

## Review Essay

### ABSTRACT DEMOCRACY: A REVIEW OF ACKERMAN'S *WE THE PEOPLE*

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*We the People: Foundations*. By Bruce Ackerman.<sup>2</sup> Cambridge, MA: The Belknap Press of Harvard University Press. 1991. Pp. x, 369. Cloth, \$24.95

*We the People: Foundations* is an ambitious book, the first of three volumes in which Professor Ackerman proposes to recast conventional understanding of and contemporary debate about American constitutional law. Unfortunately, the book's rhetoric—inflated, self-important, and self-congratulatory—impedes the effort to come to terms with its argument. How, for example, does one respond to a book that opens by asking whether the reader will have “the strength” to accept its thesis? Or that announces the author's intention of “engaging” two of the most influential works of intellectual history of the past several decades—and then discusses one in two and one-half pages and the other in one and one-half?

Despite its off-putting rhetoric, *We the People* is an interesting, often provocative, and potentially influential book. One cannot help but admire its ambition, the breadth of knowledge that informs it, and many of its insights and arguments. I suspect that many students of constitutional law will conclude that Ackerman's thesis provides an attractive framework within which to address constitutional issues. That prediction, however, has less to do with the persuasiveness of the thesis than with the opportunities it creates for employing the Constitution creatively to address a broad range of social and political issues.<sup>3</sup>

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3. The current composition of the Court may, of course, diminish the enthusiasm of some for employing the Constitution that way. But then, it may increase the enthusiasm of others.

## I

The fulcrum of Ackerman's thesis is the problem of constitutional change. As the twentieth century closes, Americans live under a governmental regime vastly different from the one contemplated by the founding generation. Congress, originally and still in theory limited to the exercise of enumerated powers, has for all practical purposes become the legislature of a unitary nation. The President exercises power far more extensive than can plausibly be brought within the founding generation's understanding of the "executive power" conferred by Article II. The Supreme Court, Hamilton's "least dangerous" branch,<sup>4</sup> has emerged as a major policymaking institution, exercising power that the framers would not have recognized as being "of a Judiciary Nature."<sup>5</sup> Extensive authority is vested in "independent agencies," a "fourth branch" of government that not only does not fit comfortably within the tripartite system established by the Constitution, but which, in combining legislative, executive, and judicial functions, exercises power in a manner that Madison labelled "the very definition of tyranny."<sup>6</sup>

As the power of the national government and each of its branches has grown, the autonomy of the states has contracted, perhaps to the vanishing point. Originally understood to be the constituent governments of a federal system, the states now occupy a constitutional position not markedly different from that of local governments in a unitary nation. Federal law displaces state law on an ever-widening range of subjects as citizens increasingly look to the federal government to address any and all issues thought to require the attention of government. Within the areas of the states' competence, moreover, federal law significantly influences and often determines the policies they adopt, the procedures they follow, their internal organization, and even their political structure. And to assure their compliance with federal law and policy, they are subject to the supervisory authority of a large federal bureaucracy and the federal courts.

The "problem of constitutional change" is that these alterations in the structure of government cannot be accounted for by the mechanisms of change provided by the Constitution. Article V embodies the framers' understanding that with the passage of time changes would be required in the constitutional plan. Consonant

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4. Federalist No. 78 (Hamilton) in Jacob E. Cooke, ed., *The Federalist* 521, 522 (Wesleyan U. Press, 1961).

5. Max Farrand, ed., 2 *The Records of the Federal Convention of 1787* 430 (Yale U. Press, 1911).

6. Federalist No. 47 (Madison) in Cooke, ed., *The Federalist* at 324 (cited in note 2).

with their understanding of the most fundamental feature of the governmental system they were creating, the mechanisms they provided for achieving such changes required the participation of the states: The Constitution might be altered only if three-fourths of the states consented. As Ackerman argues, it hasn't worked out that way.

Two illustrations, both involving constitutional provisions that have been important vehicles for redistributing power from the states to the nation, suffice to make the point. Ackerman maintains—rightly in my view—that the commerce clause, even as expansively interpreted by Marshall, will not do all the work required to justify the federal government's plenary authority over the economy. The early understanding of that clause was embedded in the further understanding that federal power over interstate and foreign commerce would leave large areas of economic activity within the exclusive control of the states, thereby allowing them to serve as important sources of countervailing power. The Supreme Court's attempt during the early decades of the twentieth century to confine federal authority over the economy was not the product of willfulness nor of its failure to appreciate the realities of modern economic life, but a reasonable effort to carry forward the framers' understanding that authority to regulate economic activity would be divided between the nation and the states.<sup>7</sup> The collapse of that effort and the ensuing assumption of national responsibility for the economic life of the country represents a major departure from the original constitutional plan, one that most of us fully accept, but it was achieved, significantly, without the participation of the states contemplated by Article V.

