The Defects of Dualism

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In 1983, in the Storrs Lectures at Yale Law School, Bruce Ackerman outlined a new history and theory of constitutional law.¹ Since that date, he has been elaborating and deepening his argument. The fruits of his labors will be a trilogy, unabashedly entitled We the People. The first of the three volumes, subtitled Foundations, is now available.² The remaining two, Ackerman informs us, will follow shortly. Because the project is not yet complete, it would be premature to venture a comprehensive evaluation of Ackerman's argument. Enough of the theory is now apparent, however, to make a preliminary assessment of it appropriate.

As one might expect, given Ackerman's proclivities and the long gestation of the book, We the People is ambitious, elegant, even magisterial. Ackerman's command of the literatures of history, political science, and law is impressive. From the combination of those disciplines, he derives many sharp-edged insights into the ways Americans think about and use the federal Constitution. Nevertheless, his argument, in its present form, has several sub-

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² Bruce Ackerman, We the People: Foundations (Belknap, 1991). All parenthetical page numbers in the text and footnotes refer to this book.
stantial flaws. Ackerman's thesis is certain to enliven debate among American constitutional theorists. The incomplete version of his theory presented in the Storrs lectures has already provoked considerable reexamination of basic features of our political order, and *We the People* will undoubtedly spark more thought and discussion. But unless, in volumes two and three, Ackerman remedies the defects of volume one, he is not likely to achieve his principal goal: to change the ways in which American lawyers and laypersons think about and participate in their system of government.

Section I of this review summarizes the argument presented or foreshadowed in *Foundations*. Section II explores the merits and demerits of Ackerman's unorthodox account of American constitutional history. Section III assesses his vision of how we should reconstruct our constitutional practices.

I.

A "Bicentennial Myth," Ackerman contends, dominates the understanding shared by most Americans and laymen of the development of the United States Constitution. The Constitution, it is generally believed, originated in a set of highly creative but extra-legal acts. Defying their instructions and ignoring the procedures specified in the Articles of Confederation for reforming the national government, the members of the Constitutional Convention drafted a document the likes of which the world had never seen and subsequently persuaded enough of their countrymen to accept it to establish the system of government under which we continue to live. To be sure, the Constitution has been modified several times, and a few of those reforms have been substantively very important. But none of the changes has been procedurally original; all were adopted in conformity with the mechanisms specified by the Framers in Article V (pp 42-43). In short, according to the reigning view, American constitutional practice for the past two centuries has been characterized by "deep continuity" (p 34).

Unfortunately, the standard story continues, the interpretation of the Constitution by the United States Supreme Court has not been as stable as the document itself. During the first seventy-five years of our national history, the Court construed the Consti-

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3 See, for example, Sanford Levinson, *Accounting for Constitutional Change (Or, How Many Times Has the United States Constitution Been Amended?) (A) < 26; (B) 26; (C) > 26; (D) All of the Above)*, 8 Const Comm 409 (1991); Frank Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 Tenn L Rev 291 (1989).
tution wisely, establishing and elaborating such basic principles as judicial review, the notion that ultimate authority on most issues lies with the national government, and the sanctity of private property. Regrettably, during the period between the Civil War and the middle of the Great Depression, the Court departed from this sensible course and in a variety of ways began to usurp the power of the legislative branches. Fortunately, the narrative concludes, the justices “switched in time.” Spurred by Roosevelt’s threat to “pack” the Court with new appointees, the “nine old men” repudiated the deviant jurisprudence of the *Lochner* period and rediscovered the wisdom of the original Constitution (p 43).

Ackerman’s objection to this story is not that it is a “myth.” On the contrary, he regards myth-making—the formulation and repeated retelling of stories about a culture—as a valuable way in which a “people” defines itself (pp 36-37). His objection is that the story is fundamentally inaccurate and, as a consequence, prevents Americans from recognizing and appreciating what is unique and valuable about their constitutional heritage.

The reigning interpretation is right in one respect, Ackerman concedes: our constitutional history is sensibly divided into three distinct eras. But, he claims, those eras were defined, not by the Supreme Court’s fall from and subsequent return to a state of grace, but rather by radical changes in the Constitution itself. Once the blinders imposed by the traditional story are removed, it will become apparent that there have been, not one, but three “founding” moments in our history: the late 1780s, the late 1860s, and the mid 1930s (p 44).

Each of these critical periods, Ackerman argues, was initiated by a group of politicians who wished to alter the basic principles upon which our national government is based. In the first period, the Federalists took the lead; in the second, a group of Republican Congressmen (first with the assistance, later over the resistance, of President Johnson) were the instigators; in the third, President Roosevelt, aided by a group of Democratic Congressmen, initiated the process. In none of these periods did the advocates of constitutional reform abide by the procedures set forth in Article V for modifying their system of government. Instead, the instigators devised novel ways of taking their case to the people.

Supplementing this revisionist view of the history of the Constitution is an equally original account of the history of the Supreme Court’s interpretation of the document. Since the establishment of the Court, Ackerman insists, it has been diligently working to “preserve” the achievements of the three founding moments
against the fluctuations in the sentiments of voters and politicians during the intervening periods. During the first third of our constitutional history (what Ackerman describes as the “Early Republican”), this preservationist function was relatively straightforward; the job of the Court was to protect the original Federalist vision against shifts in popular opinion and presidential and congressional inclinations, especially those associated with the regimes of Presidents Jefferson and Jackson.

During the second era (the “Middle Republic”), the task became more complex; now the Court was obliged somehow to reconcile the original Constitution with the Reconstruction Amendments. The solution the justices (wisely) selected was neither to treat the new amendments as creating an entirely new Constitution, nor to treat them as minor additions to the document, but rather to identify, through a process of case-by-case adjudication, a constitutional vision that would incorporate the best elements of the visions of both the original document and the amendments.

