BOOK REVIEW

THE GHOST OF LIBERALISM PAST

WE THE PEOPLE. By Bruce Ackerman.[1] Cambridge: Belknap Press of Harvard University Press. Volume 1, 1991. Pp. x, 369. $24.95.

Reviewed by Suzanna Sherry[2]

We the People is an ambitious book by one of our best constitutional theorists. Part one of a projected three-volume series, it aims at nothing less than a re-envisioning of American constitutional history and promises a new synthesis of law, politics, and history. Ackerman weaves an intriguing story about who we are and who we might be as a people. Unfortunately, Ackerman's tale fails to inspire, because it is mired in a fictional past and envisions a utopian future. In addition, the book ultimately raises more questions than it answers because it provides inadequate criteria to identify the moments in the past that have special constitutional importance.

I.

Ackerman's basic theme is constitutional dualism. He argues that the Constitution contemplates two types of politics: normal or ordinary politics and higher lawmaking or constitutional politics. Normal politics is what goes on in Washington — and at the polls — year in and year out. Busy private citizens muster just enough civic virtue to vote, but not enough to take their votes particularly seriously. The politicians so elected are thus stand-ins for the populace but cannot truly speak in the name of "We the People." There are no electoral mandates here. Higher lawmaking, in contrast, has occurred only three times in our history. It is a process of extended and thoughtful deliberation by a significant portion of the people, in which *private* citizens temporarily become private *citizens*. In this process, the people make a truly considered choice about the direction in which they wish the nation to go, and politicians implementing their choice *do* speak in the name of "We the People." Thereafter, the people return to their civic slumber and the nation returns to ordinary politics, but the Supreme Court has a mandate (a "preservationist function") to protect the results of the people's higher lawmaking from future ordinary politicians.

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As this synopsis suggests, Ackerman views himself as a committed and unwavering democrat who ultimately justifies his entire thesis in terms of the knowing and deliberate consent of the people.[3] Constitutional moments of higher lawmaking represent the purest form of popular consent and thus are superior to the mere unthinking acquiescence of ordinary politics. Moreover, according to Ackerman, the Founders themselves recognized and enshrined in their Constitution this particular version of the sovereignty of We the People.

We The People is largely an elaboration of this crucial insight. In this volume, Ackerman provides a theoretical defense of his dualist thesis and a relatively detailed historical examination of his first example of constitutional politics: the Founding itself. He intends to deal with the two more recent instances of constitutional politics in the second volume of the series (pp. 44 & 162) and with the Supreme Court's response to constitutional politics in the third volume (pp. 99 & 162).

Ackerman's theory of constitutional dualism is an elegant and complex structure that unfortunately is built on a flawed foundation. Before I examine those flaws, however, it is worth considering one part of his book that can stand independent of the dualist foundations: his discussion of constitutional synthesis, or the problem of how to integrate new constitutional principles into the existing Constitution. Ackerman focuses on what he sees as the two most significant changes in constitutional outlook: Reconstruction and the New Deal. Ackerman's analysis of constitutional synthesis provides valuable insights that do not depend on his dualist thesis and hence are not subject to my later criticisms of that thesis.

Reconstruction, according to Ackerman, transferred power to the national government and relied on separation of powers rather than federalism as the primary safeguard against governmental tyranny (pp. 45–46). The New Deal transformed both what remained of federalism — by repudiating the "notion that the national government had limited powers over economic and social development" (p. 105) — and separation of powers — by establishing "a new paradigm of Presidential leadership" (p. 106). For purposes of constitutional synthesis, the most important aspects of these two transformations are the nationalism of Reconstruction and the economic activism of the New Deal.

Ackerman's characterization of these two events as constitutional transformations allows him to sketch the problem of constitutional

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[3] He clearly believes that consent is more important than morality and that any substantive rule is legitimate if it was legitimately derived from popular consent. He suggests that, as a judge, he would uphold and enforce a constitutional amendment establishing Christianity as the state religion and proscribing all other religions — and even an amendment effectively making the Christianity amendment unamendable (pp. 14–15 & n.†).

synthesis as a problem of "triangulation" (p. 116). The judges of what Ackerman calls the middle republic (between Reconstruction and the New Deal) had only to reconcile the principles of the Founding with the newer principles of Reconstruction — a "one-two synthesis." Modern judges, however, have had to harmonize the New Deal with both the Founding (a problem of "one-three synthesis") *and* Reconstruction (a problem of "two-three synthesis") (pp. 116–19).

