Reviews

Populist Pabulum

AKHIL REED AMAR & ALAN HIRSCH
FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS
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Honorable Morris B. Hoffman

THE BACK DUST COVER of *For the People: What the Constitution Really Says About Your Rights* contains these stark pronouncements:

> Did you know that:
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> The Supreme Court is not the ultimate authority for constitutional interpretation.
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> The Framers intended for us to be able to protect ourselves from the federal government.

These two propositions nicely summarize what is wrong with this book – it spends most of its 202 pages mired in either the grossly inaccurate or the hopelessly trivial. And it swims between these two extremes submerged in a bath of forced, rather confrontational, populism. It is a sort of "Jerry Springer goes to law school."

Law students who read this book and believe it will flunk constitutional law (an admittedly flawed metric by which to judge creative constitutional discourse). Citizens who read it, believe it, and act on it, will be arrested and convicted. Judges who read it have too much time on their hands and need more cases on their dockets.

What was most troubling to me about the book is that flowing through every one of its arteries is the suggestion, spoken and unspoken, that a cabal of judges, lawyers and academics is responsible for mischaracterizing what the Constitution *really* says and for denying to ordinary citizens buckets full of rights that the founders *really* intended for ordinary citizens to enjoy. Why has the elitist cabal done this? Presumably in an effort to protect the status of judges, lawyers and academics as members of the ruling class. This suggestion is as loony as it is popularly tempting, and it

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reflects either the authors' own abject misunderstanding of law's fundamental role in regulating the relationships between the governors and the governed or their intentional decision to mischaracterize that role to fit their model of a Constitution so subject to populist sway as to be meaningless.

For the People fails on many levels. Though it is well-organized and clearly presented, its authors make embarrassing mistakes – of commission as well as omission – about fundamental constitutional principles and about the way various parts of the justice system work. Much of what remains after this flotsam is swept away is focused on the trivial observation that the Constitution is grounded on citizens' consent to be governed by it. The whole discussion of the non-trivial implications of that proposition takes place in an eerie X-files kind of conspiratorial atmosphere.

The curious reader of this review might like to know at this point what exactly it is that these authors are trying to say about the Constitution and about how We the People (a phrase the authors use, in the same capitalized form as it appears in the Preamble to the Constitution, regularly throughout the book) can reclaim the constitutional rights that the founders guaranteed us but that have been hijacked by aristocratic and self-interested judges, lawyers and professors. Unfortunately, I really don't know. Apparently, the best thing we can do is to recognize that these rights are connected by a kind of populist substructure previously undiscovered (or lost to antiquity). The authors' promise is that once this connecting constitutional substructure is appreciated, all manner of light will illuminate what once were intractable and unrelated constitutional problems, and will give us all a richer appreciation of the Constitution. But the substructure is a trivial platitude, the intractable constitutional problems are quite tractable, and the only "insight" the authors offer is the outlandish idea that, despite clear language in Article V, and the even clearer judgment of history, the Constitution is actually subject to amendment by a simple majority vote of the people. Far from giving the Constitution additional sheen, the authors' view renders it little more than a temporary compendium of the popular will.

To avoid being mistaken as wild-eyed militiamen, the authors go to great pains, as early as the introduction, to explain that their ideas are neither "liberal" nor "conservative." They are right about that. They have managed to take the worst ideas from both political extremes to cobble a constitutional view that has as its primary theoretical tenet the tautological political axiom that the people's consent to be governed is revocable and, as one of its primary practical implications, in addition to amendment by plebiscite, the strange notion that as long as the people consent to be governed the government has a constitutional obligation to take care of their economic needs. I do not doubt for a moment that the authors have no ideological ax to grind. These are neither "liberal" nor "conservative" ideas, they are just goofy ideas. Their engine is not a political agenda, but an academic one: two law professors searching so desperately for a "new" way to look at the Constitution that they don't mind ignoring two hundred years of accumulated thought on the subject.

