubert Humphrey's advocacy of the Civil Rights Act (136), and in Walter Mondale's defense of the Fair Housing Act (206). Even conservatives seemed to have picked up the thread, with Justice Burger implicitly defending the anti-humiliation principle in 1972's *Wright v. Emporia* (269–70) and President Nixon using an analogous principle to distinguish between *de jure* segregation designed to create a caste system in the South and the pride in ethnic neighborhoods in the North that did not similarly build an implicit, hierarchical stigma (259).

Although Ackerman frequently makes claims that at times defy the talking points of the legal progressive wing, the book remains at its core a passionate brief charging the conservative Roberts Court with failing to recognize the new constitutional order created by sovereign Americans in first the New Deal and then the Second Reconstruction on which this volume is focused. (It is also, as he notes in a passing exhortation, hopeful that a reinterpretation of *Brown*'s anti-humiliation principle means that "no thoughtful American" who "looks squarely at social reality, as *Brown* demands," can continue to treat the nation's "eleven million undocumented immigrants . . . in the same demeaning fashion in which southerners treated blacks" [335–36]). But it is the Court itself that really draws his fire, especially the justices' decision to incapacitate the preclearance sections of the Voting Rights Act in *Shelby County*, which looms throughout the book. The jurisprudence that

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produced a close call on Obamacare and the Court's formalism on race is "nothing less than an elitist effort to erase the Constitution left behind by our parents and grandparents" (19).

Popular constitutionalist scholarship has frequently been the target of critics who claim that it is too directly motivated by the ideological proclivities of the scholars making the arguments, and relies on simplistic and outdated assumptions about democracy. It is argued (see, e.g., Friedman 2003; Benson 2008) that seemingly liberal professors are simply responding to conservative majorities on the Supreme Court with claims that the public should "take the Constitution away from the courts" (Tushnet 1999b) by removing the authority of judicial review, or at least that judges should partake in "minimalism" when invoking constitutional doctrine (Sunstein 1999). Critics claim as well that the popular constitutionalists overly focus on the positives of democratic life in nonjudicial institutions and rarely make much mention of the negative. As Benson (2008, 1083) writes, these scholars have embraced the pluralist arguments of the mid-twentieth century that claimed "every citizen participates in the polity; no one is marginalized. Minorities may lose some political battles, but they do not lose them all, because they can form alliances with other groups to advance their interests" (see also Graber 2000; Friedman 2003; Chemerinsky 2004).

As such, Ackerman's efforts—as well as those of the other popular constitutional scholars we have discussed here—to expand the sphere of popular constitution to "the people" is a critical move in the progression of our understanding of law and democracy. His attention to regimes provides the kind of broad scope necessary to truly assess the possibilities and limits of popular constitutionalism. But, perhaps because he is in dialogue with "lawyers" (as he references throughout the book), Ackerman does not do enough with these regimes, and without a more systematic understanding of the boundaries that delineate peoples, institutions, and constitutional moments, he continues too often to reify a dichotomy that is too clean in making the contrast between "democratic" institutions and the courts. He also does little to critically assess the substantive meaning of democracy in other branches of government and institutions of politics, finding the only limits to come from the shortcomings and partisan leanings of individuals, not structures. Despite his important criticisms of structural formalisms like Article V, he ignores other structural dynamics—such as collective action problems and institutional differentiation that situates and mitigates certain constitutional actors as much as it can mobilize them—that are critical in determining the ultimate outputs of popular dialogue.

Scholars in recent years have tried to more precisely separate the ways in which the Constitution is both a long-term structural commitment to a set of ideas *and* premised in promoting democracy (Whittington 1999, 2007). The best of this work, moreover, has carefully uncovered ideas and activists promoting constitutional claims in ways that have long been ignored in constitutional scholarship (Goluboff 2007; Beaumont 2013). Still, the criticism leveled against popular constitutionalists is most powerful when focused on the alternatives that popular constitutionalists invoke. Not only do the advocates of popular constitutionalism tend to be fairly vague about what "We, the People" constitutes, but the institutions they find

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appealing typically have, on closer examination, problems similar to the types for which the judicial branch is criticized. Indeed, even a quick glance at the scholarship of each of these realms yields a cacophony of caveats and concerns about the potential of these institutions to truly represent the public voice that rival those who criticize the courts.