Since the late 1930s, the job of constitutional interpretation has become even more difficult, but the Court has gamely assumed the burden of integrating the fruits of these three separate creative moments. As was true during the middle period, the justices began cautiously, limiting themselves initially to “particularistic” reconciliations of old and new constitutional principles. Examples of this tentative approach, Ackerman contends, are the Court’s decisions in *Carolene Products* and *Brown*. But particularism gradually gave way to increasingly confident and comprehensive syntheses, exemplified by the Court’s decisions in *Griswold* and its progeny.

The central conclusion of this portion of Ackerman’s argument is that, throughout our history, the Supreme Court has been conscientiously “interpreting” the Constitution, as defined by “We the People” during three transformative moments. In other words, the Court has been doing the job originally marked out for it by Alexander Hamilton: ensuring that the temporary agents of the people (their elected representatives) do not exceed the powers vested in them. The commonly held view that the Supreme Court has exercised considerable discretion in construing the document—that

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4 *United States v Carolene Products*, 304 US 144 (1938).
"the Constitution is what the judges say it is" and that what the judges have said has often had little to do with the will of the people—Ackerman insists is simply mistaken.

One of Ackerman's purposes in deploying this alternative account of American constitutional history is simply to set the record straight. But his principal motivation, it appears, is more presentist: he means to use this revisionist narrative as a platform from which to launch a novel constitutional theory, a new conception of what American politics could be and should be like.

The genius of the American system of government, he contends, is that it enables and encourages most of the people most of the time to live primarily private lives without fear that their elected representatives will alter the structure of their society or polity, but that it also contains procedures that enable and encourage the People on rare occasions to redefine themselves and their world. Distancing himself sharply from contemporary Republican theorists, Ackerman argues that it is appropriate that the large majority of Americans during the bulk of their lifetimes are not fully engaged in politics but concern themselves primarily with their work, their families, their friends, and their religions. Usually during ordinary times—periods of what Ackerman refers to as "normal politics"—most people are not and should not be "constantly debating the future of America with one another" (p 306).

This is not to say that Americans have no interest or involvement in politics; Ackerman devotes many pages to the contention that most of us are not what he describes as "perfect privatists"—people who treat the question, "What is good for the country?" as equivalent to, "What is good for me?" (pp 232-43). Nevertheless, our participation in politics falls well short of full-time, passionate engagement. More precisely, Ackerman contends, most Americans fall into one of two categories: they are either "private citizens" (poorly informed, often politically passive but nevertheless aware of their political responsibilities and moderately altruistic in exercising them); or they are "private citizens" (more politically knowledgeable and "energetic," willing to make money contributions to political campaigns, sign petitions, participate in marches, but not totally committed to public life) (p 243).

* Remark made by Chief Justice Hughes while governor of New York, quoted in Merlo J. Pusey, 1 Charles Evans Hughes 204 (Macmillan, 1951).

* For a summary of the arguments of the republican theorists, see text accompanying notes 13-14.
This state of affairs, though inevitable and (most of the time) desirable, is dangerous. Well-heeled “private interest groups,” fanatical “public interest groups,” and ambitious politicians have the incentive and means to work radical changes in the social and political order. It is therefore crucial that, during periods of “normal politics,” someone keep an eye on our elected leaders in Washington and make sure that they do not take advantage of our apathy and inattentiveness to change the rules of the game. That job is and should be performed by the Supreme Court.

But a polity in which all politics were “normal” would be unsatisfactory and unstable. The possibility of periodic political renewal must be preserved. How? By assuring advocates of reform that, if they comply with a carefully designed procedure for securing the consent of the body of the People, they can change the terms of social and political relations. The procedure must be rigorous enough to ensure that the political order is not modified cavalierly, but it must not be so demanding that it prevents peaceful revolution.

More specifically, Ackerman contends that the polity should require would-be constitutional reformers to do four and only four things. First, they must alert the public at large to their intentions and achieve a sufficiently high level of initial popular support to justify demanding that skeptics lift their eyes from their private affairs and take their agenda seriously. This “signaling” requirement would be met, Ackerman suggests, only if twenty percent of the population lend the reformers’ plan their “deep” support (meaning that they agree with the plan after having given the issue as much attention as they would an important decision in their own lives) and an additional thirty-one percent support the plan after having given it serious thought but not enough to satisfy their own standards of “deliberative seriousness” (pp 273-74).

Second, the reformers must be induced to refine their plan into a coherent “proposal” for constitutional change—an initiative sufficiently precise to focus the ensuing public debate (pp 270, 280-85). Third, during a prolonged period of “mobilized popular deliberation,” the reformers must engage in serious conversations with their fellow citizens and fairly earn the “deep” support of a major-

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10 It should also be required, Ackerman contends, that the reformers’ plan be a “Condorcet-winner”—i.e., that it be capable of defeating all plausible alternatives when matched with them one-on-one (p 277).
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Fourth and finally, the proposal must be “codified” through formal or informal amendment of the Constitution itself (pp 267, 288-90). At that point, the People may retire to their more-or-less private affairs, leaving the Supreme Court to guard the fruits of their labor.

Ackerman contends that Americans, without being altogether sure what they were doing, have developed two alternative procedures for modifying their constitutional system that track reasonably closely this ideal, four-step process. The “classical” system prescribed in Article V employs a combination of congressional supermajorities and state ratification to do the job. The less well known but historically more important option is what Ackerman describes as “the modern system.” The latter approach works roughly as follows: the “signaling” function is performed by a President who claims a popular mandate for fundamental political reform; the development of a “proposal” is achieved by Congress when, following the President’s lead, it adopts a raft of transformative statutes; the period of “popular deliberation” is initiated by the Supreme Court’s declaration that the transformative statutes are unconstitutional and is completed when the supporters of change prevail in a subsequent, highly charged popular election; and “codification” of the new constitutional vision is achieved when the Supreme Court, instead of waiting for a formal constitutional amendment, simply modifies its interpretation of the Constitution to incorporate the expressed will of the People (p 268).

To summarize, the American system of government, Ackerman contends, is best described as a “dualist democracy.” “Ordinary lawmaking” is effected by political leaders (selected by a partially engaged citizenry) who are prevented by the United States Supreme Court from altering the fundamental terms of social life. On rare but important occasions, those terms are altered through a formal or informal process of “higher lawmaking,” in which a fully aroused citizenry, after an appropriate period of serious debate, issues new instructions to their elected representatives and the members of the Supreme Court.