I sympathize with Professors Amar and Hirsch. It is not an easy task to write clearly and simply about a document as rich as the Constitution, even without the academic pressure to say something new about it. In fact, when I finished reading the book I found myself thinking more about the art of good writing than about the magic of the Constitution. No doubt this was in some measure because I had been commissioned to review the book for the *Green Bag*, whose revival is a testament to the proposition that complex legal ideas can be conveyed simply, and with an

entertaining verve.[1] But it was more than that. The simple and straightforward writing style in *For the People* covers, and indeed spawns, a host of historical and analytical errors.

Every act of writing, and indeed every act of speaking (and perhaps even of thinking), necessarily involves irreducible levels of oversimplification and inaccuracy. The challenge of good writing, especially good writing aimed at conveying complex ideas like those in the Constitution, is to be simple without being either grossly inaccurate or trivial. Inaccuracy and triviality are the two ever-present temptations lurking in the waters of simplification. The art is to negotiate these two shoals, and to produce something which is simple enough to be understood, but is also fundamentally accurate and not so trivial as to be meaningless.

And, of course, there is the ever-present echo when one tries to write about the Constitution, because the Constitution is itself a written document conveying complex ideas in a simple form. It is a humbling echo indeed. Even the best attempt to write about the Constitution risks a powerful rebound of the founders' own unmatched and unmatchable words. Attempts to expound on it necessarily start off at a decided disadvantage. *For the People* never recovers from that disadvantage.

The book further disappoints because its authors are not the simple-minded lummoxes they appear to be. Professor Amar has written extensively and creatively in the country's finest legal journals about the Constitution in general and about his pet topic of amendment by plebiscite in particular.[2] As I've suggested above, the historical and analytical errors in *For the People* might be attributable to the ravages of oversimplification and the challenges of writing for a lay audience. But the more I've thought about the substance of the authors' claims, the more I've come to suspect that, by reducing their complex and well-researched ideas into a form digestible by We the People, Professors Amar and Hirsch may have ironically, and quite unintentionally, exposed their arguments' central weaknesses. In the end, this may be the lasting legacy of *For the People*: if we can't get law reviews to adopt any meaningful peer review, maybe we can at least get scholars to test their craziest ideas in the fires of the popular press.

The book is organized into four parts, or what the authors call "boxes." The "Ballot Box" deals with voting rights and responsibilities, including the citizens' alleged right to amend the Constitution by a simple majority vote. The "Jury Box" furthers the emerging, and in my view quite erroneous, post-*Batson* notion that prospective jurors have certain constitutionally grounded rights to serve. The "Cartridge Box" addresses broad issues of national security, including the question of a standing army, a legion of newly discovered "rights" to serve in the military, and the right to bear arms. The "Lunch Box" champions so-called "economic rights" and the revived Reichian idea,[3] which even these authors admit is a tad wild, that the Constitution must be taken to guarantee every citizen a certain undisclosed level of economic well-being in order that he or she might be able to enjoy all the other bestowed rights.

Space, time and energy do not allow me to expound here on all the hair-raising mistakes

1 And without too many footnotes.

2 See, e.g., Akhil R. Amar, *A Few Thoughts on Constitutionalism, Textualism and Populism*, 65 Fordham L. Rev. 1657 (1997); *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 61 (1994); *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988).

3 See, e.g., Charles Reich, *The Individual Sector*, 100 Yale L. J. 1409 (1994).

that will jump out and slap even the most tolerant of readers. Let me focus on two: the discussion of jurors' rights and the authors' contention that the Constitution may be amended by majority vote.

Jurors' Rights

Perhaps it is because I am so familiar with many of the technical points raised in this section of the book, by sheer force of occupational osmosis, that the discussion about jurors' rights seemed especially dense with error and misunderstanding.