For instance, although there is historical justification for understanding political parties as critical institutions conveying popular constitutionalism, there are reasons to be wary of the continued ability of parties to offer meaningful constitutional debate. Sidney Milkis, though a believer in parties' historic role in a popular constitutionalist enterprise, argues that structural changes to party organizations in the Progressive and New Deal eras and particularly Franklin Roosevelt's construction of an entitlement-based administrative state at the time, one that redirected money from the pockets of local party leaders to the federal government—made parties largely unable to serve these historic functions (Milkis 1993). Subsequent reforms in the 1970s, such as the changes to campaign finance laws and the institutionalizing of party primaries as the mechanism for presidential nominations, only further weakened the ability of party organizations to represent locales over elite entrepreneurs and wealthy corporations that serve as the primary funders of the modern politician (see, e.g., Frymer and Yoon 2002; McCarty, Poole, and Rosenthal 2006).

Meanwhile, presidential scholars suggest that the political windows for presidents to meaningfully transform the Constitution are too infrequent to serve as a consistent avenue of popular constitutionalism (Skowronek 1993; Whittington 2007). In their accounts, only particular *reconstructive* presidents—a Jefferson or a Lincoln—bring a constitutional vision challenging the old political order's constitutional commitments. But the norm is for presidents to cede interpretive authority to the courts, both as a question of specialized labor and of blame shifting. George W. Bush famously refused to veto the McCain-Feingold campaign finance bill that he obviously believed unconstitutional (Bush 2002), instead hoping to rely on the Court to "interpose [its] friendly hand" (Whittington 2005), as it would in *Citizens United*. Similarly, on civil rights, both Franklin Roosevelt—a popular constitutionalist in other spheres—and Eisenhower chose to work primarily behind the scenes and use appointments and legal briefs rather than wield the moral authority of the office on behalf of a constitutional commitment (McMahon 2004; Nichols 2008). Perhaps most importantly, the need for omnipresent activity and minor horse-trading suggests a president, not unreasonably, devoted to the act of *governing* (Neustadt 1960). The presidency's once formidable power to wield the bully pulpit for constitutional dialogue has slowly transformed into a low-brow perpetual campaign of politics and sound-bites (Tulis 1988). All these are sensible reasons for the specialization of labor in which, critical moments aside, presidents leave the Constitution to the courts (Whittington 2007). The presidency *can be* an enforcer of popular constitutionalism of last resort, but its competing institutional obligations make it unreliable and better thought of as an indirect vote for the judiciary than an independent embodiment of the people's constitutional vision.

The congressional literature also is not as supportive as the legal theories purport. David Mayhew most famously argues that House members are rarely concerned with actual policy making and are incentivized to serve those most

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organized, notably those who represent concentrated business interests; they respond to fire alarms more than police patrol (McCubbins and Schwartz 1984) and structure voting to minimize blame (Arnold 1990). More recent work by Martin Gilens (2012) and Nicholas Carnes (2013) argues that many of the criticisms that the likes of Tushnet level at the courts—that they serve the wealthy and powerful at the expense of broader political majorities—are equally true of legislators. Even most other scholars seeking to elevate Congress's role in deliberation are not particularly optimistic about the institution's ability to put aside policy concerns, partisanship, and other demands more pressing than constitutionalism (Devins and Fisher 2004; Pickerill 2004; Devins 2012).

This is not to say that any or all of these institutions fail to reflect popular constitutionalism. It is to say it depends on specific historically constituted opportunities that derive from mobilized constituencies putting pressure on the institution to articulate a response. Ackerman incorporates this with his theoretical separation between normal and exceptional moments of politics, the latter of which reflect truly constitutional moments. But this simply begs the question of how and why these moments appear, and whether they appear out of swells of public enthusiasm or whether they are structurally shaped—being alternatively induced or repressed by features of democratic organization that shape whether the public interest can and will mobilize into an identifiable force. We need to pay greater attention to the dynamics involved in public mobilization and demobilization, they ways in which certain constituencies are more easily represented than others due both to political and structural inequalities. Here, greater attention needs to be given to the range of collective action problems that public movements, and especially those attempting to promote "public goods," face in their attempts at mobilization.

More generally, Ackerman, like many popular constitutionalists, would do well to muddy the waters. He tends to use empirical evidence selectively, like a lawyer would argue a case, in order to provide support for a theoretical proposition. However, a closer examination of the empirical reality is simply messier. This messiness does not just provide a caveat, but forces us to look elsewhere for substantive understanding of the democratic process; namely, it forces us to examine more closely political mechanisms that arbitrate power and outcomes, providing substantive meaning to otherwise falsely ambiguous ideals. It is okay for history to be messy and it is okay for the details to move in different directions. Such messiness removes false abstractions and reminds us much more simply that politics is a contestation over power.