Over the last two hundred years, Ackerman believes, this system has worked remarkably well. Not perfectly, to be sure. Many groups have been excluded from political life, and much injustice

Oddly, Ackerman is less precise concerning how many citizens must, after serious reflection and debate, give the proposal their support than he is concerning the numbers of citizens who must support a plan to initiate the process. But the logic of his argument seems to point toward the number stated in the text.
has been done under its auspices. But—partly because of the availability of the two higher-lawmaking procedures—one after another the excluded groups have been welcomed into the fold and the level of injustice has diminished. On balance, he contends, the dualist system merits our "respectful and conscientious support." At a minimum, we should seek to better our common life by building upon "dualist democracy" rather than by repudiating it (pp 296, 314-16).

II.

Much of Ackerman's iconoclastic account of our constitutional history is shrewd and helpful. The irregularities of the processes that led to the adoption of the Reconstruction Amendments have long been recognized by historians but are less familiar to lawyers, and Ackerman is right that acknowledgment of these irregularities would compel a modification of the stories lawyers tell each other about the constitutional past. Similarly useful is his analysis of the late 1930s as a constitutional watershed, not merely a repudiation by the Supreme Court of some regrettable errors in judgment.

The most important of Ackerman's contributions to our understanding of our past is his largely successful effort to "synthesize" the "republican" and "liberal" schools of constitutional and political history. During much of the 1980s, two groups of historians and constitutional theorists argued fiercely over the content of the ideology that inspired the American Revolution and subsequently shaped American politics. Inspired by the pathbreaking work of Bernard Bailyn and J.G.A. Pocock, the first group contended that, at least since the mid-eighteenth century, our political culture has been structured by the language and belief-system of civic humanism. Originating in the writings of Aristotle, Machiavelli, and Harrington, and subsequently refined by a group of dissident English politicians known as the Commonwealthmen, that outlook revolved around the notions that a good life is a virtuous life, that virtue consists partly of a willingness to subordinate one's private desires to the common weal, and that only through active citizenship in a republic does a person fully realize his self. These beliefs, the story continued, inspired the British North

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American colonists in the 1770s to break free from England, helped shape the Constitution they adopted a decade later, and continued to inform American politics for a substantial period thereafter. The implication for contemporary constitutional law: partly because the Constitution was grounded to a large extent in this republican vision, partly because during much of our life as a nation we have continued to adhere to it, and partly because the vision is a just and attractive one, the Supreme Court should seek to cultivate and implement republican ideals when construing particular constitutional provisions.

Members of the other camp claimed that the ideology that inspired the Revolution and subsequently shaped our political culture was not republicanism but rather a variant of classical liberalism. The Patriots and the members of the Constitutional Convention were moved, not by Harrington and the Commonwealthmen, but by John Locke and Adam Smith. Individuals, the colonists believed, had natural rights to liberty and property, and the principal obligation of government was to respect those rights. Private life, the exercise and protection of individual liberties, and limits on government have been Americans' principal concerns, not citizenship and the pursuit of the common good. In short, this second group of historians and theorists argued, it was a liberal vision, the byproduct of the rise of the European bourgeoisie, that moved the founders of our nation and shaped the platforms and actions of virtually all subsequent political parties.

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The implication: reforms of constitutional law of the sort advocated by the first group could not be justified on historical grounds.

Ackerman responds to this debate the same way he responds to most controversies—by insisting that both sides are partly wrong and partly right. During much of our history, he insists, most Americans have been largely aloof from politics, concerning themselves primarily with the cultivation of their private lives and the defense of their individual liberties. But commitment to the notion that the public good means something more than the sum of individual or group interests has remained widespread, and during some periods, the levels of popular interest and involvement in public affairs have risen substantially. As will be seen, this account has problems of its own, but as a rough generalization, it is truer to the historical record than either the liberal or the republican interpretations.

Unfortunately, not all aspects of Ackerman's rendering of our past are equally convincing. Four of his historical claims are both unsubstantiated and of sufficient importance to merit reconsideration when he writes volumes two and three of *We the People*.

The first concerns the historical pedigree for Ackerman's dualist theory. Constitutional scholars often get in trouble claiming that the Framers saw things just the way they themselves do, and Ackerman is no exception. Much of chapter seven of *Foundations* is devoted to the contention that, unlike most subsequent American legal and political theorists, the authors of *The Federalist Papers*—and James Madison in particular—understood the merits of "dualist democracy." Publius recognized, Ackerman claims, that while "permanent revolution" was undesirable, the "new constitutional machine could not operate indefinitely without further exercises in mobilized deliberation by the people at large" (pp 171, 165). Moreover, Publius believed that invocation of the mechanism

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16 For other examples of Ackerman's penchant for seeking syntheses of contending schools, see pp 19, 321-22.

prescribed by Article V of the Constitution was not the only way in which the people could and should occasionally restructure their system of government; "informal" and "irregular" procedures should also be available (pp 174, 195). This view of the historical record prompts Ackerman during the remainder of the book to characterize his theory as "Neo-Federalist."

To make this case Ackerman is obliged to read a few passages in The Federalist very aggressively and to ignore several well-known features of James Madison's theory of government. "Mobilized deliberation by the public at large" frightened, not attracted, Madison. He argued in several contexts, that the American system of government should be organized to minimize the circumstances in which the people as a whole are consulted on matters of importance. Reformation of the Constitution itself struck him as especially dangerous. Instead of encouraging and facilitating such popular initiatives, he sought to instill in the populace an irrational, unreflective attachment to the document in its original form. So, for example, he opposed Jefferson's proposal for periodically consulting the people at large concerning the proper form or interpretation of the Constitution, arguing that such a system would "deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability."

His (belated) justification for a Bill of Rights derived from a similar understanding of the benefits of popular attachment to a constitutional regime; incorporation in the Constitution of a list of protected liberties was a good idea, he contended, not because it would empower the judiciary to strike down statutes that abridged them, but because "political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion."

