

American Constitutionalism and Dualist Democracy:
A Brief Reply and Critique of Ackerman's "We the People"

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General Outline:

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I. Introduction

This work will attempt to provide a brief reply and critique of Bruce Ackerman's constitutionalism. Bruce Ackerman is the Sterling Professor of Law and Political Science at Yale University. And he has been for the past quarter of a century actively engaged in the interpretation of the American Constitution. His efforts have yielded deep insights into the politics of American Constitutionalism. As is natural with scholars and theorists that take on large chunks of the Constitution for interpretation, it yields supporters and critics. Ackerman's interpretation of American constitutionalism is no exception. Ackerman's critics have been particularly vocal and sharp with the publication of his We the People¹ books. As is the case with any such large enterprise, there is much to admire in Ackerman's work but also a great deal skepticism with the yield of his efforts.

Ackerman started out his legal career in an effort to grasp the economic impact of American laws. From a specialized niche in taxation, property law, and environmentalism, he has branched out into constitutional law issues, jurisprudence, and general philosophy. Therefore, in Ackerman's efforts to encompass the whole of American constitutional development, it has generated a number of critical responses.

Ackerman starts out from the familiar tripartite model of analyzing the major elements of American constitutionalism. These three pillars of American constitutionalism are: 1) popular sovereignty, 2) federalism, and 3) individual rights. This work will focus on the first pillar of American constitutionalism. It will be argued that Ackerman makes a serious mistake, in his analysis, in grounding his dualist

¹ 1BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (BELKNAP PRESS OF HARVARD UNIVERSITY PRESS 1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (BELKNAP PRESS 1998).

constitutionalism on a foundation of popular sovereignty. Dualism is defined by Ackerman to mean the process by which lawmaking takes place in the United States. He characterizes one mode of lawmaking as ordinary and the other as higher lawmaking. Ordinary lawmaking is the day to day lawmaking that politicians are elected to perform. Higher lawmaking occurs during exceptional periods of American history where ordinary citizens are directly thrust into the political arena in deciding the future course of the political system as a whole. His thesis of dualist constitutionalism centers around “We the People” delegating authority to the professional politicians to make law during normal periods, and the idea that citizens are willing to become more active participants in public affairs during extra-ordinary times. He asserts that We the People must delegate day-to-day governmental activity to the elected officials, the professional politicians. But, during periods of turmoil, crises, and other public stresses, the citizens are called upon to participate in the political process in a more direct way.

This brief reply could not adequately treat each and every major element in Ackerman’s book, We the People. Hence, the major focus will be to critically analyze the first element in his thesis. This element centers on his interpretation of what demarcates “constitutional moments” of change in American politics. A “constitutional moment” is defined as a major turning point in American politics as evidenced by a tectonic shift from what came before in the daily lives of people. For example, the American Revolution was a constitutional moment because it resulted in a tectonic and structural shift in the politics and identity of the American people. Another example is the Civil War, prior to the Civil War slavery was legal and tolerated in the United States. After the Civil War, it became illegal to have slaves. The final example of a major

constitutional moment in American politics is the New Deal because it shifted away from giving primacy to local and state rules to a system where the Federal government takes on greater responsibility for the lives of citizens.

Ackerman believes that the Supreme Court played an important role in codifying these tectonic shifts in American law. But, is Ackerman correct in his analysis of the Supreme Court as codifier of the people's will when the people have spoken on those rare constitutional moments? Has the Supreme Court adequately listened to the People and codified what the People said? This work will argue that such a simplistic schema is not an accurate representation of Supreme Court opinion surrounding each of Ackerman's "constitutional moments." That Popular Sovereignty, as conceived in Ackerman's We the People, is a flawed idea, and he makes a mistake to adopt it as a foundational matter in describing American political development. Popular sovereignty is the idea that what the people have to say in political affairs matters. An appeal to the People may make for good advertising copy, but it plays a small role in American constitutional history.

The key question is: Does Ackerman's dualist democracy, in We the People, serve as an adequate description of representing the will of the American people? This question will be broken down into two parts. The first involves historiography, i.e., does his one-Constitution/three-regime theory, as outlined in his "constitutional moments" of political change, fairly capture the will of the American people? The second part asks: Is Ackerman correct in casting the Supreme Court as the codifier and preserver of the People's will during those "constitutional moments" when they have spoken?

Ackerman relies on the concept of popular sovereignty to vindicate his view of constitutionalism. However, this foundation is a very shaky foundation, and Ackerman

does not give it adequate consideration. This reply will show that Supreme Court case law does not support Ackerman's democratization thesis.

Ackerman's We the People project is a projected three-volume effort, with the first two volumes already published. Although this work will focus on volume one, it will also borrow heavily from volume two. We the People covers much ground, and an adequate analysis of all its parts would be difficult to treat within a single paper or book. But, before proceeding to a more specialized and limited treatment of We the People, an overall sense of Ackerman's project will be provided. In his first volume Foundations, he takes his theory of higher lawmaking and ordinary lawmaking and attempts to explain his dualist democracy. It serves as the foundation for his constitutional philosophy. He focuses on political foundations and tectonic shifts in political regimes from one generation to the next generation. The second volume Transitions takes the three major regime changes in American history and explains how this tripartite model can be of help in explaining American political and constitutional development.

Ackerman has set himself the major task of re-conceptualizing American constitutional law. He is bold in his challenge to both historian and theorist to re-think American constitutional politics. As indicated above, the cornerstone of his enterprise is what he describes as the dualist democracy of the American system of government. With this stroke, he challenges both parliamentarians and individual rights foundationalists to re-conceptualize American democracy. Parliamentarians are people who give priority to the legislative branch of government over the executive or judiciary. Individual rights foundationalists give priority to inherent or granted rights of individuals to shape their lives free from electoral politics. Voting should not be sufficient grounds to negate

inalienable rights that were granted by either a higher being or granted over generations as a matter of common law. Whereas parliamentarians would put everything to a vote, individual rights people carve out a space from the democratic process that is sacred and immune to democratic politics. The tension between a carved out sphere of individual rights free from the democratic process and the ability of democratic institutions to subject all matters to a vote has been an ongoing debate for generations.

Ackerman attempts to reconcile this tension between rights and democracy by giving democratic institutions a privileged position in altering rights that may be considered sacred by some. In this effort, he moves boldly and with sweeping breadth in this reconceptualization project. He intends no less than to overturn more conventional understandings of American constitutionalism. To do so, he breaks up American history into three major constitutional moments—the Framing of the Constitution, the Civil War, and the New Deal. Each of these constitutional moments has come about by revolutionary² upheaval and serves as a major marker for beginning any meaningful analysis of American constitutionalism. These three major constitutional moments have brought forth vast changes in how Americans define themselves and interpret their history.

What is defined as the constitutional moment theory of historical change goes beyond the cut and dry positivist understanding of American constitutional law. Ackerman means no less than to overturn the conventional understanding of constitutional change in

² Ackerman uses the term “revolutionary” in a different sense than the French Revolution, Leninist, or Maoist types of revolution. He believes that there can be such a thing as a liberal revolution. As a liberal, he generally means upheaval that falls short of total revolution, but, nevertheless, can still be revolutionary in scope. Ackerman has been influenced by Hannah Arendt’s work on this matter. For an elaboration on his conception of revolution, *see*: Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279 (1999).

the United States. Convention has it that the American people, through their representatives, are sworn to uphold the Constitution as it is written and changed via the formalist procedure set out in Article Five. That is, Article Five of the Constitution specifies all the legitimate ways that it could be altered. Ackerman believes this is not an accurate explanation of the American system of government. In the place of such a formalist procedure, he attempts to substitute a more dynamic and dialectical explanation of constitutional change. What lies at the heart of this enterprise is the Constitution is seen as a “living” document that can be altered by a multitude of ways that go outside of Article Five procedures and thereby giving new life to the document.³

In the process of explaining his theory of constitutional change, Ackerman commingles the liberal and republican traditions of political theory. He attempts to bridge the Hartzian and Pocockian tradition via his dualist democratic theory.⁴ He cannot *either* fully endorse the Liberal/Hartzian tradition of American development with all the paraphernalia of American exceptionalism, *or* the Republican/Pocockian tradition with citizens breaking out of their selfish needs to help the Republic. He aims to bridge this dual explanation of American development by acknowledging the strong liberal individualist streak in American politics without ignoring a tradition of civic virtue.

³ Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (Tribe argues, in opposition to this proposition, that Article V is not as malleable as Ackerman would have us believe. That in fact Article V does have teeth to it and cannot easily be discarded in the name of higher lawmaking.)