The idea that jurors have some constitutionally grounded "right" to serve as jurors has been a recent and controversial by-product of the Court's expansion of the *Batson* doctrine.[4] When it decided that *Batson* applies regardless of the race of the defendant and the race of the challenged juror,[5] that it applies in civil cases as well as criminal ones,[6] and that the prosecution has the right to make *Batson* objections,[7] the Court had to grapple with the thorny problem of state action. Exactly how can it be said that a criminal defense lawyer, or a private lawyer representing a corporation in a breach of contract suit, is engaged in the kind of state action which is ordinarily needed to violate the protections of the due process and equal protection clauses? And how exactly is equal protection violated when a white defendant challenges a white juror? The Court answered these questions, at least in part, by focusing not on the rights of the litigants but on the supposed rights of the excused jurors, concluding that prospective jurors have a cognizable right not to be excused for unconstitutionally discriminatory reasons. The recognition of this new "right" was extremely controversial then, and continues to be extremely controversial today.[8] Not the least of these controversies includes the question of whether the Court was being intellectually dishonest in creating this new juror's "right," when the juror appears to be the only one in the courtroom without any remedy to enforce it.

Yet the authors of *For the People* gloss over all these central and painful issues as if it were crystal clear from 1789 forward that jurors have rights protected by the Constitution. Of course, the text of the Constitution is completely silent about any juror rights. In one of the book's most glaring miscarriages of logic, the authors rely on several of the voting rights amendments as sources of a supposed right to sit on a jury, arguing with no detectable shame that because jurors "vote" when they deliberate on juries, their expressly protected right to vote in elections extends to the right to vote, and by necessity sit, on juries. I suppose this means we all have a constitutional right to sit on the board of the Federal Reserve because the members of the Federal Reserve Board "vote."

The authors also make a structural argument for the existence of a citizen right to serve on juries. They contend that the nature of the jury – especially the criminal jury, given its constitutional role in moderating the prosecutorial power of the state – supports the proposition that jury service should be grounded in some constitutional foundation.

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4 *Batson v. Kentucky*, 476 U.S. 79 (1986).

5 *Powers v. Ohio*, 499 U.S. 400 (1991).

6 *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

7 *Georgia v. McCollum*, 505 U.S. 42 (1992).

8 See, e.g., Robert L. Harris, Note, *Redefining the Harm of Peremptory Challenges*, 32 Wm. & Mary L. Rev. 1027 (1991); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 Tex. L. Rev. 1041 (1995); and Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway?*, 92 Colum. L. Rev. 725 (1992).

The jury right, that is the right to *serve* on a jury as opposed to the right to be tried by one, serves many purposes, from the more commonly understood function of keeping prosecutors in check to the newly discovered power to enhance citizens' lives, both by making them part of their government and by giving them a reason to educate themselves about the legal system. Juries give citizens greater responsibility, and they respond to the duty by more thoroughly educating themselves about the laws they will have to interpret.

No one can disagree with these observations about good citizenship, or with the notion that serving on a jury is an important dimension to civic responsibility in a democracy. But that is a far cry from saying the structure of the Constitution requires us to convert the duty to serve on a jury into a constitutional right to serve on a jury. Citizens no more have a constitutional right to sit on juries just because the Constitution recognizes the importance of the jury, than they have a constitutional right to serve in the armed forces just because the Constitution recognizes the importance of an army (though, of course, the authors take this very position).

Shouldn't we all recognize by now that courts are on perilous footing whenever we seek to discover previously undiscovered rights lounging around in the "structure" of the Constitution? Nowhere do we risk being farther from the framers' meaning, and closer to our own policy inclinations, than when we are digging around the Constitution's "structure" in an attempt to locate a right left out by the text.