II. THE PEOPLE'S COURTS

A great strength of Jed Shugerman's *The People's Courts* is that he continually illuminates, in insightful and often counterintuitive ways, how judicial independence has meant different things over time depending on historical and political context. In particular, he is interested in the historical development of judicial elections, which have sometimes been seen as a way to democratize the courts and sometimes seen as a way to better separate judges from the reach of electoral

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politics. In each situation, "politics" has been the important generator of reform, and typically it is driven by a belief by a set of people that the courts are not effectively doing their job. However, the type of "politics" changes over time, and the resulting creation of a *general* judicial independence and *relative* independence often involves a complicated negotiation about the nature of a judiciary independent from the different principals-agents to which judges are in some way connected. Indeed, one of the ironies of Shugerman's detailed historical research is that elections often are motivated by a public desire to have greater independence from the legislative branches in an effort to better protect law from "politics."

Although judicial elections are typically linked to democratizing efforts, they have often been the rallying cry for judicial independence. In the nineteenth century, elections were about more judicial power—not less. Early supporters of judicial elections viewed judicial independence as the insulation from insider politics, and particularly the partisan patronage politics of appointments. "In that moment, reformers believed that direct elections gave 'the people,' mobilized by more participatory political parties, a check on insider politics" (6). By contrast, in the twentieth century, the nature of the reformers and their goals had changed, with business interests most notably pressing against judicial elections and in favor of merit selection, claiming that judicial independence would legitimate their reform efforts. In both historical moments, "a somewhat inchoate belief that law should be separate from politics influenced each change in judicial selection," with each stage leading reformers to focus on separating the courts from an immediate set of evils, but often leaving judges subsequently vulnerable to the next set of interests (8).

Shugerman progresses historically in order to show the wide array of interactions between judicial elections and democratic politics. In revolutionary times, judicial independence meant separation from the king, not public opinion (19). The Constitution helped change this by fostering judicial independence to "defend people's rights and property from the tyrannical wills of interested popular majorities" (Wood 1991, 23). As Shugerman tells it: "For Hamilton and some of his fellow Federalists, judicial independence meant protecting commerce and credit from majoritarian meddling" (23). Alexander Hamilton was worried about legislatures repudiating private debts and the rights of creditors. Anti-Federalists, meanwhile, believed that judges should be beholden to the people, and controlled by them through democratic elections" (26). The nature of court authority was highly contested during the early years after the writing of the Constitution, with "judges testing boundaries and planting the seeds of judicial review. In these years, judicial review was not as much bold practice; rather, it was more theory, dicta, sleight of hand, and grounds for removal from office" (34). Justice Marshall's subtle use of judicial review to resolve the political controversy that embroiled the Jefferson Administration against a Federalist Party political appointee in *Marbury v. Madison* (1803) was an important moment within this, in expounding our present day understanding of judicial review. But the decision read so frequently in constitutional law courses today did not receive much attention at the time, and far less than *Stuart v. Laird* (1803), which was issued six days later (46).

It was in *Laird* that the Supreme Court quite visibly capitulated to Republican efforts at court curbing by upholding the Jefferson Administration's repeal of the

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Judiciary Act of 1801, thereby opening the possibility that some federal judges could be revoked of their supposedly lifetime appointments as well as reinstituting the practice of circuit-riding, a practice judges deeply disliked. With the *Laird* decision perceived as the Supreme Court backing down to Republican demands, the nation's new dominant political party flirted with more aggressive efforts to dominate the judiciary. This was especially true in Maryland, where Samuel Chase, "the Court's partisan hot-head," further antagonized Republicans by wading into state judicial affairs with openly Federalist jury instructions in Baltimore (Shugerman 2012, 48). Party hardliners had already considered the almost complete elimination of the Federalist-dominated Maryland General Court, on which sat Chase's cousin Jeremiah, and its replacement by Republican-packed bodies. Prudential actions by Federalist judges helped defuse tensions, as they backed down on threats to boycott circuit-riding and issued a conciliatory ruling in *Whittington v. Polk* (an important if underappreciated 1802 Maryland case foreshadowing both *Laird* and *Marbury*). As a result, moderate Republicans at both the state and national level moved toward a centrist, good-government coalition with similarly moderate Federalists, saving that court and eventually sparing Chase impeachment (48). Other states, especially on the frontier, were more successful in court-curbing efforts, especially against judges who blocked debtor relief laws, but for the most part Republicans shied away from draconian checks like judicial elections and instead chose to strengthen juries or reduce the duration of judicial terms (48–53).