⁴ LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (A HARVEST/HBJ BOOK 1955); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (PRINCETON UNIVERSITY PRESS 1975). For a critique of both neo-liberal and neo-republican approaches, see: Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 529 (1995). For a further critique of the Hartzian model of American democracy, see: NORMAN BIRNBAUM, *THE RADICAL RENEWAL: THE POLITICS OF IDEAS IN MODERN AMERICA* (PANTHEON BOOKS 1988). Birnbaum says, “Hartz’s view of the United States as a society whose central agreement was that it was a democracy of property owners, and Hofstadter’s pervasive skepticism about the extent to which democracy could dominate property (to which was added an even more pronounced skepticism about the *bona fides* and efficacy of many of the tribunes of democracy).” p. 60.

Ackerman shifts back and forth between liberalism and republicanism as he weaves his tale of American development. As Miriam and William Galston wrote, “On another level, We the People represents Ackerman’s effort to mediate between liberal democratic theorists and their civic republican critics.”⁵

Further, Ackerman neither endorses a Wilsonian/Beardian progressive explanation of American constitutional development⁶, nor a more liberal laissez-faire explanation.⁷ Again, he is relying on his dualist democracy to bridge the gap between class/interest politics and unfettered privatization of national and natural resources.⁸ Yet, Ackerman is convinced that there is a discernable pattern to American development. His constitutional moments theory encompasses an explanation for how political change is legitimated in the United States, and how the masses play a vital role in that legitimation process.

Ackerman does this by splitting up politics into “normal” and “higher” level. By normal politics, he means the day-to-day legislation that governmental representatives are engaged in debating, blocking, or passing, about which the typical citizen knows nothing of what or whom such legislation will benefit or hurt. Presumably the representatives are acting for the benefit of all citizens. Whereas Ackerman characterizes higher level politics as those rare moments, three such moments thus far, according to Ackerman that brings the people into the political arena. Therefore, when the people speak on those rare

⁵ Miriam Galston & William A. Galston, *Reason, Consent, and the U.S. Constitution: Bruce Ackerman’s We the People*, 104 ETHICS 447 (1994).

⁶ WOODROW WILSON, CONGRESSIONAL GOVERNMENT (MERIDIAN BOOKS, INC. 1956); CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (THE FREE PRESS, 1986).

⁷ WILLIAM GRAHAM SUMNER, WHAT SOCIAL CLASSES OWE TO EACH OTHER (HARPER & BROTHERS PUBLISHING, 1920).

⁸ William W. Fisher III, *The Defects of Dualism*, 59 UNIVERSITY OF CHICAGO LAW REVIEW 955, 964-974 (1992).

occasions, what they say should be taken seriously by the professional politicians and the courts.

One key aspect of this “higher” level of politics is that citizens are brought directly into the political arena. According to Ackerman, the citizens play a key role in the “debating” and “deliberation” phase of the constitutional moment. Ackerman marks out four distinct stages in his constitutional moments theory of change: 1) political signaling, 2) proposing, 3) public debate/deliberation, and 4) Supreme Court codification.⁹ All of these stages of major political transformation have been questioned by scholars, but stage three has received sustained critique. For example, Nedelsky says:

What makes for a successful moment of constitutional politics? By Ackerman’s own arguments, it cannot be simply persuading enough people to accept the change you advocate; it requires getting them to ponder and deliberate the change with serious and sustained attention. Ackerman tells us too little about what enables a people to do this, especially given the rather grim picture he paints of what people do during the long periods of normal politics. What will enable them to reflect thoughtfully and effectively about basic shared political values, when for decades they have done little more than try to pursue their private interests?¹⁰

Also, Ackerman casts the Supreme Court in a “preservationist” role. That is, the Court serves to codify what the people said, and monitors the politicians during normal political periods to insure they do not exceed the people’s will. Hence, the Supreme Court, in the Ackermanian worldview plays a vital role in preserving the will of the people, until the people speak again. Ackerman sees the federalist role and separation of powers as vital in describing the American system of government. He will counterpoise this federalist position to the parliamentarian or Wilsonian understanding—or as he calls the Wilsonian democrats: “monistic” democrats. The Wilsonian democrats give the legislature supremacy. That is, a Wilsonian is like a parliamentarian, a person that sees the benefits

⁹ WE THE PEOPLE: FOUNDATIONS, pp. 267-269; for a more detailed presentation of Ackerman’s four stage theory of constitutional change, *see generally*, WE THE PEOPLE: TRANSFORMATIONS.

¹⁰ Jennifer Nedelsky, *The Puzzle and Demands of Modern Constitutionalism*, 104 ETHICS 513 (1994).

of giving primary authority to the legislative branch of government over the executive or the judiciary.

The final major element in the Ackerman thesis involves his treatment of individual rights. Here, Ackerman departs from his liberal position into a more civic understanding of individual rights. He will not ground his thesis in a natural rights philosophy. That is, he will not ground individual rights in a “higher power” or “being.”¹¹ Nor will he fix rights as immutable once placed in the Constitution. Hence, he objects to there being natural rights that could not be overturned by popular will if the people so chose to do so. He refers to those that protect rights first and democracy second as Rights Foundationalists.¹²

According to Leuchtenberg, scholars have not been kind to Ackerman’s constitutional moments theory.

Scholars have dealt harshly with Bruce Ackerman’s audacious reconfiguration of American constitutional history. Suzanna Sherry, who calls the Yale Law School professor “one of our best constitutionalist theorists,” nevertheless concludes that “Ackerman’s tale fails to inspire, because it is mired in a fictional past and envisions a utopian future” and because his “historical analysis is simplistic.”¹³

Now that the broad summary of Ackerman’s work in We the People has been stated, it will be examined in a more detailed way and sharpen the focus of what this paper aims to do and hopes to accomplish.

II. Constitutional Moments Historiography and Democracy’s Prospects

¹¹ Flaherty says, “For starters, Ackerman skimps on what Edward C. Corwin termed “the ‘[h]igher [l]aw’ [b]ackground of American Constitutional law.” As a matter of theory, We the People has little patience for “natural law”—or “right reason”—as a source of constitutional rights or value. [A]ny strategy for protecting rights outside constitutional politics can only be an ahistorical and essentially un-American import. But virtues higher lawmaking may not be all the Federalists believe in. As Bailyn pointed out a generation ago, American Whigs marched toward resolution with “the law of nature” as one of several arrows in their quiver.” (p. 588).

¹² WE THE PEOPLE: FOUNDATIONS, pp. 10-16.

¹³ William E. Leuchtenburg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 108 YALE L. J. 2077 (1999).

Ackerman states that there were three constitutional moments in American history. The first was the American Revolution/Constitution; the second was the Civil War/Reconstruction, and the third was the Great Depression/New Deal. According to Ackerman, these three major markers are the bedrock of American constitutional law as we know it today. Should any or all of these upheavals not have occurred, we would have a vastly different constitutional system.

Ackerman's historiography in depicting these demarcations is problematic. Many historians are left uncomfortable with Ackerman's leap into their domain. Ackerman claims that his historiography is anti-Burkean, yet one legal historian depicts his approach to be exactly that, Burkean.¹⁴ A Burkean is someone who believes in incremental change, is suspicious of abstract principles, and sees rule by the People as a troublesome concept. This I will call Ackerman's "historiographic problem."

The second component of the problem deals with the claim that the Supreme Court has served as codifier of what the People have said during constitutional moments. This work will show that Ackerman's depiction of the Supreme Court as preserving the People's will is seriously flawed and an inaccurate reflection of American constitutionalism. This I will call Ackerman's "the Supreme Court as preserver problem."

As indicated earlier, Ackerman's constitutional moments theory involves four stages: 1) political signaling, 2) proposal, 3) public debate/deliberation, and 4) Supreme Court codification. Political signaling indicates the need for political change. The proposal stage is one whereby elected leaders spell out their plans to address the new political

¹⁴ Eben Moglen, *The Incomplete Burkean: Bruce Ackerman's Foundation for Constitutional History*, 5 YALE J. L. & HUMAN. 531 (1993).

problem. The public debate and deliberation stage is the most critical because it demands that the public at large have an input in legitimizing the plans to resolve the changed circumstances of the nation. The final stage is basically a consolidation stage. It calls upon the Supreme Court to preserve the changes proposed and effectuated in the first three stages. The Court is asked to play this role because normal politics may dissipate the revolutionary gains made during the third stage. In order to secure the People's judgment and will from being whittled away during normal politics, the Court is asked to insure that the politicians do not backslide to a pre-revolution stage once the revolutionary fervor ends. According to this theory, the Founding, Reconstruction, and New Deal meet all of these criteria. Ackerman argues that these moments in American history are moments of regime change. Hence, once the above listed criteria have been met, it indicates that "We the People" have spoken.