What is an already weak structural argument is all the weaker because it is simply historically inaccurate to suggest that the jury trial was of such momentous importance to the founders – even as a device to protect the accused, let alone as a device to celebrate civic participation – that they felt no need to articulate the obvious constitutional rights of jurors. It is true that there was much anti-Federalist sentiment praising the jury as an important constitutional instrument to protect individual citizens from the excesses of government. Among the most famous expressions of this sentiment was Jefferson's observation that if he were forced to choose between leaving the people out of the legislative or judicial branches, he would leave them out of the legislative.[9]

But when push came to shove during the process of drafting the Constitution, references to the jury trial were remarkably sparse. Randolph's original draft of Article III contained no provision guaranteeing either criminal or civil jury trials.[10] The version of Article III, Section 2 that was eventually adopted, and which guarantees the right to jury in federal criminal cases, was accepted by the convention with no recorded discussion or debate.[11] The only significant pre-ratification discussion of the right to a jury is contained in *Federalist* 83, in which Hamilton explains why there is no jury guaranty in civil cases. The right to a jury in civil cases was not added until the Seventh Amendment, and even then it was a limited right, and so far from fundamental that its guaranty doesn't even apply to the states.

With litigants' own right to a jury having such an unremarkable history, it is not surprising that no one, until the post-*Batson* cases made it a necessity, has seriously suggested that citizens have any kind of constitutionally protected right to serve as jurors.

9 Letter from T. Jefferson to L'Abbe Arnoux, July 19, 1789, reprinted in J. Boyd, ed., 15 The Papers of Thomas Jefferson 282-83 (Princeton 1958).

10 Saul K. Padover, To Secure These Blessings 419 (Washington Square 1962).

11 Id.

And what is the nature of this supposed bundle of juror rights? The authors' suggestion that it simply means that jurors may not be excused without reasonable and demonstrable grounds, does not, at first blush, seem extreme. That would mean the abolition of the peremptory challenge, a proposition with which I heartily agree.[12] But constitutionalizing jury service has the potential to ravage the entire system of challenges for cause.

Many of the so-called "at-law" challenges for cause recognized by most states – challenges that are based on an irrebuttable presumption of partiality flowing from the particular relationship between the prospective juror and the parties or the case – would surely not survive constitutional attack if jurors have a constitutional right to serve. In fact, the authors devote an entire chapter of the book to the *benefits* of narrowing challenges for cause. In doing so, they grossly mischaracterize the current state of the law and the practice regarding challenges for cause. They describe a system of challenges for cause in which judges willy-nilly excuse large classes of perfectly impartial people on tenuous and speculative grounds:

> Whole categories of people are dismissed based on speculation that some circumstances in their life could unconsciously affect their impartiality. If the defendant is a businessman charged with fraud, the judge might dismiss business people. If the case involves a school, bid farewell to teachers, students, and administrators. In a malpractice case, forget healthcare officials.[13]

I don't know where these two law professors have been practicing or observing, but it hasn't been in any jurisdiction I'm familiar with. No state of which I am aware authorizes an at-law challenge merely because the prospective juror shares the same or similar occupation as one of the litigants. Indeed, in the state in which I serve, excusing a prospective juror solely because of his or her occupation is expressly forbidden.[14] Teachers are unlikely to serve on juries in cases involving schools, but that is not because judges excuse them for cause, but because lawyers excuse them peremptorily. Judges don't dismiss "categories" of people for cause, other than the categories recognized by the at-law challenges. Indeed, the federal rules recognize no at-law challenges whatsoever – in federal courts all jurors challenged for cause are excused only after the judge makes a determination that that particular juror cannot in fact be impartial. State rules on at-law challenges for cause typically disqualify jurors who are related to the parties or their lawyers, who have any one of several legal relationships with any party (landlord/tenant, employer/employee, master/servant), or who may have been a juror in a prior case between the same parties.[15] It simply is not true that the at-law challenges for cause are so broad that large classes of people are being excused from jury duty without reasonable inquiry into their particular individual ability to be fair and impartial.