Though the mechanism of change was different, essentially the same is true of another important vehicle for the expansion of federal power, the fourteenth amendment. Controversy over the amendment has for many years focused upon questions about how it should be interpreted, but Ackerman usefully directs attention to a quite different issue that it raises. The amendment, like the less formal "amendment" that permitted the federal government to assume responsibility for management of the national economy, was adopted without the participation of the states contemplated by Article V. As Ackerman reminds us, the "consent" of the states to the adoption of the amendment was purely formal: The necessary assent of the Southern states was obtained by means that deprived

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7. See Terrance Sandalow, *Constitutional Interpretation*, 79 Mich. L. Rev. 1033, 1048 (1981); Terrance Sandalow, *The Expansion of Federal Legislative Authority* in Terrance Sandalow and Eric Stein, eds., *Courts and Free Markets* 49, 65 (Clarendon, 1982).

them of the opportunity for independent judgment implicit in the requirement that three-fourths of the states join in approving any amendment to the Constitution. In effect, Congress nationalized the process of constitutional amendment.<sup>8</sup>

These and other departures from the original constitutional design that have been achieved without regard to Article V are now so deeply embedded in our "working constitution" that it may seem quixotic to raise questions about their legitimacy. The question of legitimacy is, however, of more than academic interest. Ackerman is right to emphasize that the absence of a satisfactory theory—one that recognizes and justifies the realities of constitutional change—has a corrosive effect on the commitment to constitutionalism. And, as his argument also suggests, the theory by which past constitutional change is understood is likely to exert a shaping influence upon the means by which constitutional change is sought in the future.

Ackerman addresses the problem of constitutional change by embedding it within a comprehensive theory of the American constitutional experience, one that seeks to explain and justify the workings of American democracy and the institutions through which it is given expression. Briefly stated, he argues that our constitutional tradition distinguishes between "constitutional" and "normal" politics, between decisions made by "the People"—a civically aroused electorate—and those made by the government. Building upon ideas widely held when the Constitution was adopted, he maintains that only the former are entitled to constitutional status. Instances of such "higher lawmaking" are necessarily infrequent because, as the framers understood, in a liberal democracy the mass of citizens cannot be expected to be continuously attentive to politics, much less to deliberate about the issues of principle that are the subject matter of constitutional politics. Their attention is, inevitably and desirably, mainly directed elsewhere—to their work, to their families and friends, and to religious and cultural activities, "all weaving together to form the remarkable patchwork of American community life." A diminished sense of civic responsibility is "the price we pay for freedom—freedom to explore the depth and breadth of the human spirit; freedom to live within one of the countless frameworks of meaning opened up by the modern world." (306)

During the long periods of civic slumber, when most citizens are relatively inattentive to public affairs, government must none-

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8. See also Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *Yale L. J.* 453, 500-10 (1989).

theless go on. Important decisions must be made. Interest groups—motivated by a desire for private advantage, by ideals, or by some mixture of the two—inevitably attempt to influence those decisions. But though periodic elections provide a measure of accountability to the citizenry, the People—the mobilized mass of citizens seriously engaged in deliberating about the principles that should guide the operation of their government—are not present at these times. Because they are not, the ever-present claims of government officials and interest groups who purport to speak on their behalf must be rejected. Decisions taken by government during these periods of civic somnolence must, instead, respect the principles established by the People when they have spoken.

From time to time, the People do arise, responding to arguments that some fundamental change in the constitutional order is required. Politics during these periods is marked not only by increased public attention to and more serious deliberation about the affairs of government, but by enhanced public-spiritedness, a greater willingness on the part of citizens to put aside their personal interests in the pursuit of the public interest. The obvious question is how one knows when the People have accepted the argument for constitutional change. One lesson of our history, Ackerman responds, is that the People are not limited by a requirement that they express their will through established legal forms. The People did not respect the procedures established by the Articles of Confederation when they adopted the Constitution, nor did they comply with Article V when they approved the constitutional changes wrought during what he regards as the other great “transformative moments” in American history, Reconstruction and the New Deal. Just as the founding generation invented constitutional conventions as a means of eliciting the People’s will, subsequent generations found other irregular means for ascertaining whether the People would approve major changes in the constitutional order.