In the book's strongest section, Shugerman shows how impatience with corrupt and profligate legislators and governors caused many US voters to reconsider ways to both streamline and strengthen the judiciary in the 1840s and 1850s. This growing distrust of government manifested itself in several other institutional changes, for example, the movement for codification rather than reliance on the nebulous common law (100–01), and the increasingly restrictive conversion of state constitutions from documents conveying presumed plenary authority to charters jealously guarding enumerated powers. To enforce that transparent, limited-government vision, constitution makers settled on the seemingly counterintuitive option of empowering state judges by electing them—giving judges the democratic legitimacy to strike down democratic action. Stated bluntly, judicial elections followed from contempt for the other branches, with citizens turning to them as a last resort after exhausting their patience with the more immediately representative institutions. Between 1844 and 1853, twelve existing states adopted new constitutions and four new states entered the union with new constitutions, all fiscally conservative and opposed to government regulations, reflecting Jacksonian populism and free market values. Elected judges, an Ohio delegate declared, should "stand as sentinels to guard the constitutional rights of the people" (109). The problem that elections were intended to solve was the danger of political pressure from the governors and legislatures who appointed judges. Americans wanted their judges to be independent—independent from the other two branches of government.

The elected judges did what the voters seemingly wanted them to do. They struck down state statutes frequently on a wide range of subject matters, and far more often than in the decades prior to the constitutional changes that put these elected judges in power; in the process, their activity greatly expanded the use of

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judicial review. They used their expanded power to defend democracy against the abuses of corrupt and zealous elected officials as well as unscrupulous and unknowledgeable voters. Judges increasingly perceived majorities as tyrannical and invading on the rights and liberties of individuals. In particular, they stood up for the property rights of individuals finding their possessions being threatened by activist state legislators; they also waded into fights over slavery on both sides, seeing their interventions as necessary in such caustic and divisive debates. In doing all of this, these *elected* judges became more independent from state legislatures and more aggressive in striking down legislation, all because they saw the people themselves as a threat to higher law. But at the same time, as Shugerman acutely notes, they situated their activism within the ways they interpreted public opinion, responding importantly, if not straightforwardly, to different constituencies that were rallying for reforms to a democracy out of control.

Shugerman's research preempts several competing explanations about the rise and proliferation of judicial elections. Indeed, his findings consistently surprise, and judges emerge from different historical and political contexts in manners entirely unexpected. For instance, the switch to elected judges was not, he argues, simply a partisan story in which legislators wanted to strengthen their allies or feared for their fading coalitions. Instead, it often resulted from strange bipartisan alliances that came together to defend the ideal of the separation of powers as a populist means to vindicate constitutionalism. He also finds slavery's contribution to judicial autonomy as consistently complicated. As northerners grew wary of the implicit equation of slavery with "popular sovereignty," for instance, they saw the need for a robust individual rights jurisprudence as a counterpoint. Judges, now personally involved in vote getting (or remaining aloof from it, at their peril), recoiled from the grimy process of elections and party machinery. Conscientious judges suffered disastrous consequences, as elections failed to separate "law" and "politics" as thoroughly as promised (135–38). All of these, Shugerman suggests, spurred judges to see themselves as creatures apart, zealously wielding the power of judicial review to protect the people from themselves.

After the Civil War, state judges reared in an environment of increasing partisan conflict ever more aggressively blocked protective legislation, with voters occasionally rising up and blocking them in turn. When the Illinois Supreme Court overturned a state regulation on railroad rates, the Grangers rallied their supporters and threw out the chief justice who had written the opinion. The distressed editors of *The Nation* in turn warned investors against spending money in Illinois until the state developed an independent judiciary (142). Perhaps the most appalling display of a judicial election gone wrong was the retribution against Michigan's Thomas Cooley. Cooley allowed a libel suit against a local newspaper; its vindictive editors successfully mobilized against him, ending a twenty-year career as one of the most respected judges in the country (146). If even a Cooley could go down, any judge could; between the 1850s and 1920s, judicial elections were particularly close, making voter ire a very credible threat.