In fact, thoughtful jury reformers are proposing an *expansion* of the challenge for cause to compliment the abolition of peremptory challenges.[16] One of the reasons trial lawyers are so jealous of the peremptory challenge is that they simply do not trust that trial judges

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12 Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. Chi. L. Rev. 809 (1997).

13 For the People at 80.

14 Colorado Revised Statutes § 13-71-104(3) (1998).

15 See, e.g., Colorado Rule of Civil Procedure 47(e) and Colorado Rule of Criminal Procedure 24(b).

16 See, e.g., District of Columbia Jury Project, Juries for the Year 2000 and Beyond, Recommendation No. 19(c) (1998) (recommending expansion of challenges for cause).

will do the right thing in granting appropriate challenges for cause.[17] Their skepticism has, unfortunately, been too often well-taken. Who among us as trial lawyers has never said to himself or herself in a fit of exasperation during jury selection, "Forget it. This dim bulb of a judge just doesn't get it. I'll just use a peremptory challenge." And who has not heard the aforementioned dim bulb say something like, "Well, counsel, this is a close call. But I'm just not convinced that prospective juror Jones cannot be impartial just because she said she couldn't, and just because her son was convicted of this same crime last week. You'll just have to use one of your peremptory challenges." Peremptory challenges have made us lazy trial lawyers and lazy trial judges, and if we ever hope to make progress in eliminating them, judges are going to have to try to convince lawyers that we will do a better job dealing with challenges for cause.

The authors' proposal to *narrow* challenges for cause – much like some of the "feel good" Arizona-style jury reform sweeping the state courts[18] – risks sacrificing the concrete interests of the litigants for the ethereal civic good of prospective jurors. It is a sacrifice I suspect few trial judges, and even fewer trial lawyers, think is worth making.

The narrowing of challenges for cause would also cut against the clear march of history. English jurors in 1300 could be challenged for cause only if they were related to one of the litigants by blood, marriage, or economic interest. There was no generic requirement that they be impartial, and, in fact, jurors in fourteenth-century England were juror-witnesses, selected precisely because they might have knowledge of the litigants or even the facts in the case.[19] The King's prosecutors had an unlimited number of peremptory challenges, and therefore did not need to trouble themselves with "cause." Over the next several centuries, however, as the number of allowed peremptory challenges for both prosecutor and defendant steadily decreased, and, just as importantly, as the English venire began to diversify, challenges for cause began to broaden. The idea that jurors needed to be impartial began to crystallize sometime in the 1500s, and became preeminent by 1700.[20] By 1989, the English had eliminated peremptory challenges entirely, and greatly expanded challenges for cause.

Constitutionalizing jury service and narrowing challenges for cause in the manner suggested in *For the People* would abruptly reverse this long, natural and sensible evolution in the law of challenges for cause. Trials with no peremptory challenges and with narrowed challenges for cause might be a more pleasant civic experience for jurors, but they will be disastrous for litigants and for the Sixth Amendment's central and express constitutional command of impartiality.

Amending the Constitution by Simple Majority Plebiscite

There is no goofier idea in this collection of goofy ideas than that the people may, by direct vote and by a simple majority, amend the Constitution. Quite apart from its fatal flaws as an exercise of constitutional interpretation and history, discussed below, the adoption of this idea would surely mark the end of our constitutional republic. To imagine what our country would be like under this kind of

17 Raymond Brown, *Peremptory Challenges as a Shield for the Pariah*, 341 Am. Crim. L. Rev. 1203 (1994).

18 Janessa E. Shtabsky, Comment, *A More Active Jury: Has Arizona Set the Standard for Reform with its New Jury Rules?*, 28 Ariz. St. L.J. 1009 (1996).

19 John Proffatt, A Treatise on Trial By Jury, Including Questions of Law and Fact §§ 29-30 (Rothman 1986).

20 Id.

populist regime, one need only consider those chilling opinion polls done from time to time, usually near the 4th of July, in which a majority of Americans not only can't recognize the Bill of Rights but actually opine in favor of its abolition. Modern American political life seems to be dominated by a collection of disconnected special interests and by the rapacious access to the media which those special interests enjoy. Imagine if the prize in these media contests for the popular will were not just which particular yokel goes to Congress but the very nature of our republic itself.