With respect to the latter, Ackerman imaginatively develops striking parallels between the adoption of the fourteenth amendment and the “ratification” of the constitutional changes that, as he views it, were accomplished by the New Deal. Briefly, he argues that in both instances the separation of powers in the national government substituted for Article V as a means of bringing to the People the question whether the existing Constitution should be fundamentally altered. In each instance, part of the government—Congress in the earlier, the President and Congress in the later—proposed measures inconsistent with the received understanding of the Constitution, measures that were resisted by another branch—

the President in the earlier, the Supreme Court in the later. On each occasion, the resulting impasse led those proposing change to take the issue to the country at the next election, and at both elections the People overwhelmingly voted for the proponents. Armed with a mandate from the People, the proponents returned to do battle with the conservative branches, threatening the President with removal from office and the Supreme Court with “packing.” In each instance, the conservative branch then acquiesced, thereby completing the process of constitutional change.

These “transformative moments”—the founding, Reconstruction, and the New Deal—provide the framework for Ackerman’s interpretation of constitutional history, dividing it into three distinct “constitutional regimes,” which he defines as “the matrix of institutional relationships and fundamental values that are usually taken as the Constitutional baseline in normal political life.” (59) The “early republic,” which lasted from the founding to Reconstruction, was characterized mainly by decentralization and a congressionally led federal government. During the “middle republic,” from Reconstruction to the New Deal, the federal government took on new importance as the guarantor of individual rights, especially rights of contract and property, against incursion by the states. Despite the federal government’s growing power, however, its authority over the national economy remained problematic. With the New Deal, we enter the “modern republic,” a period marked by a “truly national” federal government, a “plebiscitary presidency,” a repudiation of the previous regime’s commitment to *laissez-faire*, and—as a consequence of the latter—a redefinition of the rights warranting federal protection. Widespread acceptance, even expectation, of governmental intervention in the economy requires, as a corollary, significantly reduced protection for property and contract, but the nation’s continuing commitment to individual freedom has led to a new emphasis on other rights. Among them are some that protect interests previously shielded from government by contract and property rights. Others are concerned with safeguarding opportunities to participate in and benefit from government, interests that have taken on new importance in an era in which government has replaced the market as the central organizing institution of the society.

Though Ackerman’s account of constitutional history is far too schematic, his description of the three “constitutional regimes” nicely captures important tendencies in each of the periods. His argument in this respect is, however, a good deal less bold and revisionist than he supposes it to be. Nearly all students of constitu-

tional history would recognize that the Reconstruction amendments and the New Deal were constitutional turning points and, were they willing to paint with as broad a brush, accept something akin to Ackerman's characterization of the three periods. The arresting features of his thesis lie elsewhere, in his related claims that "[t]he basic unit of [constitutional] analysis should be the *constitutional regime*" (59) and that the characteristics of the three regimes are the product of decisions made by the People. Ackerman thus draws attention away from such conventional sources of constitutional judgment as the text and Supreme Court opinions. The task of constitutional interpretation, he argues, is to give content to decisions made by the People on those occasions when they have spoken, whether or not they have embodied their will in amendments adopted pursuant to the procedures prescribed by Article V. The Supreme Court, to which the task primarily falls, thus serves a "*preservationist function*": "[I]ts job is to preserve the higher law solutions reached by the People against their erosion during periods of normal politics." (60)

## II

Although Ackerman's thesis, which he labels "dualist democracy," is richly elaborated and defended in the present volume, important elements of the supporting argument and a full development of the implications of the thesis are deferred to subsequent volumes. A final appraisal of the project must await the publication of those volumes. Some preliminary observations may nonetheless be in order.

Ackerman's thesis is certain to be rejected out of hand by "originalists" of every stripe. Though originalist theories have proliferated in recent years, all share a common premise, that constitutional law should be confined by principles that can be derived from the written Constitution. A major difficulty with all such theories is that they fail to describe either our constitutional history or the current content of constitutional law. The adoption of the fourteenth amendment and the federal government's assumption of plenary legislative power are especially vivid illustrations of that failure, but others, of varying significance, are no less familiar.<sup>9</sup> Originalists can meet that difficulty only by reading the document at a very high level of abstraction, one that makes room for the judgments of succeeding generations and thereby accounts for a constitutional history that demonstrates the ability of successive generations to shape

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9. See, e.g., Sandalow, 79 Mich. L. Rev. 1033 (cited in note 7); Thomas C. Grey, *Do We Have A Unwritten Constitution?*, 27 Stan. L. Rev. 703 (1975).

constitutional law to their perception of their needs. Reading the Constitution in that way, however, sacrifices the point of the originalist project, *i.e.*, to confine contemporary judgment by the historical document. As constitutional law increasingly bears the imprint of judgments subsequent to the adoption of the Constitution, the most that can be said is that the law we ascribe to the Constitution can be traced to the document—which is not quite the same as saying that it can be derived from the document.