Nonetheless, judges were still seen as somewhat preferable avatars of constitutional government and the popular will—they were perceived to be the least bad option. Thus, late nineteenth-century constitution makers tinkered with the system

by expanding judicial terms on the grounds that, for all their faults, "judicial elections were relatively less partisan than appointments" by venal officeholders (153). Longer terms, it was thought, still provided the moral authority to strike unconstitutional legislation, but infrequent election also minimized corruption by sheltering judges from constantly currying the favor of voters. Turn-of-the-century progressives tried to soften the sharper edges of judicial elections with similar tinkering. As one would expect among such antiparty reformers, progressives moved to institute either primary elections or, preferably, make them nonpartisan—still retaining the advantages of elections but freeing them from the corruption of partisan control. Of course, as William Howard Taft and other critics noted, the sundering of party ties raised its own problems. Without access to party machines, judges were now forced to do more of their own electioneering or enlist the support of interest groups rather than leave their fates up to the dumb luck of ballot ordering. To drum up such interest group support, or the attention of the citizenry at large, however, judges had to distinguish themselves in controversial, high-profile cases, creating perverse incentives arguably more dangerous than partisan alliances (171–72).

Thus, in the second decade of the twentieth century, reformers proposed various methods of lawyer appointments, such as electing a chief justice who would then select his fellow members, or, foreshadowing current day merit plans, mixing appointments with recommendations from lawyers groups or local bar associations. In chronicling the rise of such merit plans and the next vision of judicial independence, Shugerman rediscovers an underappreciated figure instrumental to their success: Earl Warren, the prosecutor, yet to become Earl Warren the Chief Justice. Warren, then an ambitious local prosecutor in booming California, warned that local judicial elections allowed criminal syndicates to get their way and floated a return to appointments and a more centralized process. Invoking Republican progressive rhetoric about good government by experts, Warren added the influence of a professional board that would give a lawyerly imprimatur; such vetted titans of the law were less likely to roll over to Capone than weak, unprofessional, and easily outmaneuvered judges facing tight elections. Aided not only by media sensationalism about a (nonexistent) nationwide crime wave but an actual increase in California crime, Warren successfully enlisted business groups like the Commonwealth Club to join his crusade. Old guard Republicans, fearing the spread of New Deal principles or the election of the Socialist-leaning Upton Sinclair, signed on to protect themselves from future judicial demagogues. Warren's initiative passed—as did other measures bundled with it as part of the 1934 "Curb Crime" platform. With his tough anti-crime and pro-business reputation carefully secured, Warren soon waged a conservative campaign for attorney general, and from there, governor of California (180–92).

In the next ten years, only one other state adopted a judicial selection scheme requiring lawyers' input, namely, the Missouri Plan adopted in 1940. (California's plan, which never found favor elsewhere, was more of an after-the-fact veto of a governor's nominee, rather than a nominating panel forwarding names to the governor coupled with retention elections.) Labor opposition in Ohio and Michigan killed merit plans in those midwestern states, but, as in California, crime and corruption concerns, namely, the public collapse of the Pendergast machine and high-

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profile bootlegger shootouts, helped ease passage in Missouri. And the business community, including Rush Hudson Limbaugh, a leader in both the state's Republican Party and legal community, helped mobilize the overwhelming GOP support for the plan (197–204).

Missouri's passage foreshadowed the unique confluence of seemingly necessary conditions for passage elsewhere. As Shugerman argues, so-called merit plans succeeded in rural populist states where voters would seem unlikely to cede their own voting power, but that were rapidly urbanizing. Only in that very specific set of conditions was business strength at its apex: populists in rural states would overwhelm the still weak business interests, and organized labor in urban states would similarly kill the plans. As in California, business interests throughout the nation defended merit plans as a solution to crime, arguing that professional judges were more skilled and therefore should be able to defeat "the bad guys." Across the Mountain West and Midwest, the dynamic was similar in state after state adopting the plan from the 1950s to 1970s. Cold War politics gave business elites a new rhetoric of meritocracy and even the term "merit plan" itself. New Dealers and conservative Republicans in MacArthur's Japanese reconstruction team joined across such lines to give Japan merit plans; at home, meritocracy became a contrast to distinguish the United States from the Soviet Union (213–17). Thus, echoing the 1840s claims, judicial independence enabled strong courts to overturn oppressive laws and guard the precious civil liberties of democracies. Ironically, despite being partially provoked by merit plan architect Earl Warren himself, the 1960s fear of crime gave political leaders in conservative areas a bogeyman that merit plans could defeat.