For Ackerman constitutional moments are periods of "constitutional politics" or higher level politics, during which ordinary citizens participate in the political arena. They have transformed themselves from private observers and selfish individuals to civic-minded, public-regarding citizens. "Ackerman regards the concept of 'private citizenship' as being the foundational idea underlying dualism. As the founders recognized, most citizens in the United States are private citizens, not public citizens or perfect privatists."¹⁵

With this level of involvement of the mass of citizenry, during constitutional moments, politicians and the judiciary cannot disregard or take lightly what "We the People" have said. And for Ackerman, these constitutional moments are very rare in

¹⁵ Kent Greenwalt, *Dualism and Its Status*, 104 *ETHICS* 480 (1994); *see also*, Bruce A. Ackerman, *Neo-Federalism?* in *CONSTITUTIONALISM AND DEMOCRACY*, Jon Elster and Rune Slagstad, eds. (CAMBRIDGE UNIVERSITY PRESS, 1988). pp. 175-176.

American history. Ackerman finds only three such major constitution/regime changing events, in the 200-plus year history of the United States. During a return to normal politics, the professional politicians and judges must update their policies to reflect those changes that the People demanded.

Many commentators and critics have dissected Ackerman's work from numerous angles and perspectives. This reply attempts to make a contribution to the ongoing political and constitutional debate by approaching Ackerman's analysis of American constitutional politics from a rather unique angle. Ackerman, along with most of his critics, approach American political and constitutional development with a presupposition that takes democracy for granted. That is, democracy is assumed to be feasible even before any constitutional moments play themselves out. Democracy is like air, we notice it when we are choking for lack thereof. Or democracy is like water. It is all over the place and noticed when it's gone, during moments of drought. So it is taken for granted by both political scientists and constitutional law scholars, and democracy is taken as foundational for scholars beginning their inquiry into American politics.

This work will distinguish itself from the constitutional literature in that it will not presuppose such a democratic foundation. What Ackerman and his critics take for granted in their analysis of American politics and constitutionalism will be questioned here. That is, this work will not presuppose any possibility of the realization of democratic theory in the real world of American politics or in any other country's politics for that matter.

The realization of democratic principles in real life, outside of the theoretical world, is hard to come by if not non-existent. The usual defense of nations falling short of

democratic principles, including the United States, has been that we have a democracy in its rudimentary form, in its primitive form, in an undeveloped state, but we are growing our democracy day and night. That is, although democracy does not exist anywhere in the world in a perfect state, nevertheless, it is being home grown in many countries throughout the world, and each country has reached its own level of democratic growth. So the upshot of this is that some variation of democracy is worth striving for, even if perfect democracy cannot be established in the real world. What Ackerman and his critics fail to notice is that democracy is a fictionalism, perhaps a useful fiction in some abstract sense, but nevertheless a fiction. This reply dispenses of any such hope, dream, or expectation of democracy's growth. The foundation of this work, unlike Ackerman and his critics, does not presuppose the possibility of a democratic foundation, and the concept democracy is taken to be a basically metaphysical concept.¹⁶

Historically, the notions of democracy and popular sovereignty have not fared very well. Even Lincoln's "great antagonist" could have endorsed a notion of popular sovereignty akin to Ackerman's idea.

Ackerman's near-neglect of this possibility reflects the remarkable resemblance between his position and that of Lincoln's great antagonist, Stephen Douglas. It was Douglas, after all, who affirmed the principle of "Popular Sovereignty": As long as the inhabitants of the territories conformed to the relevant procedural norms, they were perfectly free to decide whether to enter the

¹⁶ For convenience's sake, not every use of the word "democracy" will be placed in quotations. Here the concept is being used either to conform to common rhetoric of its existence or to describe Ackerman or his critics. Although his critics are evaluating Ackerman's work, they are, nevertheless, working within the same framework or paradigm as he is. Hence, it should in no way be inferred that this paper will either accept or rely on any democratic principles that inform the work of other scholars or theorists. For a detailed critique of democracy, see: EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* (THE UNIVERSITY PRESS OF KENTUCKY 1973). Purcell says, "In Public Opinion Lippmann had retained some hope for a chastened, elite-controlled democracy, but he abandoned even that during the next three years. The Phantom Public, which he published in 1925, revealed an almost complete despair about the possibility of democratic government. His last hope was that people could be taught simply not to meddle in public affairs. If that were possible, private interests could somehow make the governmental process work. The public did not and could not govern." (p. 106). Further, Purcell goes on to say, "By the end of the twenties many students of government had come to reject what they considered the romantic idea that all men should actively engage in governing the country, assuming the irrationality of most men and the practical impossibility of actual popular control." (p. 108).

union as free or slave states, and there were no deeper constitutional principles inclined one way or the other. And while the event is unlikely in the extreme, Ackerman's dualist democracy similarly offers no principled arguments against a suitably mobilized majority of the people that chose to institute slavery.

It is pertinent to recall the grounds on which Lincoln opposed Popular Sovereignty, so understood. His thesis was that the collective right of the people to rule themselves, the right to begin the Constitution with "We the People," rests on a foundation of equal rights for individuals.¹⁷

Beyond the Lincoln-Douglas debates, the concept of popular sovereignty has not fared well.¹⁸ Whether the concept of popular sovereignty is equivalent to the concept of democracy is hard to say. But, regardless, of the degree of equivalence, they have not fared well as explanatory tools of American constitutional politics. In particular, the notion of democracy has not done well either in its 2000-plus years of historical journey from Greece; nor has it fared well in its modern reincarnation, since the French Revolution. Outside of rhetoric or high theory, one would be hard pressed during democracy's 200-year revival to find nations, countries, and states that have lived up either to its rhetoric or high-theory expectations. Consequently, those scholars or theorists that accept and incorporate such a theory in their investigations, analyses, or reviews have a very heavy burden to carry in explaining why they are incorporating such a theory into their work.

Accordingly, this work will argue that Ackerman's dualist democratic principles are problematic, because he implicitly and explicitly adopts a democratic foundation for his

¹⁷ Galston & Galston, p. 457.

¹⁸ "The sovereignty of the people is a key element of American constitutionalism. [T]he ratification of the Constitution through constitutional conventions enabled the founding generation to implement the abstract idea that only the people could adopt a fundamental law. Yet the doctrine of popular sovereignty has never had an entirely clear meaning in the American constitutional tradition. [M]ost colonists accepted the idea, conventional in the political theory of the time, that there must be a supreme, indivisible, final, and absolute power in every government. [I]n the debate over ratification of the Constitution, the Federalists gave new emphasis to the idea of popular sovereignty. Neither state government nor the new federal government was to be sovereign. Instead, the American people as a whole were the true sovereign, parceling out authority to the different levels and branches of government." STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* (PRINCETON UNIVERSITY PRESS 1996). pp 19-20.

constitutional analysis. Ackerman knows very well from his reading of the Constitution and of the disposition of the Framers of this document that they neither endorsed democracy nor incorporated democratic principles into the Constitution. Hence, Ackerman has a very heavy burden of proof to bear in finding the rudimentary elements of democratic principles underpinning the Constitution or in explaining how those who drafted the Constitution, being non-democrats to the last man, could have somehow inculcated any democratic principles into the document that they were drafting.

Ackerman has no difficulty accepting, and gladly accepting, such a challenge because a close analysis of his book, We the People, indicates that he is well aware that the original Constitution and its Founders were not democrats. But, this will not deter Ackerman in establishing the democratic *bona fides* of the Constitution retroactively. That is, although the Constitution did not start its life as a democratic document, it was subsequently transformed into a democratic document via the blood that was spilled to make certain fundamental amendments stick to it. Hence, the whole Constitution has experienced a rebirth every time the People stood up and demanded changes.

There are formidable problems of determining that “we the people” were the authors of any major political change in the United States—from the elite gathering of the constitutional convention in 1787 to the embrace of the regulatory state by much of the corporate elite in the New Deal era. I have come close to arguing that the Constitution of 1787 was designed to make it practically impossible for “we the people” ever to form and give effect to their considered political judgment.¹⁹

Built into Ackerman’s conception of American development is American exceptionalism, with a wink and nod to Hartz and to the Whig tradition of casting American democracy as a march for progress, liberty, and apple pie. That is, Ackerman

¹⁹ Nedelsky, p. 503.

sees American democracy as one of the strongest and one of the healthiest democracies ever known on this planet.

Ackerman is fully aware of historical arguments that suggest the difficulties in the formation and maintenance of democracies. He addresses some of the historical or theoretical concerns of democracy by distinguishing his dualist democracy from its Wilsonian and direct democracy cousins. But if democracy is not a viable or possible model, then whether it is dualist, unitarian, direct, or what have you, it is simply a very serious error to build such a model in describing the American system of government. It not only does not accurately reflect the current American situation, but it also risks distorting American historical development. This work will have none of such presuppositions.

Ackerman is jubilant and at times celebratory of the progression of American democracy. He sprinkles his rhetoric, in We the People, with nothing less than God smiling down on American democracy, with the Deity justly rewarding the American people with its blessings. So Ackerman's jubilation and overflow of patriotic fervor underlies much ground that he covers, only to pile qualification upon qualification, as the good lawyer that he is, to make sure that his enthusiasm and jubilation do not overtake his cautious lawyerly approach to writing constitutional history.