Amar and Hirsch themselves recognize the dangers inherent in this scheme; it is barely out of their mouths before they begin watering it down. Some of their suggestions for controlling plebiscite are both unreasoned and unprincipled, such as requiring two separate votes to make sure the people really have deliberated thoughtfully, or the possibility of subjecting the vote to an executive veto. The authors don't even attempt to find the basis for such limitations anywhere in either the Constitution or in majoritarian regimes generally.

The authors do take some time to explain one limit on popular sovereignty: the Constitution itself. Certain amendments, the argument goes, would themselves interfere with popular sovereignty, such as repealing the First Amendment's guaranty of free speech. Because popular sovereignty is the overriding value of the Constitution, amendments that would limit popular sovereignty would not be valid – they would not be constitutional. The authors don't begin to examine the political and logical complexities of this proposition. They can't afford to because they need this limit desperately in order to assuage concerns that they know are growing in the reader's mind: If amendment is by plebiscite, our most cherished constitutional guarantees will no longer be guaranteed.

Not only is amendment by plebiscite a dangerous idea, it is one the authors are forced to craft from whole cloth because it was absolutely clear to our founders, and made clear by them in the text of the Constitution itself, that the Constitution should be difficult to amend precisely because fundamental principles are fundamental, and do not change with the vagaries of public opinion. Article V deals directly with the question of amending the Constitution, and clearly sets forth two alternative methods to begin the amendment process – a two-thirds vote of both Houses of Congress, or a vote by two-thirds of the state legislatures – and two alternative methods of ratifying any such proposed amendment – by three-fourths of the state legislatures or by three-fourths of state constitutional conventions.

After quoting Article V, the authors spend several paragraphs explaining why such a restrictive procedure for constitutional amendment is a bad idea. Their rendition of objections sounds like a satire prepared by a playful Federalist:

- Since constitutional amendments pursuant to Article V require a supermajority vote of government officials, the amendment fails to preserve rule by the People.

- [A] clear majority of the American people wish to amend the Constitution but cannot convince their representatives to initiate or support an amendment.

- To make matters worse, such resistance [by elected officials to amending the constitution] is not always principled.

- If the People are to govern, we cannot be ruled from the grave by those who

> passed on the Constitution.[21]

With enemies like this, Hamilton would have needed no friends.

But there is more. Not only is Article V a bad idea, but a "close reading" of it reveals to our authors, armed with their new vision of a Constitution grounded on the foundations of popular will (or, as they put it, by scholars like themselves "sensitive to the tapestry of the entire document"[22]), that Article V is not the *exclusive* method of amending the Constitution. By this I suppose they mean that Article V does not contain a phrase like "the following is the exclusive method of amending this Constitution." But short of that, there is absolutely nothing in the language of Article V, or in its placement in the "tapestry of the entire document," by which any careful and neutral reader could come to any conclusion other than that Article V sets forth the exclusive procedures for amendment. Article V even specifically lists three types of amendments that are flatly prohibited – any amendment that would deprive each state equal representation in the Senate, and any amendment before 1808 that would prohibit immigration or the importation of slaves or permit direct taxes not based on population. Why bother with such a detailed amendment mechanism if the founders intended this to be something other than the exclusive mechanism of amendment? Indeed, if Article V could itself be amended by a vote of the people, what in the world could these three proscriptions against particular kinds of amendments possibly mean?

The authors, freed not only from the restrictive bonds of our dead founders' intentions, but even from the unambiguous words those dead founders chose to use, have no trouble answering this question. Article V, they conclude, actually applies only to the way in which *governments* – Congress or state legislatures – try to amend the Constitution. Article V is, under this view, the exclusive mechanism of constitutional amendment for those governing bodies, but it poses no barrier at all to the organic right of the People to do so.