Although often pitched as high-minded good government, merit plan passage occasionally took on a racial tone as well. In New York, meritocracy sometimes came to be seen as an alternative to affirmative action (237), and claims that merit plans would block minority judges and give those positions to white elites helped defeat Pennsylvania's attempt in 1968 (232–33). The racial undertones took an even more ominous turn in the South, where fears of a populist biracial coalition under Jim Folsom led white segregationists to join with business leaders in entrenching a reasonably business-friendly judiciary in Alabama, Florida, and Tennessee (218–24). Starting in the 1980s, the kinds of campaign techniques seen in national presidential and congressional campaigns finally came to state judicial elections. Business abandoned its support for merit plans and corporate interests instead preferred to refocus their attention on more direct influence, namely, funding judicial elections. Thus for Shugerman, California Chief Justice Rose Bird's retention election loss was as much part of a long-term tort war between business and trial lawyers as about her decisions attacking the death penalty (244–47). Karl Rove, meanwhile, was perfecting his craft in judicial elections first in Texas and then elsewhere; Shugerman attributes several particularly Machiavellian schemes, including insinuations of pedophilia and false flag attacks on his own candidate, to the man who would become Bush's campaign wizard (251). With such trends unleashed, both partisan and nonpartisan judicial elections became increasingly expensive over the course of the 1990s—with merit plan retention elections seeming to follow, though less dangerous to judges than contested elections.

Shugerman's book, then, illuminates a complicated and nonlinear relationship between different levels of democratic participation and varying degrees of judicial autonomy. Like Alan Tarr's complementary book focusing more on contemporary connections between elections and judicial independence (2012), Shugerman aspires to reinvigorate popular constitutionalism by reintegrating it alongside courts, rather than putting them in opposition as so many popular constitutionalists are wont to do. This argument suggests the difficulty of making overly formal distinctions between institutions that represent "the people" and those that seemingly are insulated from public opinion and open to elite activism. Moreover, Shugerman finds that opportunities for popular constitutionalism—whether coming directly from "the people" however defined or more indirectly through judicial activism and autonomy—are not constant but subject to temporal dynamics that often intersect and entrench popular constitutional claims within the legal branch as much as more directly representative institutions. In turn, this research provides an important way forward in a vibrant and enduring debate about the competing merits of judicial autonomy and popular constitutionalism.

III. GOING FORWARD: FINDING THE POPULAR AMONG THE POPULAR CONSTITUTIONALISTS

Shugerman and Ackerman both importantly advance the scholarship of popular constitutionalism by expanding the terrain of actors and complicating the ways in which democratic decision making through the purview of the Constitution takes place. They are leading us down the right path toward a rich and nuanced understanding of constitutionalism that is leagues away from the formal models of judicial authority that dominated only decades ago. Ackerman is a leader of this revolution and Shugerman importantly complicates the often propagandist picture that arises from some of this literature. The next step in going forward is to think more carefully about the seemingly more democratic sides of the equation, both by incorporating—as opposed to disposing of—the skepticisms that the likes of John Hart Ely (1980), Owen Fiss (1976), and E. E. Schattschneider (1960) so acutely offered many decades ago, that democratic institutions are not neutral, are not all encompassing of the people, and are continually sites of contestation. Moving past overly formal features of legislative and executive democracy requires that we more carefully delineate what opportunities each institution offers by understanding all institutions as the province of rules and procedures that provide and empower opportunities to some and marginalize and discount others. To more effectively do this, future scholars should pay closer attention to micro dynamics of democratic contestation, which involves several components.

First, there needs to be a greater recognition that institutions evolve historically in a manner that provides differing opportunities to different actors dependent on the specific political and historical context in which they operate (Orren and Skowronek 2004). Courts, legislators, executives, and even electorates vary in their effectiveness in protecting rights over time, with different institutions taking the lead across different times in US political development. This is in part because

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different popular movements target different institutions depending on their opportunities; it is also in part because different institutions provide both internal and external incentives to direct political activists into different arenas. Because of this, formalities over one institution being more "representative" than another quickly break down as seemingly representative institutions will often empower or indirectly delegate "less representative institutions" to be more accommodating of the public interest (Graber 1993). Who is populating a specific institution matters as well; rarely do institutions remain static over time, but instead shift according to their broader position within the political system and the array of actors who see different venues as offering different opportunities in different contexts.