Of course, originalists might respond, as some do, that the failure of constitutional law to conform to their theory does not impugn the theory; rather, it calls into question the legitimacy of what we call constitutional law. It is far from evident, however, why a theory so lacking in explanatory power should be of interest. In the large, constitutional law is an important repository of our national experience. It reflects not only the lessons gained over the course of two centuries about the means by which a written constitution can accommodate changing social circumstances and values, but the judgments of successive generations about the appropriate role of government in our society and the responsibilities of the several institutions of government for achieving successful performance of that role. A theory that calls for massive repudiation of that experience is unlikely to exert an important influence on our constitutional future. Nor should it. Successful social institutions and practices—hence, the institutions and practices of a successful government—are not the product of a comprehensive plan or derivations from one or another abstract theory. They evolve over time, as existing institutions and practices are employed, and in the process transformed, to fashion solutions to emerging problems and to accommodate changing values.

Ackerman seems to me quite right, therefore, in urging that the Constitution is “best understood,” not as a document, but “as a historically rooted tradition of theory and practice.” (22) Although the fact is generally not recognized in the conventional language of constitutional discourse, we have returned to an earlier conception of the Constitution—one that retains currency when, for example, we refer to the British constitution—as the (evolving) set of institutions and practices, together with the principles that undergird them, that define the major features of the governmental system.<sup>10</sup> A candid acknowledgement that we have returned to that conception of the Constitution has the potential of significantly enriching our understanding of constitutional law, drawing attention to insti-

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10. See Gordon S. Wood, *The Creation of the American Republic, 1776-1787* 259-68 (U. North Carolina Press, 1969).

tutions other than the Supreme Court as agents of constitutional change, to processes other than adjudication as vehicles of change, and to markers of change other than Supreme Court opinions.<sup>11</sup> An awareness of the importance of these other actors and processes may, in turn, suggest important sources of constitutional judgment when courts are called upon to interpret the Constitution.

*We The People* develops both possibilities, and in doing so demonstrates that an imaginative engagement with history offers a fruitful alternative to, on the one hand, the formalism that insists on rooting all of constitutional law in the written Constitution and, on the other, theories that Ackerman labels "foundationalist," those that, in whatever guise, aim to shape constitutional law to some transcendent moral or political theory. Like Holmes in *Missouri v. Holland*, Ackerman seeks to understand the contemporary meaning of the Constitution by asking, through time, "what this country has become."<sup>12</sup> His survey of history yields a number of important insights, initially by drawing attention to features of the constitutional landscape that heretofore have received inadequate attention and, secondly, by stressing the importance of the "constitutional regime" both as an aid to understanding our constitutional past and as a source of contemporary constitutional judgment.

*We The People* thus makes a number of important contributions to our understanding of constitutional law. None, however, is integral to nor a product of Ackerman's central thesis, "dualist democracy." The persuasive portions of his argument might be accommodated, at least equally well, within an evolutionary theory of constitutional change, one that regards it as the product of a process characterized by a more complex and less episodic set of interactions among governmental institutions and between those institutions and the citizenry. Indeed, one might suppose that such a theory would better fit Ackerman's conception of the Constitution "as a historically rooted tradition of theory and practice." Nevertheless, he expressly rejects what he labels a "Burkean" approach to constitutional change, arguing that it fails to recognize the importance of the defining characteristics of "dualist democracy," higher lawmaking by the People and the need "to prevent normal government from departing from the great principles of higher law validated by the People during their relatively rare successes in constitutional politics." (21) His argument in support of "dualist democracy" is, however, beset by difficulties sufficiently serious that

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11. The references, obviously, are to constitutional change that is not the product of formal amendments of the document.

12. 252 U.S. 416, 434 (1920).

they raise doubts, even at this early stage of the project, whether it offers a useful framework for understanding our constitutional past or thinking about our constitutional future. The difficulties can conveniently be brought together under two major headings: first, those that are raised by Ackerman's arguments concerning the role of the People in "higher lawmaking" and, second, those that involve the role he assigns the Supreme Court during periods of "normal politics."