This construction is tortured, to be kind. It makes no more sense to say that Article V is limited to attempts by Congress and state legislatures to amend the Constitution than it does to say that Article I, Section 10's prohibition against states coining money is limited to state legislatures, and that states are free to coin their own money if only a simple majority of citizens in any state votes in favor of such a power.

The authors also analogize to state constitutions to support their argument for amendment by plebiscite. Several of the state constitutions that were in place in 1787 had restrictive rules for amendment similar to those in Article V. The authors argue that those state constitutional provisions which conflicted with the new federal Constitution (and which in fact would have prohibited ratification of the federal Constitution), were in effect amended out of existence when such states ratified the federal Constitution. The authors even quote Madison's famous reply to a Maryland anti-Federalist's argument that ratification of the federal Constitution would violate the Maryland constitution; Madison brushed aside the restrictions in the state constitutions as being subject to the people, who are "the fountain of all power."[23] Amar and Hirsch argue that if the people are the fountain of all state power, and can amend their state constitutions unencumbered by the

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21 For the People at 5.

22 Id.

23 2 M. Farrand, ed., The Records of the Federal Convention of 1787 at 476 (Yale 1937).

limitations set forth in those state constitutions, then the people should be able to do the same with the federal Constitution. That analogy, however, is deeply flawed.

First, the states ratified the Constitution by a majority vote of *delegates* (usually state legislators) sitting in state constitutional conventions, not by a majority vote of the *people*. A total of only 1649 delegates voted in all the state conventions, yet they purported to represent a total non-slave population of more than 3 million people.[24] That is one delegate for every 1800 people – quite a far cry from populism, let alone direct democracy. It is simply impossible to square the authors' contention that the founders intended for the "people" to be able to amend the Constitution with the fact that the founders did not even allow the "people" to vote on its ratification.

Second, the analogy to the state constitutions ignores the difference between amending an existing document which governs the relationships between the consensually governed, and revoking that consent entirely by dissolving the existing arrangement and forming a new government. It goes without saying, though the authors manage to spend 202 pages saying it, that the authority, legitimacy, and, at the very least, the naked power of any government depends, in the end, on the revocable consent of the governed. It is beside the point whether this fact of political life is constructed, as was ours, on the foundations of the Enlightenment, in which God is seen as having invested individuals with rights that the government must protect, or on the more mundane Leninist notion that the people by their sheer numbers ultimately have the power to seize the government and insist that it accede to their collective will. The point is that the governed, even in a constitutional republic, can always reject their government by revoking their general consent to be governed by it.

But revoking the general consent to be governed is like being pregnant. Either you are or you aren't. Either you consent to be governed or you don't. Either you agree to dissolve the pre-1787 arrangement you as a people have entered into as the State of Maryland, and replace that bipartite arrangement with the new tripartite federal arrangement, or you don't. Just because the people have given their consent to be governed, and just because that consent is ultimately revocable, doesn't mean it is good government or good philosophy that their consent should be revocable in dribbles.

The delegates of the various ratifying states assented to a fundamental change in the nature of their government. Madison's comment means only that the language of those state constitutions are no barrier to that fundamental reorganization. To extend that analogy nationally would require us to be talking about a situation in which the people decide to revoke their general consent to be governed by the federal government, and to instead replace that consent with another form of government – to join the United Kingdom, for example. Madison's observation simply means that in such a circumstance – where the people vote to dissolve the federal government and join the United Kingdom – the limitations of Article V would not prevent such a reformulation because the people would have rejected the Constitution in its entirety, Article V included.