Ackerman aims at no less than rehabilitating the "People" in casting them front and center of American political development. For Ackerman, the People are the source and foundation and necessary energy to legitimize constitutional regimes and regime change during those critical moments that serve as markers to subsequent changes in constitutional law. "Still there are very grave problems with trying to legitimate the U.S.

government via popular consent. For at least two-thirds of American history, the majority of the adult population was legally ineligible to vote.”²⁰ “Whereas Bickel rejects “the People” and popular sovereignty as abstractions, Ackerman wants to imbue those concepts with meaning.”²¹ Without the People serving this important role, Ackerman would become very dismayed at the prospects of developing and nurturing American democracy.

Unfortunately, Ackerman’s belief in the People appears to be a very vague, almost a mystical belief—that they can be counted on to help bolster and define American prospects. Not only does Ackerman use the notion of the People as a trump card, but, he makes it easy for the People to exist in Ackerman’s dualist democracy. The main function of the People in Ackerman’s democracy is played out during stage three of his constitutional moments theory of regime change, the stage that involves public debate and deliberation on the part of the People to bring forth and help in the legitimation of the new regime. After the People have spoken, they can go back to sleep, so to speak, for the next 60 or so years—until they are required to awaken from their slumber for the next regime change.

Ackerman has a very good reason to assign the People this vital role. He recognizes, as well as many other empirical social scientists, that the People have fallen asleep during periods of normal politics. So if Ackerman is to salvage the role of the People in a democracy, he needs to make sure they are definite participants in the system, but on only very few occasions. The rest of the time, if the people manage to get themselves to the

²⁰ Roger M. Smith, *Legitimizing Reconstruction: The Limits of Legalism*, 108 YALE L. J. 2039, 2055 (1999).

²¹ Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L. J. 2165, 2208 (1999); *see generally*, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS*, 2nd ed., (YALE UNIVERSITY PRESS 1986).

polls and pull the lever once a year or perhaps every couple of years, the People have fulfilled their citizen role.

Ackerman sees no other way to inject ordinary citizens into the “normal” political debate on a continuous basis. As a follower of The Federalist and practical and shrewd reader of poll returns, he realizes his dualist democracy needs to make the People vital, yet also needs to explain their lack of participation and interest in day-to-day politics.

III. A Critical Analysis of the Underpinning of Ackerman’s Constitutional Democracy

The gist of this brief reply to Ackerman should suggest that Ackerman’s appeals to the People is nothing more than a smoke screen used to obscure the true objectives underlying various ideologies, ideas, and dreams that require wide support.²² Political scientists have not been kind to the idea of the People, especially since World War II, as the various behavioral models suggest that there are many people out there, but not a single entity encompassing the People as a whole.

²² Another scholar that is troubled by Ackerman’s appropriation of the phrase “We the People” is Randy Barnett. Barnett is skeptical of the unity such a phrase implies in the granting of consent or legitimacy to the proposed courses of action by the professional politicians, in the name “We the People.” Barnett says: “[I] will show that “We the People” is a fiction. I will demonstrate that constitutional legitimacy has not been conferred by either the individual or collective consent of We the People. [T]hough genuine consent, were it to exist, could give rise to a duty of obedience, the conditions necessary for We the People actually to consent to anything like the Constitution or amendments thereto have never existed and could never exist.” Randy E. Barnett, *Constitutional Legitimacy*, BOSTON UNIVERSITY SCHOOL OF LAW, (Working Paper Series, Public Law & Legal Theory, Working Paper No. 01-19). p. 8.

Pluralist political scientists, such as Robert Dahl, were able to capitalize on this insight in the 1950s by breaking up democracy into various interests groups.²³ Interest groups competing for resources, collectively take on the role of the People. Hence, democracy was redefined from the *People speaking to the various interests groups speaking* in their competition with one another for scarce resources through votes and dollars. This is a more utilitarian and practical form of democracy than the lofty “We the People” version.²⁴

Nevertheless, this does not deter Ackerman from serving as a cheerleader for American exceptionalism and his faith in “We the People.” Even though Ackerman splits citizens into three groupings—public citizen, private citizen, and perfect privatist—it is not clear what he is trying to accomplish with such a division.²⁵ Presumably, during constitutional moments, most citizens regardless of their classification during normal politics will become engaged and participate.

Ackerman appears to have an overly psychological explanation for participation in politics. It basically centers on the self-interest or selfish nature of our species. Whereas the People go about their day-to-day business during the normal political season, they

²³ ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (YALE UNIVERSITY PRESS 1989); *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL* (YALE UNIVERSITY PRESS 1982); *A PREFACE TO DEMOCRATIC THEORY* (THE UNIVERSITY OF CHICAGO PRESS 1956).

²⁴ JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (HARPER TORCHBOOKS 1976). Schumpeter’s procedural version of democracy marked a whole generation of post-World War II political scientists that became disillusioned over the prospects of an earlier more substantive and more progressive version of democracy. Ido Oren, *How America’s Foreign Policy Affects Its Political Science*, *THE CHRONICLE OF HIGHER EDUCATION*, sect. II, September 6, 2002, p. Oren says, “Progressive definitions of ‘democracy’ that had been common in the 1930s met a similar fate. During the Great Depression political scientists often defined democracy as much in economic as in political terms and as much in terms of substantive ideals as in terms of electoral process. [R]obert A. Dahl of Yale mounted a lucid defense of democratic socialism in his doctoral dissertation in 1940. Merriam defined democracy partly in terms of ideals such as ‘the perfectibility of mankind’ and fair distribution of economic gains throughout society. But, in the 1950s, political scientists concluded that faith in human ‘perfectibility’ was a pathology associated with ‘totalitarian’ regimes, and they abandoned substantive visions of democracy in favor of procedural definitions inspired by the work of Joseph A. Schumpeter.” (p. B13).

²⁵ *WE THE PEOPLE: FOUNDATIONS*, pp. 230-235.

seem to be forced into the political arena with focused attention to the goings on of public life during disasters, upheavals, famines, etc. So, Ackerman basically has a captive audience, whether they like it or not, during turbulent times. Whether this shock therapy or forced labor in the public domain properly squares with the People's choices is another matter. But Ackerman is able to claim, with some plausibility, that crises generate intense public interest in the issues and policies of the day.

However, if democracy is defined by voluntary participation in the political arena, then Ackerman's schematic is problematic because he catches his audience in a forced way during periods of upheaval. Regardless of whether the masses become mobilized under such immediate threat to their personal, economic, or land interests, it would seem to suggest that such moments are the worst period to consult the People, because they are less lucid and in a panic and are more likely to operate as a mob rather than calm citizens weighing their political options.²⁶ That is, Ackerman defines his constitutional moments as critical to his definition of a dualist democracy, but it seems that turbulent periods would be the worst time to consult the people, since the People are reacting under emergency conditions and are liable to over-react and take matters into their own hands. And if history is any guide, the People will mobilize themselves into deadly mobs and will threaten life or property of those they perceive as their enemy.

Yet Ackerman singles out such a period in his constitutional moments schematic to invite the People into the public debate. This seems to me to be a shortsighted and erroneous analysis of crises situations. Yet, Ackerman would have us believe that the

²⁶ Terrence Sandalow, *Abstract Democracy: A Review of Ackerman's WE THE PEOPLE*, 9 CONSTITUTIONAL COMMENTARY 309 (1992). "Crises do sometimes bring out the best in us, but at times they seem to do the opposite. It is, therefore, hardly self-evident that the increased popular attention to politics during such periods is especially likely to produce public-spirited deliberation." (p. 327)

People are in their most creative mode during such periods. One would assume that such periods should be treated as aberrations, and more thoughtful and creative solutions come about during less stressful and peaceful times. But, Ackerman would have none of it.

At bottom, although Ackerman would not directly admit it, he supports judicial supremacy in the day-to-day monitoring of normal politics. The Supreme Court's preservationist role becomes critical to ensuring that the professional politicians do not exceed the parameters set out by the People. Hence, indirectly, Ackerman has set up the Supreme Court as the ultimate authority and interpreter of the People's will during normal periods. Unlike the Progressive monists, such as Wilson, that give priority and supremacy to the legislative branch, Ackerman opts out for a federalist system where the Supreme Court serves as the ultimate interpreter and codifier of the People's will.

To what degree this undermines his faith in democratic principles is unclear. Although the People may speak in amorphous terms, it is the responsibility of the Supreme Court to decipher what they said and to codify it. It is a rather dubious proposition that the Court can maintain such a role. A brief review of Supreme Court opinions will show that the Court has not carried out its preservationist role, as Ackerman would have us believe.