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18 Jack Rakove makes this observation in a review of We the People forthcoming in the Journal of American History.


20 Letter from James Madison to Thomas Jefferson (Oct 17, 1788), in 5 Writings at 269, 273 (cited in note 19). See also Speech by James Madison in the House of Representatives (Jun 8, 1789), in id at 370, 382.
short, it requires considerable strain to depict Madison as a devo-
tee of "dualist democracy." Ackerman would be better advised to
abandon the claim that his argument can be derived from the
Federalists. 21

The second of the defects in the historical portion of *Founda-
tions* concerns the origin of the notion that a President, when
nominating Supreme Court justices, may and should select persons
who will implement the President's vision of what the Constitution
should contain. Because (for reasons explored more fully below22)
Ackerman believes this practice is pernicious, he wishes to depict it
as a recent innovation. To that end, he argues at various points
that Franklin Delano Roosevelt is to blame for developing the

The argument is wholly unpersuasive. Many Presidents before
Roosevelt sought to use their appointment power to influence the
Supreme Court's decisionmaking. Although in some cases the ap-
pointees surprised and disappointed the Presidents who sponsored
them, more often they behaved much as expected. 23 The most fa-
mous and important exercise of this power was the nomination of
Chief Justice Marshall by John Adams. The standard story is that
Adams, having been decisively defeated in the election of 1800,
sought through his appointment of Marshall to use the Supreme
Court to implement the Federalist agenda—the central features of
which were economic nationalism, the protection of property and

21 Instead of abandoning his effort to draw inspiration and support from the Federal-
ists, Ackerman might prefer to alter the way in which he seeks to garner their support. In
*Foundations*, Ackerman makes the ambitious claim that the "Founders"—including
Madison—"recognized" the merits of dualist democracy. Like most contemporary "contex-
tualist" intellectual historians (see, for example, Quentin Skinner, *Meaning and Under-
standing in the History of Ideas*, 8 Hist & Theory 3 (1969)), Ackerman describes his project
as "learn[ing] to see the Founders as they saw themselves" (p 165)—extracting from their
writings an understanding of what they themselves meant to say. A rereading of "the
sources" in this spirit, he contends, will reveal that the Federalists substantially anticipated
his own argument. For the reasons indicated in the text, the contention is not convincing.
But Ackerman might preserve a portion of his argument if he changed the way he under-
stands and describes his project. If, instead of trying to recover the intentions of Madison
and his colleagues, he aspired to "interpret" or "construe" their writings in the fashion that
best cohered with the subsequent interpretation and amendment of the Constitution and
with a just and attractive vision of our political practices, his argument would not be so
manifestly untenable. See also Richard Fallon, *A Constructivist Coherence Theory of Con-
stitutional Interpretation*, 100 Harv L Rev 1189 (1987) (developing and defending a similar
approach). Such a shift in orientation would require more than minor adjustments in Acker-
man's argument, but might be more satisfactory in the long run.

22 See text accompanying notes 55-57.

23 See Laurence H. Tribe, *God Save This Honorable Court: How the Choice of Su-
preme Court Justices Shapes Our History* (Mentor, 1985).
contract rights, and the supremacy of federal judicial power.\textsuperscript{24} Marshall's determination, political acumen,\textsuperscript{25} interpretative "creativity,"\textsuperscript{26} and longevity enabled him to implement the bulk of the Federalist program.

In nominating Roger Taney to take Marshall's place, Andrew Jackson similarly was seeking to influence the Court's construction of the Constitution. Although Taney was not as aggressive or effective in implementing the Democratic agenda as Jackson had hoped, the Court under his leadership was substantially less protective of "vested rights" and more solicitous of state power.\textsuperscript{27} In short, the use of "transformative judicial appointments . . . to transform the Constitution" (p 55) is no modern innovation. Ackerman should candidly state that he wishes Presidents to renounce (or be deprived of) a power that Presidents have been exercising for two centuries.

The third of the four defects in the historical argument is more central to Ackerman's project and thus, unfortunately, less easily remedied. A good deal of Ackerman's theory revolves around his characterization of the Supreme Court's constitutional role as "preservationist." Originality, he insists, is not a virtue in constitutional adjudication. The job of the Court is to ensure that the achievements of "We the People" are not eroded by the actions of their representatives during periods of normal politics. To be sure, that is not an easy or mechanical job. "Synthesizing" the principles adopted in two or more "founding moments" and then determining which modern statutes run afoul of the synthesized vision re-


\textsuperscript{25} As evidenced, for example, in Marbury \textit{v} Madison, 5 US (1 Cranch) 137 (1803), where (as every law student knows) he contrived to confirm the principle of judicial review in a decision invulnerable to presidential or congressional attack because the case limited the jurisdiction of the Supreme Court.

\textsuperscript{26} The most important example of Marshall's willingness to adopt highly strained readings of constitutional provisions when he deemed it necessary to institute the Federalist vision is his interpretation of the Contracts Clause. See G. Edward White, History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815-35 600-73 (Macmillan, 1988)(documenting the divergence of the decisions in Fletcher \textit{v} Peck and Dartmouth College \textit{v} Woodward from what Marshall must have known was the intent of the drafters of the clause).

\textsuperscript{27} For balanced treatments of the extent to which Taney did and did not alter the course of constitutional law, see David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888 209-22 (Chicago, 1985); Carl B. Swisher, History of the Supreme Court of the United States: The Taney Period, 1836-64 71-98, 128-54 (Macmillan, 1974).
quires wisdom, even brilliance. But the difficulty of the task does not empower the justices to invent new constitutional principles, or to move the country in directions not authorized by the People as a whole after an appropriate period of serious debate. Throughout our history, Ackerman contends, the justices of the Supreme Court have understood their "preservationist" responsibility and, for the most part, have done their job faithfully.

The weakness of the historical component of this argument is perhaps best exposed through an analysis of two important decisions Ackerman uses to substantiate his theory: \textit{Scott v Sanford},\footnote{60 US (19 Howard) 393 (1856).} and \textit{Lochner v New York}.
\footnote{198 US 45 (1905).} In both cases, he insists, the Court was doing its preservationist job.