Nevertheless, as Ackerman points out, although modern judges face a more difficult problem than middle republic judges, we can learn a great deal from examining how judges of the middle republic engaged in their own process of synthesis. According to Ackerman, traditional constitutional history has obscured both the constitutional synthesis achieved by the Court in the middle republic and the similarities between that Court and the Court of the modern republic (pp. 39–50, 58–67). Ackerman's description of traditional history's "Bicentennial Myth" — that the judges of the middle republic "strayed from righteousness" and the New Deal returned the nation to its original Founding principles (pp. 42–43) — is probably unfair and unrealistic, but he does notice similarities between the post-Reconstruction Court and the post-New Deal Court that have escaped other scholars.

It is in describing and illustrating these various problems of constitutional synthesis that Ackerman is at his best.[4] He suggests that, in the period immediately following a transformative moment, constitutional synthesis begins with relatively narrow and particularistic interpretations of the new principles that have been adopted. Only later do the courts begin to "develop the entire set of constitutional principles in a comprehensive way that harmonizes [the] deeper aspirations [of all the past constitutional moments]" (p. 98).

Ackerman gives persuasive explanations for the existence of this pattern of synthesis. Judges learn their original constitutional law from a distance, through the great expositors; but as they live through an era of constitutional politics, they learn the new paradigms by experience. They will likely be unable to grasp the full significance of the more recent changes and will view them instead as they were won: a small piece at a time. Until enough time has passed for both (or all) constitutional moments to become equivalently impersonal matters, judges will be unable to treat them equally or to attempt a grand synthesis. Instead, they will undervalue modern constitutional politics as mere tinkering and will fail to recognize the real contribution of that politics to the constitutional framework as a whole (pp. 94–99).

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[4] Even though this first volume is merely a preliminary sketch of judicial behavior, which will be more fully addressed in the third volume, his discussion is well worth reading.

In the *Slaughterhouse Cases*,[5] for example, the Supreme Court of the early middle republic "recognized that the [Reconstruction] amendments revolutionized traditional principles of federalism so far as blacks were concerned, [but] was entirely unwilling to concede that the amendments required a similar judicial reassessment of traditional principles of federalism more generally" (p. 95). Only later did the Court begin a comprehensive synthesis of Founding and Reconstruction principles. Ackerman describes that later synthesis in a way that interestingly reinterprets the much-maligned *Lochner*[6] case: "if the early republic gave *limited* protection to the fundamental right of *white men* to exercise their freedom through *property and contract*, shouldn't the Reconstruction amendments be interpreted to require *equal* protection to the fundamental rights of *all* Americans to exercise their freedom through *property and contract?*" (p. 101, emphasis in original). In other words, although the pre-*Lochner* Supreme Court limited the Reconstruction Amendments to giving blacks the same rights to which whites had been entitled before Reconstruction, the later Court saw Reconstruction as changing the scope of those rights, or at least as increasing the authority of the *federal* judiciary to interpret the scope of those rights (p. 101). Although Ackerman does not claim that the *Lochner* Court's synthesis is the only one possible,[7] or even that it is the best one, he does show that *Lochner* was a conscientious attempt at constitutional synthesis and thus removes *Lochner* from the list of cases that are necessarily incorrect interpretations of the Constitution *ab initio*.

Ackerman also shows how synthesis progressed in the modern republic, after the New Deal. *Carolene Products*,[8] one of the first cases to attempt to integrate the New Deal's activist state into the preexisting Constitution, "expressed a *Slaughterhouse*-like reluctance to generalize beyond the context of ordinary commercial transactions with which Roosevelt and the New Deal Congresses were particularly concerned" (p. 121). Ackerman sheds new light on the famous *Carolene Products* footnote[9] by suggesting that its first paragraph, which refers to "specific prohibition[s] of the Constitution,"[10] allowed the Court to begin integrating the recent New Deal transformation cau-

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[5] 83 U.S. (16 Wall.) 36 (1873).

[6] Lochner v. New York, 198 U.S. 45 (1905).

[7] For another view, see Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987). Sunstein argues that *Lochner* symbolizes an "approach that imposes a constitutional requirement of neutrality, and understands [neutrality] to refer to preservation of the existing distribution of wealth and entitlements under the baseline of the common law." *Id.* at 875.

[8] United States v. Carolene Products Co., 304 U.S. 144 (1938).

[9] *Id.* at 152 n.4.

[10] *Id.*

tiously, without undermining much of the pre-New Deal Constitution (pp. 122–23). In contrast, the second and third paragraphs of the footnote tentatively began a much more ambitious project of synthesis that sought doctrinal integration (p. 130).[11]

In what is perhaps the book's best chapter, entitled "The Possibility of Interpretation" (pp. 131–62), Ackerman uses his theory of triangulated synthesis to reinterpret two of the more theoretically difficult cases of the twentieth century, *Brown v. Board of Education*[12] and *Griswold v. Connecticut*.[13] Although his particular interpretations are partial and ultimately unsuccessful, the method of synthesis they illustrate offers guidance to courts and scholars.