The history of the Supreme Court is mostly one of neglect with regard to what the People have to say. But it is puzzling why a well-educated man such as Ackerman would place such ultimate faith in the Supreme Court. He is fully aware that the Supreme Court has been ahead of the People in a few cases in American history—and dragged its feet on popular demands in other cases. Yet, the Court could hardly be characterized as the People's preservation institute. Of course, here Ackerman neglects the fact that most

judgeships below the Supreme Court level are elected judgeships in the United States, with all that elections entail in terms of fundraising, politicking, campaigning, promising, and executing the partisan will of their supporters.²⁷ Nevertheless, Ackerman feels comfortable in casting the Supreme Court as the ultimate guardian of the People's will.²⁸

As indicated earlier, Ackerman characterizes American constitutional history as one Constitution/three regimes. He marks the first regime from the endorsement of the original Constitution until the Civil War, the second regime (also referred to as the Middle Republic) from the Civil War to the New Deal, and the third regime from the New Deal to the present. Ackerman takes the Civil War Amendments and the New Deal actions as markers for the emplacement of the new regimes. But unlike Justice Black, who saw the Civil War Amendments as incorporating the original Bill of Rights,²⁹ sort of nationalizing the Bill of Rights, Ackerman is convinced that the Civil War Amendments and the New Deal changes amounted to giving birth to new regimes, vastly different from the previous ones, yet not wholly discarding what came earlier.

Yet, those doctrinalists that uphold the restoration thesis take issue with Ackerman over the New Deal as a new regime. Rather they view the situation as one of restoration, believing that the Court of the Middle Republic, as evidenced by the *Lochnerism* of the period, exceeded its authority in overstepping the boundaries of the other branches of government and meddling with political and economic questions and issues.³⁰

²⁷ Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

²⁸ WE THE PEOPLE: FOUNDATIONS, p. 10.

²⁹ The Bill of Rights was intended to apply only to the Federal government, not to the States. Justice Black among others claims that the Reconstruction Amendments nationalized the Bill of Rights. That is, it has become applicable against the States as well as the federal government.

³⁰ WE THE PEOPLE: TRANSFORMATIONS, chap. 9.

According to the “restoration thesis,” the election of 1936, instead of bringing forth a new constitutional regime, was simply putting the Court back in its proper place. That is, the Court was to leave the political questions to the other branches of government and simply stick to interpreting the law. And the election of 1936 forced the justices to restore its traditional role by overturning their *Lochnerian* philosophy of reading a particular economics into their decisions. That is, the restoration theorists believe the Court has restoring its proper role in the federalist system by leaving economic and political questions to the other bodies. Hence, it was believed that the Court exceeded its authority during the previous 50 years, and the election returns of 1936 strongly indicated that the Court best retreat and to leave economic decisions to the political bodies and not go beyond those economic/property protections clearly stated in the text of the Constitution. “This is nowhere better illustrated than by the reaction of some leading Harvard doctrinalists to Ackerman’s criticism of restorationism. The response of Charles Fried and Laurence Tribe contain more than a whiff of the idea that the post-1937 Court was returning to the path laid down by Chief Justice Marshall.”³¹

Ackerman, however, will not have any of this restoration thesis.³² He attempts in his work to refute any suggestion that the Court has simply backtracking to a previous

³¹ Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L. J. 2115, 2123 (1999).

³² “Within the familiar story line, the Supreme Court’s defense of private property during the early twentieth century was a historical aberration, based on little more than the judicial will to power. In building up a structure of laissez-faire constitutionalism, the justices of the *Lochner* era strayed from the ancient truths elaborated by the Marshall Court. Once this point is recognized, Franklin Roosevelt enters the story as an avenging angel of legal tradition—forcing the justices to return to an older and sounder version of the Constitution.” Bruce Ackerman, *Rooted Cosmopolitanism*, 104 ETHICS 516, 523 (1994). For more on this debate between the “constitutional moments” theorists and the restoration theorists, see: Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONSTITUTIONAL COMMENTARY 115 (1994). pp. 117-12. McConnell says, “This challenges the constitutional view of New Deal constitutionalism, which rested not on a return to what Justice Hugo Black—a quintessential New Dealer—said was ‘the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.’” (p. 118) “Constitutional moment theorists, by contrast, tell us that the substance of the Constitution was transformed—not just that

position. His dialectical historiography suggests rather than retreating, the Court has been forced to move forward. That is, most doctrinalists take the Middle Republic opinions to be an aberration. But, Ackerman suggests nothing of the kind. Rather, he maintains that those opinions were proper, and the Court was simply reflecting the state-centered,³³ Social Darwinian thrust of the time of the Middle Republic. There was nothing aberrational about it. So according to Ackerman, the Court was forced to make progress after 1936 rather than retreat to an earlier period.

Similarly, Ackerman does not accept any explanation that smacks of the “grasp of war”³⁴ theory in explaining the inclusion of the 14th Amendment to the Constitution. He does not believe that the Republicans had a mandate, or a right, to exclude the Southern Democrats in passing the 14th Amendment, under a “grasp of war” theory, because Lincoln maintained all along that the South never had left the Union. Hence, claims Ackerman, the Southern states were illegitimately excluded from voting on the 14th Amendment, because under Lincoln's theory the South never left the Union, and they could return to their proper place within the Union upon the termination of hostilities. So, Ackerman does not buy the explanation that the Republicans were properly excluding rebel states because they were defeated and terms were dictated to them before they could

mistaken interpretations were corrected or that the balance of power between legislative and judicial branches was righted.” (p. 119).

³³ State-centered government being one in which the Federal government did not have the level of control over the local economy during the Middle Republic period. The Federal government played a smaller role vis-à-vis the state governments. It was a period where states held more power in controlling their economy than after the federalizing of the economy post-New Deal.

³⁴ The “gasp of war” theory suggests that Lincoln was wrong in suggesting that the Southern states formally left the Union. Although they seceded it was not a lawful exit, as rebellion states, once they laid down their arms, they were back to their original and lawful place in the Union. So they had a constitutional right to vote on the Reconstruction amendments because they ceased their hostilities. Historians have found such an explanation hard to believe. The “gasp of war” thesis holds that once the Southern states left the Union and took up arms against the Union, they became enemy combatants, not simply a minor breach but a break in the Union. So upon their surrender, they were in no position to dictate terms. In this “gasp of war” scenario, Lincoln was wrong. These states had to follow the orders of the Union if they expected to be taken back into the Union as full participants.

be allowed to rejoin the Union. Since the South made it clear that they would not vote for the 14th Amendment, they could properly be excluded as long as they failed to meet the terms and conditions set for defeated combatants.³⁵

What appears to be emerging is not simply a semantics debate as to the proper reading of historical documents, but the various interpretations based on ideological debates. With each group attempting to find a particular reading of historical events that supports their theory of constitutional evolution in the United States. Some have argued that Ackerman's one Constitution/three regime theory of American government is either under-inclusive or over-inclusive.³⁶ Some of Ackerman's critics would include the Age of Jackson, the dismantling of Reconstruction period from the 1870s to 1900s, the Civil Rights movement in the 1950s and 1960s, and the Feminist Movement of the 1970s.³⁷

At this point, we can begin to see the costly ways in which Ackerman's framework for legitimating the American regime minimizes moral substance. According to his telescoped but accurate retelling, the Jacksonian era was a thirty-year period when the nation through popular elections frequently endorsed, and the courts consolidated, a vision of the United States as a state-centered, racist white "democracy" in ways that went far beyond the settled constitutional understandings of the Founding era.³⁸

Further, Ackerman claims that lawyers, judges, and scholars that see a smooth transition from the Civil War and the New Deal are making a serious mistake in their

³⁵ WE THE PEOPLE: TRANSFORMATIONS, *see*, Part Two: Reconstruction.

³⁶ G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (HARVARD UNIVERSITY PRESS 2000). "Ultimately Ackerman lets his normative and schematic goals overwhelm his historical narrative. The result is an ingenious but over-determined portrait of constitutional jurisprudence at the time of the New Deal, and a remarkably sparse and derivative portrait of the years that preceded Ackerman's transformative moment in the 1930s." (p. 27).

³⁷ Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 845 (1996); Larry Kramer, *What's a Constitution for Anyway? Of History and Theory*, Bruce Ackerman and the New Deal, 46 CASE W. RES. L. REV. 885 (1996); both articles attempting to see whether the Lopez case signals Ackermanian constitutional change within the Newt Gingrich revolution; United States v. Lopez, 115 S. Ct. 1624 (1995); other scholars would add the dismantling of Reconstruction and the election of 1800 as constitutional moments, *see respectively*: Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONSTITUTIONAL COMMENTARY 115 (1994); Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 YALE L. J. 1959 (1999).