Ackerman's analysis of neither case is convincing. His depiction of \textit{Scott} as a "preservationist" decision is especially implausible. Taney's meandering opinion for the Court\footnote{With respect to \textit{Scott}, Ackerman does not expect that this contention will be controversial. Although virtually every American now regards the outcome of the case as despicable "[f]rom a moral point of view," "mature" modern judges, Ackerman contends, recognize that Taney had a "legally plausible case" for his decision (pp 63-64, 79). With respect to \textit{Lochner}, however, Ackerman expects resistance. His aspiration is to persuade skeptical readers that "[l]ike the courts of the early republic, the \textit{Lochner} Court was exercising a preservationist function, trying to develop a comprehensive synthesis of the meaning of the Founding and Reconstruction out of the available legal materials" (p 101).} contains three constitutional pronouncements. First, because at the time the federal Constitution was drafted and ratified no Negroes were citizens of the separate states and because the power of naturalization is enjoyed exclusively by Congress, no Negro can be a "citizen" within the meaning of the "diversity of citizenship" clauses of Article III and of the Judiciary Act of 1789.\footnote{Whether Taney was entitled to describe his opinion as "the opinion of the court" has long been disputed. See, for example, John S. Vishneski, \textit{III, What the Court Decided in Dred Scott v. Sanford}, 32 Am J Leg Hist 373 (1988). Ackerman is justified in bypassing the issue.} Second, the authority of Congress under Article IV, Section 3 to "make all needful rules and regulations respecting the territory or other property belonging to the United States" does not extend to territories acquired by the United States after 1789.\footnote{\textit{Scott}, 60 US (19 Howard) at 405-27.} Third, the provision of the Missouri Compromise excluding the institution of chattel slavery from a substantial portion of the federal territories deprived slaveowners...
of their property (in their slaves) and therefore violated the Due
Process Clause of the Fifth Amendment. 34

As the dissenting justices observed at the time, and as several
subsequent students of Scott have confirmed, none of these rulings
can be justified on the basis of the intent of the drafters of the
Constitution. Of the many weakness of the first ruling, the most
glaring is the fact that, in 1787, "all free-born inhabitants," includ-
ing free Negroes, who resided in New Hampshire, Massachusetts,
New York, New Jersey, and North Carolina were citizens of those
states. 35 Taney's parsimonious view of Congress's power over the
territories was also highly implausible. He offered no evidence that
any of the Framers shared his interpretation of Article IV, Section
3, and what evidence exists of the contemporary understanding of
the clause is flatly inconsistent with his reading. 36 As for the third
ruling, Taney's use of the Due Process Clause to impose substan-
tive restraints on federal legislative power was not only unprece-
dented, 37 but conflicted with the Framers' understanding of the

34 Taney never stated in so many words that the Missouri Compromise violated the
Due Process Clause. But that such was his intention has traditionally (and correctly) been
inferred from the combination of his insistence that the Constitution placed property in
slaves on a par with property of other sorts, Scott, 60 US (19 Howard) at 451, and his
declaration that, "an act of Congress which deprives a citizen of the United States of his
liberty or property, merely because he came himself or brought his property into a particu-
lar Territory of the United States, and who had committed no offense against the laws,
could hardly be dignified with the name of due process of law." Id at 450. See Edward
Corwin, The Dred Scott Decision, in the Light of Contemporary Legal Doctrines, 17 Am
Hist Rev 52, 61-63 (1911); David Potter, The Impending Crisis, 1848-1861 277 (Harper &
Row, 1976).

35 See Scott, 60 US (19 Howard) at 572-75 (Curtis dissenting); Currie, The First Hun-
dred Years at 266 (cited in note 27).

36 See Potter, The Impending Crisis at 277 (cited in note 34); Currie, The First Hun-
dred Years at 268-69 (cited in note 27). As Don Fehrenbacher has shown, Madison and the
other members of the Convention not only "expected Congress to continue exercising the
same kind of power in the western territory" that had produced the Land Ordinance of 1785
and the Northwest Ordinance of 1787, but they assumed that Congress's legislative power
included the authority to forbid slavery. Don E. Fehrenbacher, The Dred Scott Case: Its
Significance in American Law and Politics 367-70 (Oxford, 1978). In addition, as Justice
McLean observed at the time, Taney's construction of the provision differed sharply from
the interpretation it had been given by Chief Justice Marshall in American Insurance Com-
pany v Canter, 26 US (1 Peters) 511, 542-43, 546 (1828). Scott, 60 US (19 Howard) at 540-
43.

37 In the only case in which the Court previously had invoked the clause, Justice Curtis
assumed that it only imposed limits on the kinds of procedures Congress could institute.
See Murray's Lessee v Hoboken Land and Improvement Co., 59 US (18 Howard) 272, 276
(1855).
import of the provision. In short, Taney’s opinion cannot plausibly be explained or justified as an attempt to “preserve” against faithless legislators the principles agreed upon by “We the People” in the 1780s. Rather, “Taney constructed his own peculiar version of American history to serve his judicial purpose.”

The decision of the Court in *Lochner* was equally creative. The holding of the case was that bakers and their employers enjoyed constitutionally protected rights to enter into contracts pursuant to which the former would work more than sixty hours a week. Justice Peckham in his majority opinion founded the ruling on the provision of the Fourteenth Amendment forbidding states to “deprive any person of life, liberty, or property, without due process of law.” Ackerman does not argue that either the draftsmen of the Fourteenth Amendment or the energized People of the 1860s anticipated or would have wished such a result. Rather, his depiction of the case as “preservationist” rests on the assertion that the Supreme Court correctly saw in the Reconstruction Amendments a more general understanding that henceforth certain fundamental individual rights would be guaranteed by the federal government and that “freedom of contract and the right to own private property” were the most important of those rights (p 100).