Brown v. Board of Education, according to Ackerman, is an exercise in "two-three synthesis": the Court was faced with the task of reconciling the principles of Reconstruction with the activist state of the New Deal. The "separate but equal" doctrine of *Plessy v. Ferguson*[14] was based on a distinction between social and political equality and a denial that the government had any role in shaping social reality. The New Deal fatally undermined both the distinction and the denial (pp. 142–48). In an activist state, the *Brown* Court could neither "reaffirm[] [*Plessy*'s] confident assertion that 'the nature of things' precluded a government assault on social inequality" (p. 146)[15] nor deny "the active role of the state in shaping 'choices' in the 'free market'" (p. 147). A refusal to overturn the result in *Plessy* would have been an abdication of the Court's duty to synthesize constitutional principles. Of course, one can envision alternative interpretations of the changes wrought by the New Deal, such as one limiting the activist state to *economic* intervention, that would make Ackerman's particular synthesis untenable, but the method can carry over.

Griswold v. Connecticut, according to Ackerman, is an example of "one-three synthesis." The Founding era "link[ed] the constitutional commitment to individual liberty with the rhetoric of contract and private property" (p. 152), but the New Deal deprived constitutional liberty of its concrete basis in property and contract by focusing on redistribution and governmental activism. The Court in *Griswold* made sense of this contradiction by linking individual liberty to another value inherent in the Bill of Rights: privacy (pp. 150–58). Again, privacy is not the only value that the New Deal might have

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[11] Arguably, although Ackerman himself does not suggest this, later interpretations of the first paragraph also continue this more ambitious integration.

[12] 347 U.S. 483 (1954).

[13] 381 U.S. 479 (1965).

[14] 163 U.S. 537 (1896).

[15] Ackerman quotes *Plessy*, 163 U.S. at 544.

substituted for contract and private property, but Ackerman's analysis is instructive in its method, regardless of outcome.

Ackerman's contribution does not depend on his identification of particular constitutional moments or on the correctness of his interpretation of the two cases. As long as there is any constitutional change short of total abandonment of prior principles — whether that change occurs through constitutional amendments or judicial interpretations — judges will face the problem of determining the extent to which later principles modify earlier ones. They will have to integrate the two sets of principles and to decide whether the changes are discrete or global. In this process, they — and scholars studying their decisions — might be guided by Ackerman's discussion of how judges have approached this task in the past. Ackerman's approach to synthesis is useful whether or not the reader finds his particular synthesis persuasive.

Unfortunately, Ackerman's examination of the problem of synthesis is but a small portion of *We the People*.[16] The larger part of the book is devoted to demonstrating that, as a matter of both history and theory, we have a dualist democracy and a constitutional past that encompasses three — and only three —instances of constitutional politics. This part of the book detracts from Ackerman's real contribution by combining weak analysis with sloppy history.

II.

At its simplest level, Ackerman's basic dualist thesis is unexceptionable. The Constitution has changed over time, and the political circumstances surrounding its changes may be different from more ordinary political circumstances. Beyond that simple recognition, however, Ackerman fails to sustain his arguments. His argument that we are absolutely bound by the popular intent underlying constitutional moments of the past suffers from all the problems that beset originalists generally.[17] His contention that, as a matter of history, the Framers contemplated constitutional politics outside the specifications of Article V (but not, as any good originalist will agree, as a matter of *judicial* innovation) is unsupported and probably insupportable. And his identification of the New Deal as the one and only

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[16] His proposed third volume, which is to focus on the Supreme Court, may well examine the problem of synthesis in greater detail and therefore may be a better book than this volume. Unfortunately, the remainder of volume I is weak enough to overshadow the strengths of the short discussion of synthesis.

[17] *See generally* Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1087–97, 1104–06 (1989) (discussing various objections to the originalism thesis).

instance of constitutional politics outside of Article V fails because he cannot distinguish sufficiently between that era and others that have seen momentous constitutional change. I will first examine Ackerman's historical proposition — that the Framers envisioned a dualist democracy — and then his more theoretical attempt to identify actual constitutional moments.[18]

Unfortunately, Ackerman's historical analysis is simplistic[19] and ultimately supports only the weakest and least interesting version of his theory. In one long chapter, he attempts to demonstrate both that the Founding was an instance of constitutional politics (a relatively uncontroversial conclusion, which I will not discuss in detail) and that the Founders themselves contemplated a dualist democracy (pp. 165–99). Ackerman relies almost exclusively on the *Federalist Papers*, to the exclusion of the massive historical evidence from the Philadelphia Convention, the ratifying conventions, other Federalist and Anti-Federalist writings, and the letters and papers of the principals.[20] Much of this material is easily accessible,[21] and Ackerman's decision to ignore it makes for poor history indeed. What he produces is not even "law-office history,"[22] because it ignores a tremendous amount