³⁸ Smith, p. 2065.

analysis of American constitutional history. “Throughout, Ackerman stresses the radicalism, the ‘unconventionality’ of Republican Reconstruction. It is central to his thesis that Reconstruction worked a ‘transformative’ change—another term that appears consistently in his text.³⁹ For Ackerman, the essence of transformation was what he calls a ‘re founding’ of the United States—the replacement of the incompletely nationalized polity established in 1788 with a fully nationalized polity.”⁴⁰ He neither accepts the grasp of war explanation with regard to the passing of the Reconstruction Amendments nor the restoration thesis in explaining the Court’s overstepping into the domains of the other branches of government. And, the election of 1936 forced the Court to return to the Marshall principle of not entangling the Court in political questions.

So the transformation of the American republic was nationalized and democratized via the passage of the 14th Amendment to the Constitution and the election of 1936. The procedures used were outside the formalities of the Constitution itself. Nevertheless, the document needed updating and change had to be made by going outside the Constitution’s parameters in order to effect change to the Constitution’s internal organs.

IV. The Supreme Court in the Middle Republic and its Aftermath

The Supreme Court has not served the role well, as the People’s preservation institute during the Middle Republic. Contrary to Ackerman’s thesis, the Court did not incorporate the People’s will in the aftermath of the Civil War or New Deal. The Civil War and New

³⁹ See generally, WE THE PEOPLE: TRANSFORMATIONS.

⁴⁰ Michael Les Benedict, *Constitutional History and Constitutional Theory: Reflections on Ackerman, Reconstruction, and the Transformation of the American Constitution*, 108 YALE L. J. 2011, 2028-2029 (1999).

Deal were major events, but the Supreme Court failed to serve as the People's codifier. Prior to the Civil War, the Supreme Court supported the institution of slavery with its opinion in *Dred Scott v. Sanford*,⁴¹ which was overturned by the 13th Amendment, but the Supreme Court did not take the 14th Amendment as a fundamental break in American constitutional law. Cases such as the *Civil Rights Cases*⁴² and *Plessy v. Ferguson*⁴³ continued the segregation and exclusion of blacks even though they gained their freedom.⁴⁴

Although big changes were underway during the late 19th century with regard to the power of private property via the explosion of corporate America, the Supreme Court was not more inclined to break with the past as Ackerman would have us believe. The *Lochnerian*⁴⁵ bent and Social Darwinian thrust of the turn of the century jurisprudence does not sit well with democratic principles. But, regardless, of the type of economic philosophy a particular Court may be imbued, the granting of popular consent becomes

⁴¹ 19 Howard 393 (1857) (The Court held that a Negro slave was not a "citizen" of the United States and hence could not claim rights and privileges afforded to citizens.)

⁴² 109 U.S. 3 (1883) (The Fourteenth Amendment does not inhibit private citizens from discriminating with regard to hotel, theater, or railroad accommodations to blacks.)

⁴³ 163 U.S. 537 (1896) (The Court promulgated the doctrine of "separate but equal" as sufficient in the treatment of black citizens.)

⁴⁴ BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* (OXFORD UNIVERSITY PRESS 1993). "Sumner's bill reached the statute books as the Civil Rights Act of 1875. It contained a prohibition against racial discrimination in inns, public conveyances, and places of amusement. The prohibition was, however, ruled invalid by the Wait Court in 1883 *Civil Rights Cases* on the ground that it sought to reach discriminatory action that was purely private in nature and consequently not within the scope of the Equal Protection Clause." (p. 166). Freedom of contract doctrine clashed with the rights of people to engage in private enterprise without being found to have trespassed on the rights of minorities. "It was Justice Peckham who spoke for the majority in the important freedom of contract cases decided by the Fuller Court. In particular, he wrote the landmark opinion in *Allgeyer v. Louisiana* (1897), where freedom of contract was established as an essential element of the 'liberty' protected by due process." (p. 180). "Chief Justice Fuller's biography does not even mention the 1896 case of *Plessy v. Ferguson*. Yet the decision there is now one of the most criticized decisions of the Fuller Court. [W]hile the Fuller Court developed the Fourteenth Amendment's Due Process Clause as the principal safeguard of property rights, its *Plessy* decision ensured that the amendment was of little value to the blacks for whose benefit it had primarily been adopted." (p. 188).

⁴⁵ *Lochner v. New York*, 198 U.S. 45 (1905) (The Court upheld the freedom of contract doctrine, that the State had no business interfering in privately agreed to contracts.)

an illusive enterprise. Barnett put it bluntly, “[t]he conditions necessary for We the People actually to consent to anything like the Constitution or amendments thereto have never existed and could never exist.”⁴⁶

Ackerman’s thesis becomes even weaker with regard to his claim of the effects of post-New Deal constitutionalism, since no new constitutional amendments were formalized as a consequence of the Great Depression, as was the case with the Civil War. Clearly, the Supreme Court thwarted some business regulation demanded by Roosevelt. Ackerman claims that the People have spoken, and the Roosevelt Administration responded to the People’s pleas for help by forcing the Court to change direction. Although there appears to be some truth to this proposition, the reality of the situation may not be a matter of simple causality.

The Court early in the New Deal was favorably inclined towards Roosevelt’s policies in such cases as *Home Building & Loan Association v. Blaisdell*⁴⁷ and *Nebbia v. New York*⁴⁸ show. But, the Court shifted away from the proposed legislation of businesses in the case of *United States v. Butler*,⁴⁹ as a marker thwarting New Deal legislation. And, the Court was finally pushed to be more accommodating to the New Deal initiatives to get a hold of the economy as indicated by cases such as *West Coast Company v.*

⁴⁶ Randy E. Barnett, *Constitutional Legitimacy*, BOSTON UNIVERSITY SCHOOL OF LAW (Working Paper Series, Public Law & Legal Theory, Working Papers No. 01-19). p. 8.

⁴⁷ 290 U.S. 398 (1934) (The Court found that the Minnesota Mortgage Moratorium Law was not a violation of the due process and equal protection clauses of the Fourteenth Amendment nor did it impair the Contracts clause of the Constitution.)

⁴⁸ 291 U.S. 502 (1934) (The State does not violate the Due Process Clause of the Fourteenth Amendment in fixing minimum and maximum prices for milk.)

⁴⁹ 297 U.S. 1 (1936) (The Court held that the Agricultural Adjustment Act of 1933 was unconstitutional because it violated state’s rights in attempting to regulate the control of agricultural production.)

Parrish,⁵⁰ *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,⁵¹ *United States v. Darby Lumber Company*,⁵² *Wickard v. Filburn*,⁵³ and *Ferguson v. Skrupa*,⁵⁴ as the aftermath of the New Deal shakeup and the so-called switch-in-time that saved nine.⁵⁵

But, it is not clear that Ackerman is correct in characterizing this shakeup as giving birth to a new regime—as a major break in American constitutional law outside of greater control and interest in business legislation. It is also not clear whether this was so radical of a break as to consider it a new regime. The Supreme Court continued to adhere to the separation of powers. And, although the office of the presidency, under the leadership of President Roosevelt, has gained in stature, the presidency continued to be boxed in by cases such as *Youngstown Sheet & Tube Corp v. Sawyer*⁵⁶ and *United States v. Nixon*.⁵⁷ So, it is clear the Supreme Court toned down its opposition to the legislative control of business due to the disaster of the Great Depression. As indicated above, the president

⁵⁰ 300 U.S. 379 (1937) (The Court held that a Washington state laws that prohibited wages below a living wage and conditions of labor detrimental to the health and morals of women and children were not contrary to the Due Process Clause of the Fourteenth Amendment.)

⁵¹ 301 U.S. 1 (1937) (The Court held that under the National Labor Relations Act of 1935 that the National Labor Relations Board was able to regulate a corporation that engaged in unfair labor practices.)

⁵² 312 U.S. 100 (1941) (The Court held that Congress may regulate interstate commerce, where the employer fell below the prescribed minimum wage or prescribed maximum hours without paying overtime, was within the scope of the Commerce Clause in insuring that substandard products did not enter the stream of commerce.)

⁵³ 317 U.S. 111 (1942) (The Court upheld Congress’s power to regulate wheat production and consumption that is not destined for interstate commerce but solely consumed within the state in accordance to the Agricultural Adjustment Act.)

⁵⁴ 372 U.S. 726 (1963) (If the state passes legislation limiting the debt adjusting business to legal professionals, then it is not the business of the Court to insert its own opinion on that matter, according to Justice Black who wrote the opinion of the Court.)

⁵⁵ The “switch-in-time” refers to Justice Roberts switching his vote in support of New Deal legislation. With Justice Robert’s switch, a majority could begin endorsing Roosevelt’s regulatory programs. If there was not this switch-in-time, Roosevelt was willing to consider packing the Court by putting additional members on the Court who saw the need for greater governmental control of business.

⁵⁶ 343 U.S. 579 (1952) (The Court found that President Truman’s attempt to seize the steel mills in order to prevent the stoppage of production of what was deemed to be a vital industry was beyond the scope of his power as Chief Executive.)