The argument is strained. The central concern of the Americans who sponsored, drafted and (directly or indirectly) voted for the Reconstruction Amendments was cementing the victory of the North in the Civil War by guaranteeing (more or less) equal rights to the newly freed slaves and limiting the ability of state governments subsequently to interfere with those rights. It is true that among the rights they meant to provide the freedmen was the liberty to “contract for their labor and own the fruits of their productive work as private property” (id). But in treating the latter as the essence of the amendments, using it aggressively to limit the power of legislatures to respond to the accumulating ills of postbellum capitalism, while construing extremely narrowly the protections the amendments accorded blacks’ rights to equal treatment, the

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28 Its proponents thought the clause imposed only procedural limitations upon governmental power (and probably only upon exercises of executive power). See Edward Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv L Rev 366 (1911).

29 Fehrenbacher, *The Dred Scott Case* at 370 (cited in note 36).

30 *Lochner*, 198 US at 53 (quoting the Fourteenth Amendment).

31 See, for example, *Civil Rights Cases*, 109 US 3 (1883).
Court departed substantially from coherent readings of the will of the People as expressed in the 1780s and 1860s.

At a minimum, Ackerman must recognize that, during what he describes as the "Middle Republic," a majority of the Supreme Court justices chose to implement, not the only plausible synthesis of the first and second "foundings," but one among many possible syntheses. What explains the justices' choice? For many years it was thought that they simply sympathized with capitalists and wished to assist them in their struggles with workers, farmers, and Populist legislators. More recently, legal historians have offered a variety of more complex explanations: the justices, like most American intellectual and legal leaders around the turn of the century, were hostile to "class legislation" (i.e., efforts to use the power of government to benefit one social group at the expense of others) and sincerely believed that much Progressive regulatory legislation fell into that category; the justices were steeped in and sought to enforce through the doctrine of substantive due process the tenets of classical political economy; the arguments the justices found plausible were partially determined by the "style of legal reasoning" that dominated the American legal profession from the Civil War to the 1930s. Debate over which, if any, of these stories best accounts for the Lochner era will undoubtedly continue for the foreseeable future. On one point, however, virtually all students of the subject are in agreement: the justices were inspired by something other than (or at least in addition to) a desire to "preserve" the accomplishments of the Reconstruction generation.

More is at stake here than the correct reading of a few cases. At issue is the role that the Supreme Court has played in American politics. Ackerman's contention is that the Court has largely confined itself, when construing the Constitution, to explicating and enforcing the principles formally or informally adopted by the

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42 See, for example, Max Lerner, The Supreme Court and American Capitalism, 42 Yale L J 668, 672 (1933); Robert McCloskey, The American Supreme Court 105 (Chicago, 1960); William Swindler, Court and Constitution in the Twentieth Century: The Old Legality, 1889-1932 18-38 (Bobbs-Merrill, 1969).
45 See Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940, 3 Res in L & Sociol 3 (1980).
People during the three episodes of legitimate and successful "higher lawmaking." The claim is not compelling.

The fourth flaw in Ackerman's historical account is the most elusive, the most difficult to document, but arguably the most worrisome. It has to do with the imagery and tone of the book. Consensus, harmony, nationalism—these are the dominant themes. A reader who knew nothing of American history would finish Foundations with the impression that most Americans are more or less alike. Not exactly alike, to be sure; Ackerman recognizes—indeed celebrates—the variety of our interests and pursuits (pp 306-12). But the large majority of us, he suggests, organize our lives similarly. As "private citizens," our central concerns most of the time are our private affairs—our work, family, friends, and religion. But we also care and think about national politics, and periodically participate in it on reasonably altruistic terms. Partially because of the similar structures of our lives, we think of ourselves as a single people—as Americans. And one of the virtues of the "founding moments" that seem to have occurred every seventy years during our national history is that they have enabled us to redefine and reaffirm our common purposes, our national identity.

During the 1950s, many American historians adopted and popularized a similar view of our past. Louis Hartz, Daniel Boorstin, and many less prominent writers emphasized the common features of Americans' outlooks and lifestyles—the unifying principles or beliefs that created a distinctive American people. In the eyes of some, this feature of our national history was regrettable. Its expression in our domestic politics was a "colossal liberal absolutism"; in international politics, it inspired periodic efforts to remake other cultures in our own image. Most of the purveyors of this thesis, however, were pleased by the lack of fundamental dif-

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46 Ackerman does not suggest, of course, that all Americans have agreed during these reformative periods on how the nation should be defined. But he argues that one of the virtues of the mechanisms we have developed for reconstituting ourselves is that they have minimized violence and bitterness and fostered instead serious conversations among informed citizens—conversations that have convinced even the losers in the struggles that the winners legitimately spoke for the People as a whole (p 302).


ferences among Americans. They saw it as a sign of good sense, even "genius."

Since 1960, this view of our past has been largely discredited. Social historians have identified the distinctive features of the many cultures that together have formed the United States. Political and intellectual historians have explicated the dramatically different ideologies or "persuasions" that have helped organize the lives of different groups. The impression left by the bulk of recent work is that the conditions and ideas that divide Americans are at least as important as the conditions and ideas that unify them. Class, race, ethnicity, gender, region, religion—these have pulled us apart. The central lesson of thirty years of historiogra-

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52 One example of the kind of cultural division Ackerman ignores: He apparently assumes that all Americans for whom religion is important regard their spiritual lives as "private" and consequently as altogether separate from their political activities. Religion is something to be shielded from the contamination of politics. But, over the course of our history, many people have thought the opposite—that religion and politics were properly intertwined, that politics was an extension of religion or could be purified by it. See, for example, Lewis Perry, Radical Abolitionism: Anarchy and the Government of God in Antislavery Thought (Cornell, 1973); Laurence Tribe, American Constitutional Law 1201-04 (Foundation, 2d ed 1988) (arguing that the state ought not be permitted to exclude such persons from public office).
phy is that, for better or worse, the centrifugal forces in American culture have been and continue to be as strong as the centripetal.

Ackerman would have us recover the comforting impression of our past that was popular in the 1950s. The first volume of his treatise contains little in the way of evidence that would justify such a radical shift in orientation. If he wishes to make his argument stick, he must supply a good deal more in the remaining two volumes.