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[18] The originalism debate has raged for decades with no sign of resolution, and I will not contribute further to it. For my prior contributions, see Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001 (1988); and Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

[19] His opening discussion of other scholars is equally simplistic. He describes "monistic democrats" (those who focus on overcoming the countermajoritarian thesis) (pp. 7–10), "rights foundationalists" (those who wish to import foreign philosophers into the Constitution) (pp. 10–16), neo-republicans (pp. 27–29), classical liberals (pp. 25–27), and Burkeans (pp. 17–24) — all in 26 pages in which he not only describes but purportedly refutes their theories — in the starkest of dichotomies and without any subtleties. Does anyone really believe, for example, that "[d]emocracy requires the grant of plenary lawmaking authority to the winners of the last general election" (p. 8), as he portrays the "root" principle of monism? Is the dispute between any existing monists and foundationalists really about whether we can allow a "view of 'rights as trumps' without violating the monist's deeper commitment to the primacy of democracy" (p. 12), or is it about whether *particular* rights can be reconciled with democracy and our constitutional tradition?

[20] Ackerman justifies the decision not to use the notes of the Philadelphia Convention on the ground that the Convention represents the views of only a small elite (p. 88 n.*), but he later argues that the Convention "spoke for the People by adapting ideas and practices current at the time" (pp. 302–03). Moreover, his justification does not exclude most of the other sources noted in the text, which were at least as public as the *Federalist Papers*.

[21] *See, e.g.*, AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760–1805 (Charles S. Hyneman & Donald S. Lutz eds., 1983); THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981); THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (State Historical Society of Wisconsin ed., 1976); THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987); DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION (1990). I apologize to the editors of the many fine volumes I have left out; this list is only a small sample of the work available.

[22] Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 & n.13.

of both favorable and unfavorable evidence and thus can hardly be considered history at all. Viewed as a reexamination of the *Federalist Papers*, Ackerman's chapter is superficial and lacks grounding in the many recent detailed analyses of the *Papers*. Viewed as historical support for his dualist thesis, his discussion is too thin and too contentious to be persuasive.

Ackerman begins with Publius's defense of the Philadelphia Convention's "illegal" act of ignoring both the Articles of Confederation and the delegates' own instructions from their respective states.[23] According to Publius, in many circumstances the people's right of revolution can be exercised only through essentially illegal conventions whose proposals are eventually ratified by the people (pp. 173–75). The illegality of the Founders' own act and their recognition that illegal constitutional change is necessary in some times and places, however, do not mean that the Founders thought that future illegal change would be necessary in America. Publius recognized — as Ackerman notes — that revolution is a dangerous business, whether conducted by armies or by convention delegates (pp. 175–76).[24] As Charles Pinckney of South Carolina noted at the end of the Philadelphia Convention, "Conventions are serious things, and ought not to be repeated."[25] The trick is to structure a constitution that will allow for reform without necessitating revolution. The Founders did so by including provisions that make amending the Constitution difficult but not impossible — including a provision that would legitimate a repetition of their own illegal convention.[26] Thus, they created a document that allows the people to exercise their right of revolution without repeating the illegal act of the Founders themselves.

None of this is particularly new, nor does it go far enough to support Ackerman's thesis that the Founders self-consciously intended that future constitutional amendments might be enacted through processes other than those listed in Article V. For that proposition, he relies on a more complicated model of the interactions among theories of representation, judicial review, and the possibility for constitutional change. Ackerman uses the twin constitutional principles of mediated

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[23] As with much of Ackerman's discussion, that theme, too, has been explored recently and in depth. *See, e.g.*, Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMMENTARY 57 (1987).

[24] Ackerman's only new contribution is to notice that Publius may be less afraid of revolutionary fervor than some of his contemporaries because he believed that the right constitutional structure can channel mob passions into rational deliberation (p. 177).

[25] *Notes for Saturday, Sept. 15, 1787, in* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 642, 651 (1966).

[26] Some historical support also exists for the proposition that a national referendum to amend the Constitution, although technically unconstitutional, would satisfy the underlying questions addressed by the Founders. *See* Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1047–60 (1988).

democracy and countervailing factions to suggest that the people's elected representatives do not ordinarily speak for We the People (pp. 181–91). This section is well worth reading, for it describes with great clarity the "semiotic" theory of representation established by the Constitution: the Founders expected Congress not merely to mimic the views and transient desires of the people, but rather to serve as a deliberative body that "represents" the people only symbolically. Even in this argument, however, Ackerman could have profited from some discussion of how this dispute between those who advocated a mirror-like legislature and those who preferred a more deliberative one played out during the Founding era.[27] Here, as elsewhere in his book, Ackerman tends to ignore the historical context even when it might support his point.