⁵⁷ 418 U.S. 683 (1974) (The Court held that President Nixon could not withhold certain information from the court under the theory of executive privilege.)

could not take over a business in time of need or emergency, and claims to presidential privilege fell on deaf ears.

Hence, although the office of the 20th century presidency gained greater stature than the 19th century office of the presidency due to the leadership efforts of Roosevelt, it should not be characterized as a major break or a structural change in constitutional history. Lincoln held considerable power during the Civil War. And, emergency situations do thrust executives into the limelight. But, this is merely due to the nature of the office, rather than some planned manifest destiny towards greater democratization. With the fractional and in fighting of Congress, Presidents are given greater leeway to show leadership under crises conditions. Congress is not designed to act in such emergencies because decision by committee is a long drawn out process. In many other areas of law, it was business as usual. Or, the natural changes that come from the retirement or exit of Justices. Hence, it seems that Ackerman overplayed his hand in his characterization of American constitutional history as one-Constitution/three-regimes.

As Ackerman explains the New Deal, the reader too often sees the author's hand manipulating the story. Historical actors become oddly prescient. The justices of the Hughes Court, for example, are portrayed as if they were conscious Ackermanian theorists, merely seeking to prod Franklin Roosevelt to clarify his electoral mandate with the votes of the New Deal legislation. The book is also filled with "alternative histories" that imagine the causes of constitutional history if critical events had gone differently.⁵⁸

The New Deal model of constitutional change effectively undermines a central element of constitutionalism, its commitment to formality. Constitutionalism requires adhering to legal forms rather than directly pursuing a given goal, whether those forms require respecting the boundaries of the separation of powers, the technicalities of a fair trial, or the categories of the rule of law. By contrast, Ackerman is most impressed with FDR's pragmatism, his willingness to make use of any means to accomplish his goals.⁵⁹

⁵⁸ Keith E. Whittington, *From Democratic Dualism to Political Realism: Transforming the Constitution*, in CONSTITUTIONAL POLITICAL ECONOMY (KLUWER ACADEMIC PUBLISHERS 1999), p. 407.

⁵⁹ *Ibid*, p. 410.

As indicated above, the Supreme Court opinions after the Civil War and New Deal do not support Ackerman's foundational break with the past to sufficiently sustain his thesis of one-Constitution/three-regimes. If Ackerman's thesis is correct, then the Supreme Court should take decisive steps in the aftermath of the Civil War Amendments and the New Deal to adapt the Constitution to the new needs of the people. "How, then, should we assess Ackerman's contention that 1936 was a constitutional moment? Without doubt, he goes much too far in maintaining that the American people were consciously amending the Constitution in 1936."⁶⁰

Clearly, legal opinions cannot continue to keep their value once a new political regime replaces the old regime. But change in law does not come as quickly as it does in politics. Hence, many intervening factors, along with the natural replacement of Court justices, can lead to change in Court direction which goes on outside the parameters of the People demanding such and such changes be made in a simple causation model.

It is also not clear as to how controversial subjects can easily be reflected in legal doctrine that are not clearly resolved one way or another in the greater public arena. For example, not only has the Supreme Court thwarted the march of "We the People" towards democratization, but even if it served to move in that direction, as was the case with the civil rights cases such as *Brown v. Board of Education*,⁶¹ such movement proved fruitless because the Supreme Court could not democratize practices that were embedded in particular histories. According to Ackerman, cases like *Brown*, *Griswold v.*

⁶⁰ Leuchtenburg, p. 2113.

⁶¹ 347 U.S. 483 (1954) (The Court held that segregation of children solely on the basis of race, even though the schools were of equal quality, did violate the students rights of equal educational opportunities.)

Connecticut,⁶² and *Roe v. Wade*⁶³ are synthesizing cases or consolidating cases rather than markers for major shifts in constitutional law. So how is it possible for the Court to divine the law in controversial cases? Why would the Court bother to decide such conflicts without clear direction from the democratic principles as laid out by the major political parties?

However, whether these cases should be seen as synthesizing cases or major markers of American constitutional law is controversial, because each resulted from a prolonged effort by civil rights movements, women's movements, and feminist advocacy groups that challenged the original Constitution in ways that would have never occurred to the original drafters.

Certainly blacks and women were excluded from participating in or allowed to sit at the original drafting of the Constitution. It required many decades of struggle for these groups to gain constitutional recognition and to further consolidate those gains. But for Ackerman, the Civil Rights movement in the 1950s and 1960s and the feminist movement in the 1960s and 1970s, or an earlier generation of women's movements seeking the vote, are considered by Ackerman as the privileged beneficiaries of the Reconstruction and New Deal constitutional alignments. This seems to be reading history backwards—but skipping over the struggles of African-Americans or women's movement for equality.

Ackerman's hope that the legal community will recognize his one-Constitution/three-regime theory remains elusive, despite his critique of those legal scholars whom he refers

⁶² 381 U.S. 479 (1965) (The Court held that a Connecticut statute that prohibited the distribution of birth control as a violation of the privacy clause of the Ninth Amendment.)

⁶³ 410 U.S. 113 (1973) (The Court held that a Texas statute violated a woman's right to an abortion as a violation of Due Process and Privacy Clauses of the Fourteenth and Ninth Amendments. The protection of "person" did not include the unborn as found in the Fourteenth Amendment.)

to as sticklers for original text. He seems to be of the opinion that simply because formal changes are made to the constitutional document or a switch in time either via the President after the Civil War or the Justices during the Great Depression, leads to changes in fact. But, formal changes are made to documents does not mean that changes in circumstance follow.

Ackerman seems to have the optimistic view that changes in legal structure do, indeed, indicate the coming forth of new regimes, a sort of predetermined or manifest destiny to the further democratization of the original Constitution. “Yet I find Ackerman’s account over-determined. It overemphasizes the role of the Court in bringing about social change that Ackerman considers positive.”⁶⁴

Cases following a Civil War and the Great Depression do not suggest the deep and foundational changes that Ackerman proclaims. He seems to feel that lawyers and judicial folk are slow to recognize the major changes to the Constitution as a consequence of the Civil War and the Great Depression. The Supreme Court decisions during and after these major upheavals in American society did not result in furtherance of the democratization of the original Constitution. And, at best, Court opinion after these major social shakeups is mixed.

Further, Ackerman believes that We the People, as citizens, are empowered to go beyond the formalist criteria in making drastic changes to earlier legal documents when we are called into action during times of trouble or stress by the politicians. He charges those sticklers that closely adhere to the original specifications of the Constitution of being hypertextualists. “This is Ackerman’s belief that ‘hypertextualism’ and allied

⁶⁴ Kalman, p. 2196.

approaches are incompatible with the empirical facts of a living and changing constitutional order.”⁶⁵

He believes that in practical affairs, people are empowered to go beyond Article Five in making changes to the Constitution. He claims this is already what happened with the Civil War Amendments and with the New Deal. Deep fundamental changes were made to the original document by going outside its four corners. In both of these instances, extra-legal means were used to effectuate the change. The same could be said about the Articles of Confederation—when it came to making changes, the Founders proceeded by extra-legal means to bring forth the new Constitution.

Ackerman justifies each of these innovative and creative techniques in amending the Constitution on the ground that ultimately the People were brought into the process, and they legitimized the outcomes of the Constitution, the Reconstruction Amendments, and the New Deal. In other words, even if changing the Constitution or drafting a new Constitution exceeded the formal procedures for making changes to these documents, it was, nevertheless, justified because the People were called upon to endorse and legitimize the end product. Thus, the process may have been illegal, but the end product was ultimately sanctioned by those that ultimately count, We the People.

So, first, Ackerman makes a mistake with regard to his historiography of American constitutional law; that is, Ackerman seems to adopt a sort of Hegelian dialectical interpretation of history, as a sort of inevitable movement toward greater democratization. “Ackerman is motivated to focus on transformative moments precisely because he fears the implications of simply accepting the idea that constitutional

⁶⁵ Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman’s We the People*, 108 YALE L. J. 2237, 2244 (1999).

principles are historically contingent.”⁶⁶ And, second, Ackerman appropriates and misuses a key concept in his analysis of American constitutionalism. He appropriates the ideas of “democracy” in his characterization of the American system of government. This distortion is in need of a remedy. Ackerman first targets those legal scholars who see the Civil War Amendments as a mere continuation of the original Constitution, such as Justice Black, who would be labeled a hypertextualist by him. Second, Ackerman targets the Wilsonians, as adherents of monistic government, with violating the separation of powers. Ackerman adopts Madison’s position via The Federalist⁶⁷ to contest the collapsing of political authority in the way suggested by President Wilson.⁶⁸ Ackerman seems to want to modernize Madison into a supporter of his dualist democracy. Yet under no circumstances could Madison support the People participating in politics. According to Madison, the People should be able to participate in politics at the most minimal level and very few members of the populace actually qualified to participate in the political arena. Slaves, women, indigent men, natives, etc. were not qualified to participate in a Madisonian democracy. Only the elite and those with property qualified to participate in the political arena.⁶⁹

The Founders inherent fear of centralized authority or the amassing of majority power in the hands of ordinary citizens translated into a Federalist republic, with checks and

⁶⁶ Les Benedict, pp. 2015-2016.