III.

Several aspects of Ackerman's vision of our future are attractive and, if taken seriously, could improve American constitutional theory and political practice. His generous depiction of the possibilities and value of engagement in public life is appealing and offers a valuable corrective to the privatism of the increasingly popular "public choice" theory. On the other hand, its recognition that the periods in which the majority of Americans are fully and passionately engaged in politics are bound to be limited, is more realistic than the aspirations of recent champions of republicanism. Finally, his insistence upon the importance of national politics is a useful antidote for the tribalism of much of contemporary communitarian theory. In short, We the People should be—and undoubtedly will be—read by all serious students of American politics and constitutional law.

In its present form, however, Ackerman's vision has several serious weaknesses. Some are related to his account of our past. For example, the faintly xenophobic tone of his lament of the "Europeanization of [American] constitutional theory" (pp 3-4) and plea for a "deepening sense of (our) historical identity" (p 5) now seems a regrettable outgrowth of the celebration of American exceptionalism and exaggeration of our cultural consensus that mars the historical portion of Foundations. And his contention that the Supreme Court can and should confine itself, when construing the Constitution, to implementing the will of the People (unless and until they change their minds) seems especially implausible in light

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of the frequency with which during the past two centuries the Court has departed from such a role.

Other weaknesses in the argument seem largely unrelated to Ackerman's rendition of American history. An especially glaring problem concerns the application of the model of "dualist democracy" to the so-called "Reagan revolution." One of the best aspects of the American system of government, Ackerman contends, is that it enables determined constitutional reformers—if they can first gain the attention and then earn the "deep," informed support of a majority of their fellow citizens—to alter their system of government. The most original component of Ackerman's theory is his contention that such reformers are not and should not be forced to conform to the procedures for change specified in Article V; as long as they can fairly claim to speak for the People as a whole, their innovations should be deemed legitimate.

Measured by these standards, the constitutional reforms that were advocated by Presidents Reagan and Bush and that have begun to be implemented by the Supreme Court would seem to deserve our respect. In their campaigns, those two Presidents articulated an unusually clear vision of a just system of government. They advocated: a shift in power from the federal to the state governments; a shift in power from Congress to the President; reduced regulation of industry and commerce; reduced welfare benefits; less aggressive efforts to achieve substantive equality between historically privileged and historically disadvantaged groups; stronger governmental support for a particular variant of Christian morality; reduced constitutional protection for rights of sexual autonomy; and stronger constitutional protection for rights associated with private property. They explicitly promised to nominate for appointment to the Supreme Court persons who would seek to implement this vision. In the subsequent, ideologically charged general elections, they won by large margins. Finally, they have made good on their promises to press for the appointment of Supreme Court justices whose political ideologies fit their program. If we are persuaded by Ackerman's argument, should we not applaud the directions in which the newly appointed justices are moving constitutional law?


In the combined elections of 1980, 1984, and 1988, Reagan and then Bush won popular majorities in 33 of the 50 states.
For two reasons, Ackerman contends, the answer is no. First, he argues that Reagan simply “failed to convince a decisive majority of Americans to support” his program; “rather than gaining the consent of the Senate to a series of transformative Supreme Court appointments, the President saw his constitutional ambitions rejected in the battle precipitated by his nomination of Robert Bork” (p 51). Second, Ackerman contends that it is inappropriate—inconsistent with the model of “higher lawmaking”—to try to achieve constitutional change through “transformative judicial appointments.” Why? Because such a strategy reflects “unacceptable elitism” and gives the President “far too weighty a role” in the process of constitutional reform, and because “the debate over the constitutional principles involved in the confirmation of a particular Supreme Court nominee is, almost inevitably, poorly focused” (pp 52-54).

Neither argument is convincing. The first is simply out of date. Reagan’s inability to secure the confirmation of Robert Bork was more than offset by his success in the cases of Justices Scalia and Kennedy. Bush’s appointments of Justices Souter and Thomas have solidified a phalanx of justices that now constitutes a comfortable majority of the Court. None of the four appointees was as outspoken or (perhaps) as extreme in his views as Robert Bork, but all were known or assumed to share many of the attitudes and aspirations of their Presidential sponsors. In short, the constitutional ambitions of Reagan and Bush may have been hindered by the Senate and the Citizenry, but certainly have not been thwarted.

Ackerman’s second argument is no stronger. A discussion of the merits of a particular Supreme Court nominee may not be the ideal setting in which to debate constitutional principles, but it is not a bad forum either. And in fact, much of the argument in the Senate, the media, and the public arena concerning the qualifications of the candidates proposed by Reagan and Bush concerned their known or predictable constitutional philosophies. Popular debate over constitutional principles certainly was no more “focused” during the 1936 Presidential campaign—w—which Ackerman con-

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58 Ackerman is correct that the Supreme Court’s invalidation of some of the major statutes adopted during FDR’s first term played a role in the 1936 campaign. Roosevelt’s disagreement with the Court was well known, and the Democratic platform contained a plank calling for a “clarifying amendment” that would protect regulatory legislation from constitutional challenge. But in his speeches, Roosevelt rarely mentioned the Court or constitutional law. Instead, he sought to focus the campaign on: (i) the success of the New Deal in putting Americans back to work and restoring some measure of prosperity; (ii) the importance of
Defects of Dualism

tends provided a true mandate for FDR’s constitutional agenda—than during the Scalia, Bork, Kennedy, Souter, and Thomas hearings.\textsuperscript{57}

The comparison to the New Deal era also casts considerable doubt on Ackerman’s contentions that the Reagan-Bush strategy accords too much power to the President and is unduly elitist. In any event, if Ackerman’s real worry were excessive presidential power, one would have expected him to join the growing group of scholars who contend that the Senate should take more seriously its responsibility to provide Presidents “advice and consent” concerning their nominees.\textsuperscript{58}

One is left with the strong impression that Ackerman’s resistance to recognizing as legitimate the constitutional (mini)revolution of the 1980s has little to do with his theory of “dualist democracy” and much to do with his substantive vision of a just society.\textsuperscript{59} If that diagnosis is correct, Ackerman would do more to advance constitutional theory by making his substantive objections explicit than by twisting his theory of constitutional procedures to try to depict the Reagan-Bush strategy as improper.