Of course, showing that the Founders viewed ordinary politics as not fully representative — or that their theory of representation involved some qualifications on popular sovereignty, an alternative explanation that Ackerman ignores — does not establish Ackerman's dualist thesis that the Founders contemplated higher lawmaking outside Article V. To prove this point, Ackerman attempts to provide evidence that the Constitution contemplates a separate mechanism for exercising higher lawmaking and another for preserving it. It is at this crucial point that Ackerman's analysis is at its weakest.

Ackerman spins his theory that Publius envisioned constitutional politics as an occasional alternative to ordinary politics from only two passages in the *Federalist Papers*. First, he cites the recommendation of Publius "'that a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions'" (p. 179).[28] From this he concludes that Publius hoped that "the People [would], in their irregular way, prove equal to the challenge" of constitutional politics (p. 179). In the quoted passage of the *Federalist Papers*, however, Publius was simply rejecting Thomas Jefferson's suggestion of regularly scheduled conventions for correcting breaches of the Constitution. Absolutely no evidence exists that Publius was speaking of what Ackerman calls "irregular" constitutional politics as opposed to the formal method of amending the Constitution.

Similarly, Ackerman reproduces a long passage from *The Federalist* No. 78, the heart of which is that, although people have a right to alter or abolish the established Constitution:

> yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold

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[27] *See generally* FARBER & SHERRY, *supra* note 21, at 109–45, 204–11 (discussing the debates surrounding the character of the federal legislature during the Founding era).

[28] Ackerman quotes THE FEDERALIST No. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

> of a majority of their constituents incompatible with the provisions in the existing constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually . . . (p. 193).[29]

Ackerman explains that this passage "provides a wonderful summary of all the themes we have rehearsed: Publius's dualistic understanding of the People, his semiotic concept of representation, and his complex analysis of faction interact to yield a distinctive view of the Court's responsibilities" (p. 193). Again, however, no evidence exists that Publius's reference to "some solemn and authoritative act" describes anything other than the formal amendment process set out in Article V. Indeed, the more natural reading of the language — in the absence of any historical evidence to the contrary — is that Publius is specifically referring to the authoritative acts contemplated by Article V.[30]

Finally, Ackerman suggests that the Constitution includes "an institution that gives incentives to its incumbents to intervene on the side of the Revolutionary generation when factional leaders assault the People's earlier constitutional achievements" (p. 192). This institution, of course, is the judiciary. But Ackerman never describes the "incentives" that supposedly motivate judges to preserve the Constitution from legislative assaults; we are left to wonder what keeps judges from simply acquiescing to popular passion. Moreover, his only response to the opposite danger, that judges will abuse their power by furthering one or another factional interest, is to note, with Publius, that the judiciary is the weakest branch (p. 192). Even without these gaps, Ackerman's identification of the judiciary as the primary preservationist branch still does not take us beyond simple judicial review to a dualist Constitution.

What, then, does Ackerman's historical survey prove? It proves only a set of uncontroversial propositions: that ordinary laws are subordinate to the Constitution, that one function of the Supreme Court is to preserve that venerable document from the onslaughts of a temporarily impassioned legislature, and that it takes an extraordinary process to change the Constitution. None of this requires a "dualistic" view of the Constitution except in the most trivial sense, under which ordinary legislative enactments are distinguished from formal constitutional amendments.

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[29] Ackerman quotes THE FEDERALIST No. 78, at 469–70 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (footnotes omitted).

[30] *See, e.g.*, Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 453 & n.13 (1989).

Ackerman, however, means something much more: his significant contribution to constitutional theory is the suggestion that the Constitution can be (and has been) altered whenever We the People engage in constitutional politics, whether or not we do so by means of a formal constitutional amendment. But however important this contribution is, Ackerman's historical evidence completely fails to demonstrate this much more controversial thesis. Although the Founders were almost certainly dualists in the sense that they recognized a difference between normal politics and constitutional politics, Ackerman has not shown that they viewed constitutional politics in any terms other than those set out in Article V.[31]

The failure of Ackerman's historical analysis undermines his entire claim. Like the originalists, Ackerman insists that we are bound by the past, but he agrees with non-originalists that constitutional change can occur without formal amendments. To reconcile these conflicting approaches, he has attempted to demonstrate that *as a matter of original intent*, the Constitution contemplates unwritten changes reflecting constitutional moments. Once this attempt fails, he is left without historical support for his originalist thesis that the New Deal was a legitimate instance of constitutional politics. If original intent is the only yardstick for legitimacy — as it appears to be for Ackerman — then the New Deal was illegitimate because it was outside the processes contemplated by the Founders.[32] Only a non-originalist could offer a substantive, ahistorical justification for the New Deal, and Ackerman does not even try. He never suggests that the New Deal was right for any reason other than that it was a constitutional moment to which we owe allegiance simply because it reflected the intent of the American people at that time.