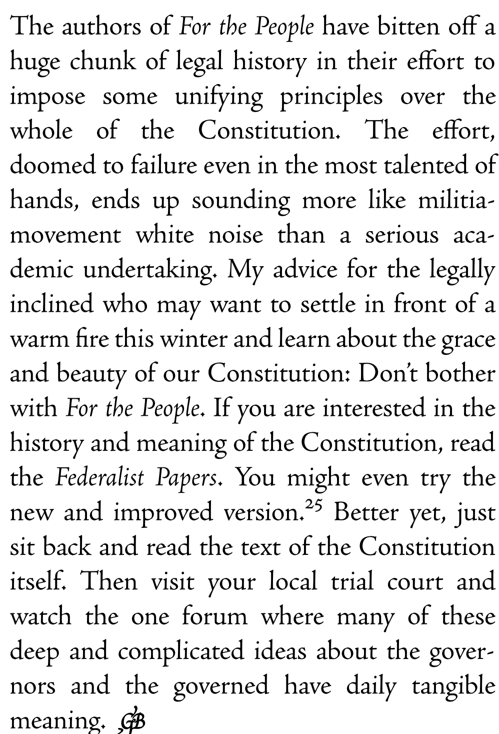
To reduce all of constitutional law into the singularity of the people's consent to be governed ignores the true genius of our founders' compromise: the government agreed to exercise limited and cleverly checked powers, but the people in exchange agreed to limit their right of direct democracy. Indeed, having any kind of "government" at all is an inherent reduction of the people's right to govern themselves directly. We have a Congress that passes

24 P. Conley & J. Kaminski, eds., THE CONSTITUTION AND THE STATES xii (Madison Home 1988).

laws, not a standing national legislative plebiscite. In fact, we even have a bicameral legislature, in which the right of the people to govern themselves even indirectly is further checked by a Senate whose members do not reflect the distribution of the national population, but rather reflect the collective interests of a particular state. We have a President who makes executive decisions regarding, among other things, our national defense and our relations with other countries; we do not submit these issues to an ongoing national vote. We have a judicial branch that decides individual cases on the evidence presented, not on television call-in polls. And, we have a Supreme Court that tells us what the Constitution means; we do not let the people, or the President or Congress for that matter, interpret the Constitution.

To suggest, as the authors do, that the consent of the governed is something that can be continuously siphoned off so that the governed have an ongoing and limitless role in the affairs of state, may be a principle of direct democracy worthy of debate at philosophical heights. Maybe that is what our government should become. Maybe that is what today's technology – in which standing national plebiscites on all manner of issues are no longer out of the question as a logistical matter – will allow. But that is decidedly not what our government is, or ever has been.

What Amar and Hirsch refuse to recognize is that the Constitution is distinctly Madisonian, in which the federal and state governments share a complex relationship, and in which the people's direct role in both levels of government is likewise divided and complex. In short, this debate about direct democracy versus representative democracy, played out as Professors Amar and Hirsch play it on the field of Article V, is a debate that was settled 200 years ago. The authors have not rediscovered a right to amend the Constitution by plebiscite, they have just re-discovered an old, and long-rejected, viewpoint.



The authors of *For the People* have bitten off a huge chunk of legal history in their effort to impose some unifying principles over the whole of the Constitution. The effort, doomed to failure even in the most talented of hands, ends up sounding more like militia-movement white noise than a serious academic undertaking. My advice for the legally inclined who may want to settle in front of a warm fire this winter and learn about the grace and beauty of our Constitution: Don't bother with *For the People*. If you are interested in the history and meaning of the Constitution, read the *Federalist Papers*. You might even try the new and improved version.[25] Better yet, just sit back and read the text of the Constitution itself. Then visit your local trial court and watch the one forum where many of these deep and complicated ideas about the governors and the governed have daily tangible meaning. GB

25 Alan Brinkley, Nelson W. Polsby, & Kathleen M. Sullivan, The New Federalist Papers: Essays in Defense of the Constitution (Twentieth Century Fund 1997). But then again, maybe not. See Lillian R. BeVier, *The New – Un*improved *– Federalist Papers*, 1 Green Bag 2d 321 (1998).