Finally, Ackerman has not yet delivered on the promise implicit in the title of volume 1: to identify the “foundations” of his theory of “dualist democracy.” For the reasons sketched in the preceding section, his claim that his theory can be derived from the Federalists is unpersuasive.\textsuperscript{60} To be sure, Ackerman does offer us many other reasons why we should accept his vision of our political system: it affords us opportunities for periodic collective redefinition and renewal; it enables and encourages us to sustain a genuinely public life while affording us the time and energy to cul-

\textsuperscript{57} Concededly, since the defeat of Robert Bork, the quality of public debate surrounding the confirmation of Supreme Court nominees has deteriorated somewhat, but the source of the decline is the strategy adopted by both Presidents Reagan and Bush of proposing persons who have been circumspect during their careers concerning constitutional questions and then instructing the nominees not to discuss their views during the Senate hearings. Ackerman would surely be justified in chastising Reagan, Bush, and the Senate for adopting or acquiescing in such an approach. What is unpersuasive is his contention that the public discussion surrounding confirmation proceedings is “inevitably” poorly focused.

\textsuperscript{58} See, for example, Tribe, \textit{God Save This Honorable Court} (cited in note 23).

\textsuperscript{59} For a detailed description of that vision, see Bruce Ackerman, \textit{Social Justice in the Liberal State} (Yale, 1980).

\textsuperscript{60} See text accompanying notes 18-21.
ivate our private lives; and it is consistent with the best aspects of our political tradition. Arguments of these sorts are helpful but invite further questions to which Ackerman has not so far provided answers.

Why is periodic cultural renewal a good thing? Because “the earth belongs in usufruct to the living”? Because shucking off inherited cultural forms (or cultural forms of our own making) is good for the soul? Because our political order must be regularly modified to incorporate steady advances in our appreciation of moral truths?

Why should people be left free most of the time to concentrate on their private affairs? Because a regrettable but unalterable aspect of human nature is a limited capacity for “public citizenship”? Because left largely to their own devices, people will develop an enormous variety of interests and lifestyles which, in the aggregate, will produce a diverse, stimulating culture from which we will all benefit? Because, in the end, meaningful work and religion are more important than politics?

And why should we care about recovering and reaffirming our distinctive cultural traditions? Because, two centuries ago, the Founders of our nation somehow saw clearly the needs and potential of the American people, and we should strive now to recover their insights? Because too much utopian speculation is dangerous, and we should be careful when modifying our polity not to throw out the baby with the bath? Or because there are no Archimedeian reference points—no immutable moral truths or stable features of human nature from which we could derive guidelines for a just and attractive social and political order—and thus the only way in which we can hope to develop answers to our common problems is to debate the meanings of the shared commitments of the community in which we must continue to make ourselves?

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63 See Wood, The Creation of the American Republic, 1776-1787 at 519-64 (cited in note 13)(arguing that such an attitude was a component of the “Federalist persuasion”).
66 See Laurence Tribe, Ways Not to Think About Plastic Trees: New Foundations for Environmental Law, 83 Yale L J 1315, 1338-40 (1974); Martha Minow, The Supreme Court,
Unless and until Ackerman tells us how he would answer such basic questions, many of the specific aspects of his argument will continue to appear ungrounded and arbitrary. For example, Ackerman plainly does not think well of cultural pluralism. A society in which people defined themselves primarily in terms of their local communities and participated in national politics only for the purpose of ensuring that their separate communities received fair shares of the society's collective resources would not please him a bit (pp 310-11). And he seems to regard engagement in local politics as beneficial only insofar as it provides Tocquevillean training for subsequent involvement in national affairs (p 22). But the reasons for this attitude are far from apparent.

The Justifications for several portions of his sketch of the optimal system for “higher lawmaking” are similarly mysterious. Why, for example, is a group of constitutional reformers obliged at the first stage of the process to obtain the support of a majority of their fellow citizens? In the Supreme Court, after all, a minority of the body can, by voting to grant certiorari in a case, compel their colleagues to take seriously the issue it presents. Why should not We the People adopt a similar procedure?

Finally, in the absence of a fleshed out justification for his overall vision, the proposal with which Ackerman concludes Foundations seems wholly ad hoc. After celebrating for most of the book the opportunities the American system of government affords determined citizens to remake any portion of their polity, in the last three pages he suggests that he would be proud to support the addition to the Constitution of a modified—and unamendable—Bill of Rights. In the aftermath of World War II, the German people had the good sense to make it “unconstitutional for subsequent majorities to weaken their founding commitment to a host of fundamental freedoms.” We Americans, he argues, would do well to follow suit—“finally redeeming the promise of the Declaration of Independence by entrenching inalienable rights into our Constitution” (pp 320-21) (emphasis in original).


* Readers familiar with Ackerman’s other writings will not be surprised to discover that the new Bill of Rights he advocates would guarantee to each individual: “equal opportunity—in schools, on the job, in public places and public life”; protection against “the vagaries of unemployment, disability, sickness, and old age”; and expanded and modernized rights of “free expression” and “privacy and autonomy” (p 319).
Why would such a move be appropriate? Are the elaborate precautions that (Ackerman contends) our system currently provides against both governmental disregard for the Constitution and casual constitutional amendments insufficient to forestall a slide into fascism? If so, what does that imply concerning the trustworthiness of the Supreme Court and of We the People? Alternatively, does this final proposal spring from a Madisonian belief that the Constitution should be used to inculcate and sustain in the citizenry an irrational, sentimental commitment to fundamental rights? How should we differentiate constitutional provisions whose desirability is so obvious that they should be made unamendable from provisions that should remain subject to modification through the processes of "higher lawmaking"? Should the "deep" support of a larger percentage of the citizenry be required to make an amendment unamendable than is required merely to adopt an amendment? Clarification of the underpinnings of his argument would enable Ackerman, in the remaining volumes of his work, to resolve such issues.