III.

Whether or not Ackerman successfully justifies a dualist Constitution as a matter of history, his discussion of theory still warrants examination. If his historical argument fails, he might nevertheless

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[31] Moreover, if Ackerman is correct that constitutional politics requires more deliberation than ordinary politics, the historical evidence might suggest that neither the Founding nor Reconstruction was a constitutional moment: although certain mobilized elites pushed through their proposals, general popular participation may have been no wider or deeper than usual. *See, e.g.*, FARBER & SHERRY, *supra* note 21, at 16–17, 297–319; MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 25–26 (1988).

[32] Ackerman apparently rejects the possibility that the New Deal enjoys legitimacy solely as an instance of higher lawmaking regardless of its historical pedigree (or lack thereof). Ackerman claims that he as a judge would be bound by higher lawmaking processes that declared the Christian religion to be the national religion *forever*, even if later periods of higher lawmaking rejected this principle. Therefore, he must accept the eighteenth-century Founders' view that the Constitution can be amended only through Article V processes.

rescue dualism by showing that, even without an endorsement from the Founders, it represents our own best hope for modern American democracy. And if his historical argument succeeds — if my criticism is not persuasive — he still must specify in greater detail the contours of his theory: how and when the People engage in higher lawmaking and how courts can distinguish it from ordinary politics.

As Ackerman hints throughout his introductory material, a key question for the dualist who recognizes constitutional politics beyond the terms specified in Article V is how to identify the differences between normal and constitutional politics. The entire theory of a dualist democracy rests on the notion that constitutional change should not occur unless it is dictated by popular will, because change based on anything less is a governmental usurpation of the people's exclusive right — exercised in earlier times and reflected in the existing Constitution — to engage in higher lawmaking. Thus, identifying when We the People are engaging in constitutional rather than normal politics completely determines what the preservationist Court may look to in evaluating the constitutional legitimacy of governmental actions. Without a means of separating constitutional politics from normal politics, Ackerman's directive that the Court preserve the will of the people (as reflected in times of constitutional politics) from governmental attempts to subvert it (in times of normal politics) becomes meaningless. In the absence of a national referendum,[33] Ackerman provides no way to know when We the People are in fact speaking with the authority that is ours alone.[34]

Ackerman describes constitutional politics as a four-part process composed of signaling, proposing, deliberating, and codifying. A committed portion of the population must *signal* that more is at stake than ordinary politics and so earn the right to put its agenda before the public; it must make sufficiently concrete *proposals* to allow reasoned *deliberation*, which is reflected in the testing and retesting of the movement's proposals in the crucible of electoral politics; and the Supreme Court (when there is no written amendment) must ultimately *codify* the achievements to supply the fodder for continued interpretation and preservation of the constitutional moment (pp. 266–67,

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[33] Akhil Amar has suggested that a national referendum would be the best way to engage in constitutional politics. *See* Amar, *supra* note 26, at 1044. Although Ackerman also endorses a national referendum (pp. 50–56), his identification of the New Deal as a constitutional moment demonstrates his belief that a national referendum is not necessary to constitutional politics and that higher lawmaking can occur, and has occurred, without such a referendum. As discussed in the text, this belief leaves a serious problem of distinguishing constitutional politics from ordinary politics in circumstances short of an amendment or a referendum.

[34] For other views on Ackerman's lapses on this matter, see Amar, *supra* note 26, at 1090–96; and Sanford Levinson, *Accounting for Constitutional Change (Or, How Many Times Has the Constitution Been Amended? (A) <26; (B) 26; (C) >26; (D) All of the Above)*, 8 CONST. COMMENTARY 409, 430–31 (1991).

272–90). At each stage, We the People must abandon our private citizens' sloth and temporarily turn our attention to politics and the fate of the nation. We must consider the "rights of citizens and the permanent interests of the community" (p. 272), rather than simply our private interests writ large.

Although Ackerman describes what must happen for constitutional politics to take place, he never sufficiently explains how we are to know when it *has* happened. For example, he notes that during the signaling phase, citizens must have made a "considered judgment" (pp. 272–74) and that their decision to support the new movement cannot depend on the particular alternative it faces at any given moment — it must "decisively defeat *all* the plausible alternatives in a series of pairwise comparisons" (p. 277). And yet, after noting — as he has to, given his description of normal politics — that voting is inadequate as a signaling mechanism, Ackerman never suggests any concrete alternative method of demonstrating when the people have in fact signalled their considered judgment, other than the obstacle course established by Article V or perhaps a national referendum (pp. 277–78), which still would not guarantee a considered judgment or a "pairwise" winner.