Second, there needs to be further effort to illuminate how these institutions—both legal and those more formally democratic—are constantly intersecting and in strategic dialogue with each other. This intersection matters because each institution has important limits on its power; whereas popular constitutionalists make much of the weaknesses of courts as institutional actors, less has been made about their more chosen venues. Although provided with weapons that courts do not have, such as the power to tax and spend, enforce and delegate, both the executive and the legislative branches are also weakened by their need to be responsive to different majorities and veto players. The relative autonomy of judges—in the sense that most have life terms—is not just something that should be perceived as a negative, but as a weapon that allows them to accomplish goals with which elected officials have difficulty. We need not attach a normative dimension to this claim, but instead analyze it empirically with recognition of why certain democratic moments will have greater success in one venue versus in another.

Third, because all institutions are comprised of actors and rules that frequently change over time, our focus should be aware of the vibrant ways in which the development of the different branches of government has significantly altered opportunities for representation. The legal branch typifies this, as the twentieth century was a time when the judicial branch both expanded in terms of the numbers of actors associated with it, and significantly altered its rules. At least some of these rules, such as the advent of the class action, provided for greater opportunities for popular constitutionalism through the courts. Of course, this opportunity had temporal limits; opportunities for democratic activism with the aid of litigation strategies were importantly scaled back in the latter part of the twentieth century and into the twenty-first century (Staszak 2015). But this is no different than variation in other institutions; Congress becomes more or less accessible depending on the rules that allow committee chairs more or less autonomy and allow minorities more or less opportunities to block legislation, while the executive branch also varies in terms of the extensiveness and openness of its regulatory process and the opportunities for public voice that come or do not come from the primary process. What is critical in this understanding is that institutions are layered, often intersecting, and reignite in different historical moments to continually shape state building and policy making (Orren and Skowronek 2004), which in turn means that we need to see court activism as part of a multilayered political project that is open to different paths and trajectories all the while being importantly confined by earlier historical acts (Pierson 2004).

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The zeal of constitutional scholars to advocate nonjudicial avenues of reform has often led them to miss what many of the participants of popular constitutionalism recognize—that judicial strategies, even indirect judicial strategies, can be central for accomplishing popular constitutionalists' goals. Not always. In the nineteenth century, critical movements such as abolitionism were able to accomplish goals by taking over political parties and often succeeded in passing constitutional amendments. In the twentieth century, from the labor movement to the civil rights movement to the Tea Party movement, results have been largely statutory and judicial, not imprinted in the Constitution. But social movements have frequently struggled to catapult themselves to the forefront of control of a political party. As such, the role of these social movements is frequently indirect and leads to specific institutional features that enable popular constitutionalism through similarly indirect means (e.g., McCann 1994; Strolovitch 2007; Frymer 2008; Francis 2014). At times, this has led party leaders to "invite" courts to intervene on behalf of the social movement so as for the party coalition to avoid internal dissension and destruction (Graber 1993; McMahon 2004). At other times, it has provided opportunities for political entrepreneurs to exert influence over a constitutional terrain. Charles Epp (1999) and Steven Teles (2008), for instance, have importantly argued for the critical role that "support structures" play in carrying out movement goals. In the twentieth century, these support structures frequently have been legal organizations. As such, an important reason why courts have so often been at the center of movement activism is because the support structure, including advocacy groups, private philanthropists, bar associations, and the federal government, has pushed them there. Similarly, recent work on "private enforcement" regimes sheds further light on why judicial activism is both central to constitutionalism, and importantly linked to popular movements and representatives as well. This literature argues that choices made by Congress and the executive branch—such as enforcing statutory matters not by delegating to executive agencies but by empowering private lawyers with the incentives of attorney fees to implement public policy—is both a product of legislative incentives and has the consequence of furthering the autonomy of the judicial branch (Frymer 2003; Farhang 2010).

The critical point of this essay, and so exceptionally illuminated in both Ackerman's and Shugerman's books, is that law and political action rarely occur in isolation, whether as an individual or a group or even a population. Institutions engage and produce these actors, and not in a manner that is without meaningful skew. The next step in understanding popular constitutionalism is to expand the confines of our institutional boundaries, scrutinize the intersections, and analyze under what conditions elected representatives, judges, and others acting under the US Constitution find the institutional and political warrants for carrying out the will of the people.

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