⁶⁷ Nos. 47, 48, & 51.

⁶⁸ WOODROW WILSON, CONGRESSIONAL GOVERNMENT (MERIDIAN BOOKS, INC. 1956).

⁶⁹ Fisher says, “He [Madison] 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.” (p. 965) Further, according to Eric Foner, the Madisonian system of government is precisely constructed to impede equality. He says, “For Madison, the answer was to structure government so as to prevent any single economic interest from achieving power. With its elaborate system of checks and balances and divided sovereignty, the Constitution was designed, in part, to enable republican government to survive the rise of economic inequality (and to render unequal concentrations of property immune from governmental interference).” ERIC FONER, THE STORY OF AMERICAN FREEDOM (W.W. NORTON & CO. 1998). p. 22.

balances, and the separation of powers. Also, the Founders had to deal with the practical task of uniting the States beyond the loose links established by the Articles of Confederation. The citizens of the thirteen separate and independent states saw themselves as citizens of their respective states rather than as Americans.

The fear of concentrated power has dissipated since the Founders drafted the Constitution, not because of changes in human nature during the 200-year span, but because of technological and industrial advances. The private sector has advanced to the point that public space is only of secondary importance in the ordering of people's lives.⁷⁰ Government simply serves as a traffic officer and umpire in a world dominated by private business and industry. Private industry and corporations have rewritten the old fashioned territorial boundaries that were monitored via nation-states. The protection of the physical borders is less of a priority than the protection of intellectual property. Consequently, the agrarian society, in which the original Federalist Constitution was developed, has passed from the scene.

At bottom, Ackerman's thesis is that citizen participation is not dead. That is, although he recognizes the empirical evidence with respect to the decline of citizen participation, he, nevertheless, goes on to explain this decline in the following way: Even though citizen participation is needed for the government to be labeled a "democracy," this does not mean that citizens must participate in everyday politics. Citizens may delegate this responsibility to the professional politicians. So, even though day-to-day citizen participation is low in American politics, it does not negate the label that Americans choose to describe their government. Although it is not a direct democracy, it can faithfully and accurately be labeled a "representative democracy" because citizens

⁷⁰ GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (VINTAGE BOOKS 1966).

are the ultimate sovereign. Is Ackerman attempting to explain dualist democracy a way of justifying and salvaging the label of “democracy” even though he is fully aware that citizens have little interest or inclination in participating in the political arena?

In short, Ackerman’s thesis is that although citizen participation in politics has declined, we can still characterize the American government as a “democracy” because citizens play a key role during those critical moments in American constitutional history—where their turnout is crucial to legitimizing a particular course of action or policy. That is, citizens are busy people; they have lives to live; they hardly have the time to constantly engage in day-to-day politics. What is puzzling and needs to be fleshed out is that Ackerman seems to perfectly understand the lack of citizen participation, citizen interest, and sufficient citizen information to elect representatives to speak for him or her. Yet Ackerman still depends and relies on citizen participation as the key to transformative government. How does the lack of citizen participation in politics affect Ackerman’s thesis of dualist constitutionalism to speak for We the People?

As indicated above, Ackerman is well aware of the problem of citizen participation. He seems to recognize, correctly, that deterioration of citizenship participation poses serious problems in establishing and maintaining “democratic” institutions. However, I have argued that despite Ackerman’s correct evaluation of data, suggesting the neglect and relative ignorance of citizens regarding the political world, Ackerman has not completely understood or come to terms with the fundamental problems involving democratic principles. If all citizens know about politics is paying taxes and compulsory jury service, the assumption that they care about government outside their pocket book or with issues that do not tangentially affect them seems reasonable.

Why should government press more for their attention than private industry or non-profit corporation? Citizens that are looking for safety, putting food on the table, and pursuing their goals, unhindered by either the public sector or the private sector, have no need to privilege one over the other. Pluralists recognized this as far back as the 1950s—that the government can be seen as just one more interest group competing with many other interest groups for citizen attention and dollars. If a corporation is best able to provide these goods to the citizenry, and the public sector is simply perceived as taxing them, then why would citizens be more loyal to the government over a corporation that clothes, feeds, and protects their financial security? Of course, this is only a rough analysis of day-to-day living. It excludes a consideration of the government’s overall contribution to the private sector by making it possible for corporations to operate in the first place.

It appears that Ackerman is well aware of his critic’s charges with regard to his excessive reliance on American exceptionalism, the growth of democracy, and patriotism. Ackerman is aware of those that claim his optimistic march of democracy is blinded only by his patriotism. Ackerman replies thus: “There are Whigs and there are Whigs. My own version—such as it is—absolutely renounces any notion of linear constitutional development, and especially the whiggish conceit that this linear development has reached for all of us to greet Y2K as the final triumph of the American struggle for freedom, equality, and justice.”⁷¹

⁷¹ Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2310 (1999).

V. Conclusion

In summary, I argued that Ackerman makes a very serious mistake in grounding his dualist constitutionalism on popular sovereignty. The notion of popular sovereignty is controversial. It especially poses serious problems for the Rights Foundationalists. Those that privilege individual rights to democratic principles are dismayed over Ackerman's dualist democratic thesis, which states that basic rights that are either listed in the Bill of Rights or elsewhere can be overturned, removed, or amended in accordance with the People's will.

Basically, the People rule in an Ackermanian democracy. Ackerman does not see anything in the Constitution or official documents that could not be overturned by following his constitutional moments procedures. For example, should a sufficient amount of people wish to add an amendment to the Constitution declaring Christianity the official religion, then so be it.⁷² Democracy trumps rights in the Ackermanian universe. The People have spoken. Many rights foundationalists are dismayed at the ease by which majority rule can trump fundamental rights under Ackerman's reading of the Constitution.

His one Constitution/three regime model of American constitutional history is in need of close examination. What he regards as the three constitutional moments has been found to be either over-inclusive or under-inclusive by his critics. Legal historians and

⁷² "For the Galstons especially, the Constitution is built upon a foundation of inalienable rights—whose content is to be elaborated through appropriate philosophical speculation. Only after this foundation has been secured does the Constitution give leeway to democratic judgment on less-than-foundational issues. I am more skeptical. My understanding of the Constitution does not begin with inalienable rights; it starts with the effort by the American people to govern themselves. Fundamental rights have constitutional status only if they have their source in a deliberate and mobilized affirmation of principle by the American people. Our constitution is democratic first, rights-respecting second." Bruce Ackerman, *Rooted Cosmopolitanism*, 104 ETHICS 516, 517 (1994).

other historians have found difficulties with Ackerman's sharp demarcation in the periodization of American history.⁷³ Historians have debated whether other periods of American history deserve to be included in what Ackerman considers constitutional moments. For example, there are historians that believe the Age of Jackson should also be included. Others believe that the dismantling of Reconstruction also merits inclusion as a constitutional moment.⁷⁴

Also, his casting of the Supreme Court in the preservationist role in codifying the People's will is seriously mistaken. Regardless of his love of the People, Ackerman reserved a most critical role for the Supreme Court. He places his faith that that non-elected institution will be able to preserve his dualist democratic principles better than any other. He seems to be wedded to the proposition that the Supreme Court has done a reasonable good job (not a perfect job by any means) as the official interpreter and guardian of the American Constitution. Therefore, he wishes the Court to continue serving as the People's preservationist institution. However, scholars and other thoughtful people over the generations would not be as optimistic or enthusiastic as Ackerman in casting the Supreme Court as the guardian of the People's will.

I have attempted to illustrate in this brief reply and overview that his faith in the Supreme Court is not justified. Ackerman uses the mask of a dualist constitutionalism to evade the central problem of American constitutionalism: that popular sovereignty plays no role, or only a small role, in constitutional politics. But, in order to mask the small

⁷³ Sandalow, "Constitutional change, as the post-adoption history of the fourteenth amendment demonstrates, is the product of a far more fluid, complex process than Ackerman's conception of 'higher lawmaking' captures. The distinction he draws between 'constitutional politics' and 'normal politics' dichotomizes phenomena more appropriately represented as points along a continuum." (p. 324)

⁷⁴ Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONSTITUTIONAL COMMENTARY 115 (1994).

interest in citizen participation in public affairs, Ackerman establishes an elaborate dualist constitutional model to hide the non-democratic nature of American government. That is, in order to explain this lack of citizen participation in matters political, Ackerman develops an elaborate scheme of dualist democracy as a cover for political legitimacy.