Ackerman states that during the deliberation phase — which he says should last a few years:

> much of the softness of normal public opinion will dissolve. The apathy, ignorance, [and] selfishness that occlude the judgments of tens of millions of Americans will have been dissipated by hundreds of millions of arguments, counterarguments, insults, imprecations. Apathy will give way to concern, ignorance to information, selfishness to serious reflection on the country's future (p. 287).[35]

Again, although this seriousness of purpose is apparently a requirement for higher lawmaking, he merely assumes that it *will* happen and never explains how to identify whether it *has* happened.

Perhaps we can derive some guidance from Ackerman's categorization of some events as constitutional politics and others as, at best, failed attempts at constitutional politics. However, because the Founding resulted in the formal replacement of one written constitution with another, and Reconstruction in the ratification of amendments through the formal processes specified in Article V, neither of those instances of higher lawmaking help us to determine what Ackerman sees as the crucial identifiers of non-Article V constitutional politics.[36]

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[35] Ackerman here appears to be exploring alternative universes.

[36] Ackerman does suggest, as others have, that the Reconstruction amendments were somehow "illegal" because of the procedures used to propose and ratify them (pp. 44–45, 81). *See, e.g.*, FARBER & SHERRY, *supra* note 21, at 322–23 (discussing the "highly irregular ratification

Ackerman does tell us that the New Deal is an example of constitutional politics, and — quite explicitly — that the "Reagan revolution" is not (pp. 50–53, 269). Because he offers little historical analysis of the New Deal (which he promises for the next volume), and even less of the Reagan era, it is difficult to assess this claim. I would hope that in his next volume he not only discusses the New Deal, but also distinguishes it in more detail from other candidates for constitutional moment status, including both the Reagan era and the civil rights movement of the 1950s and 1960s. For now, it is enough to note that Ackerman faces a considerable challenge. A number of recent analyses by political scientists have concluded that Ronald Reagan's election *was* the culmination of a paradigm shift in American politics that may have begun with Richard Nixon.[37] Ackerman identifies only a single major difference between the New Deal and the Reagan revolution: unlike Roosevelt, who was "ultimately successful in gaining Congressional consent to a series of transformative Supreme Court appointments," Reagan "saw his constitutional ambitions rejected in the battle precipitated by his nomination of Robert Bork" (p. 51).

The problems with using judicial confirmation as an identifying marker of constitutional politics are legion. To begin with, it is not at all clear that Reagan lost. After the Bork fiasco, Reagan successfully nominated the equally conservative Anthony Kennedy. President Bush has carried on the tradition with David Souter and Clarence Thomas — and may well get several more chances to place Reagan Republicans on the Court. These facts demonstrate another problem with Ackerman's description of the differences between failed and successful instances of constitutional politics: it makes constitutional politics merely a form of winner's history. We cannot know whether something is true higher lawmaking or simply a false claim until we know whether it withstands the test of time. In the meantime, we do not know whether judicial implementation of, say, the Reagan program is a legitimate aspect of constitutional politics or an illegitimate usurpation of the people's rights.

Ackerman himself notes another problem with using presidential success in judicial appointments as an identifier of constitutional pol-

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process" surrounding the Fourteenth Amendment). However, because those amendments technically met the requirements of Article V, looking at them will not help us distinguish between normal and constitutional politics when neither results in constitutional amendment.

[37] *See, e.g.*, THOMAS B. EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (1991); HARVEY C. MANSFIELD, JR., AMERICA'S CONSTITUTIONAL SOUL 21–69 (1991); KEVIN PHILLIPS, THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH at xvii–xxviii (1990); Mark Silverstein, *The People, The Senate, and the Court: The Democratization of the Judicial Confirmation System*, 9 CONST. COMMENTARY (forthcoming Feb. 1992).

itics. Without any other identifiers, he notes that judicial appointments may succeed with "a bare majority of the Senate" and thus may allow transformative judicial opinions "without persuasive institutional evidence that a mobilized majority of the American people endorse the change" (although, as noted, Ackerman never gives any examples or descriptions of the necessary "institutional evidence") (p. 53).

Finally, Ackerman's use of the Bork nomination is highly peculiar in light of his own identification of the New Deal as the most recent constitutional moment. Bork, for all his other failings,[38] never challenged the New Deal. Indeed, he went out of his way to stress that, as a judicial conservative (as opposed to a political conservative), he would never consider engaging in the activism of the pre-1937 Court by striking down legislation willy-nilly, not even (shudder!) liberal legislation.[39] Thus, Bork accepts the constitutional status of the key principle Ackerman thinks was adopted by the people during the New Deal — the ability of the state to be an activist state.[40] What Bork wanted to change was not the New Deal, but the subsequent Warren Court interpretations. Because, as we have seen, these interpretations were not the only possible syntheses of New Deal principles with earlier constitutional principles, Bork can reject the Warren Court interpretations without rejecting any principles Ackerman shows were adopted by the people in the New Deal. And Ackerman does not ever directly suggest that the Warren Court's interpretations qualify as a constitutional moment. It will be hard enough for Ackerman to demonstrate that the New Deal represented a mass mobilization without attempting to prove the same of the Warren Court, which was hated by large segments of the populace, including many ardent supporters of the New Deal.[41] Nevertheless, by sleight of hand — by

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[38] *See generally* Suzanna Sherry, *Original Sin*, 84 NW. U. L. REV. 1215 (1990) (reviewing ROBERT H. BORK, THE TEMPTING OF AMERICA (1990)) (criticizing Bork's positions and arguments).

[39] For Bork's most recent attack on conservative judicial activism, see ROBERT H. BORK, THE TEMPTING OF AMERICA 223–40 (1990).

[40] In 1990, Bork wrote:

> The New Deal Court's refusal to set limits to national power is behind us, the consolidation of all power at the federal level is too firmly entrenched and woven into our governmental practices and private lives to be undone. That consolidation is, for that reason, now our effective constitutional law. There is nothing in that acceptance, however, that retroactively casts constitutional legitimacy about the way the change was accomplished.

Id. at 216. Thus, Bork accepted the New Deal without accepting Ackerman's thesis that it was a constitutional moment.

[41] In contrast to Ackerman's insistence that Warren Court liberalism is the only correct version of the New Deal, the recent study of the decline of the Democratic party by Thomas Byrne Edsall and Mary D. Edsall concludes that the party was captured by elite liberals such as Ackerman and estranged much of the white middle class who supported the New Deal. *See* EDSALL & EDSALL, *supra* note 37, at 12, 15.

indirectly but clearly equating the New Deal with the Warren Court, as in his interpretations of *Brown* and *Griswold*[42] — Ackerman manages to create the impression that Reagan Republicanism represents a challenge to an earlier instance of constitutional politics and thus is illegitimate unless its adherents can prove a constitutional mandate of their own.

All this may not tell us very much about constitutional politics, but it tells us quite a bit about Bruce Ackerman's politics. Given the obvious fundamental flaws in his identification of the differences between normal and constitutional politics, one may wonder why Ackerman felt the need to make such a sharp distinction between the two. A more persuasive model might characterize constitutional change as an ongoing process and the differences between normal and constitutional politics as a continuum. Judges would then be bound to consider both the fact of change and the extent of its popular support. The problem with such a model, for Ackerman, is that it deprives the New Deal of its status as the unique constitutional moment of the twentieth century and thus of its authoritative power to direct the future course of constitutional doctrine (absent another constitutional moment).

At bottom, then, Ackerman's theory is merely originalism flying under liberal colors.[43] This can be seen most clearly in his discussion of the 1937 "switch in time." After asserting that the New Deal *was* a constitutional moment despite the lack of any formal constitutional amendments, he warns against future judicially instigated constitutional politics:

> Nonetheless, there is danger involved in the informality of the process by which the New Deal translated constitutional politics into constitutional law. Given the precedent of 1937, some future Court may decide to embark on a "switch in time" without the kind of broad and deep groundswell that accompanied it in the 1930's; without the aid of formal amendments, it might grotesquely distort the meaning of some future transformation (p. 284).

In this respect, Ackerman's whole book is designed to forestall, or at least to condemn in advance, what Ackerman sees as an illegitimate conservative counterrevolution by the Rehnquist Court.

Exposing that underlying motivation for Ackerman's project does more than undermine its legitimacy. Ultimately, Ackerman's originalism reveals the sad state of American liberalism. Unable to per-

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[42] *See supra* pp. 922–23.

[43] As with most observations of constitutional import, this point has already been made about Ackerman's work by Frank Michelman. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1522–23 (1988). Michelman's hope that Ackerman might eventually come to reject the authoritarianism of originalist approaches, *see id.* at 1521 n.112, has not been fulfilled.

suade the American people, or even the Supreme Court, of the substantive validity of liberal ideals, one of modern liberalism's most forceful spokesmen is reduced to this last resort of conservatives. We *must* retain the legacy of the New Deal — as interpreted by modern liberals — not because it is right, but because its founders told us to. There is genuine pathos in seeing what was once the most optimistic and forward-looking of the American political philosophies reduced to this appeal to the authority of the past.