### III

Begin with the adoption of the fourteenth amendment. Ackerman, it will be recalled, maintains that the process by which it was ratified cannot be squared with the command of Article V, arguing that the amendment's legitimacy depends, instead, on the election of 1866, at which "We the People demanded a reconstructed Union on the basis of the Fourteenth Amendment."<sup>13</sup> The difficulty is that the same history that calls compliance with Article V into question is inconsistent with the contention that the 1866 election expressed the will of the People. The proposed amendment was, to be sure, a central issue in the campaign, and the election did produce an overwhelmingly Republican Congress, significantly strengthening the hand of the amendment's proponents. But the Congress did not include representatives from the Southern states, and it is all but certain that the ratification process would have played out quite differently if it had. To hear the voice of the People in these circumstances is to indulge in a fiction that differs hardly at all from that employed by Congress in achieving ratification under Article V. It is, moreover, a dangerous fiction. Too many dark chapters in history provide evidence that those who purport to speak on behalf of the People tend to include in that august body count only those who share their commitments. Whatever good may have come of it, Reconstruction is merely one more illustration of that principle. Thus, as Ackerman wrote in an earlier article, apparently without irony, "[s]o far as Congressional Republicans were concerned, [admitting Southern representatives to the Congress] would only stifle the voice of the People."<sup>14</sup>

Difficulties in hearing the voice of the People at the 1866 election—or at least in understanding what they said—persist even if the People are understood to include only citizens of the Northern

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13. Ackerman, 99 *Yale L. J.* at 507 (cited in note 8).

14. Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *Yale L. J.* 1013, 1067 (1984).

states.<sup>15</sup> Ackerman interprets the election results as expressing the People's decision that the federal government should henceforth act as guarantor of the rights of individuals against the states. In effect, he treats the election as a referendum on the principles enunciated in section 1 of the proposed amendment. Elections are, however, complex events whose outcome is influenced by a wealth of factors—including, typically, a range of issues, the personal qualities of the candidates, and at times accident. Discerning the voice of the People—the deliberate, public-spirited judgment that, for Ackerman, emerges from “constitutional politics”—on any particular issue thus poses formidable problems. The 1866 election is no exception.

Among the factors contributing to the Republican victory was the public's strongly adverse reaction to President Johnson during his notorious “swing around the circle” to enlist popular support for his policies and his political allies. By one contemporary estimate, he cost his supporters a million Northern votes. Johnson, however, never mentioned the fourteenth amendment. The adverse public reaction appears to have been largely attributable to personal qualities he revealed during the campaign and to his repeated defense of the loyalty of the white South.<sup>16</sup> Public attitudes toward political leaders are, no doubt, always at least partly responsible for the public's response to the policies leaders propose, but in these circumstances it requires a rather large leap to translate adverse public reaction to Johnson into popular approval of a major shift in the balance of power between the nation and the states. Johnson's impact on the outcome of the election seems, rather, to point in the opposite direction, as an obstacle to interpreting the election results in that way.

Despite Johnson's silence, historians generally agree that the

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15. To understand “the People” in that way would, of course, be inconsistent with the North's insistence that the Southern states had never left the Union. More significantly, for present purposes, it would obviate the need to find a source of legitimacy for the fourteenth amendment outside Article V. Three-fourths of the Northern states had ratified the amendment no later than June 15, 1867. See U.S.C.A. Amend. 14, Historical Notes.

16. See Eric Foner, *Reconstruction* 264-66 (Harper & Row, 1988). In an earlier article, Ackerman describes Johnson as “railroading around the country . . . to call upon the People to repudiate the proposed Fourteenth Amendment by returning solid conservatives to Congress.” Ackerman, 99 *Yale L. J.* at 505 (cited in note 8). The sources he cites do not support that claim. Indeed, his primary citation states precisely the opposite, asserting, as I have stated in the text, that Johnson “never mentioned the Fourteenth Amendment.” Foner, *Reconstruction* at 265. The other sources upon which he relies do not discuss the point, stressing instead the adverse public reaction to Johnson's personal characteristics, Eric C. McKittrick, *Andrew Johnson and Reconstruction* 428-38 (U. Chi. Press, 1960), and disagreement about the terms on which representatives from Southern states should be admitted to Congress, Michael Les Benedict, *A Compromise of Principle* 188-209, esp. at 202-03 (W.W. Norton, 1974).

fourteenth amendment was a major issue in the election. Still, it ought not be too quickly assumed that section 1, the only provision of the amendment to receive sustained attention from subsequent generations, had a similar centrality in 1866. To be sure, the Black Codes and other repressive measures tending to maintain the freedmen in a state of near-servitude had outraged many Northerners, and there was, no doubt, widespread sentiment that the nation bore responsibility for protecting the freedmen. Whether that sentiment was the moving force behind Northern support for the amendment or even whether it reflected a consensus of Northern voters is more difficult to say because the amendment also addressed other issues.

The election, it hardly needs stating, came at the end of a protracted and bitter war, one that had aroused intense feelings of national identity in the North. Strong sentiments demanded assurance that the South had acquiesced in its defeat and had accepted the indestructibility of the nation. Yet, mounting evidence suggested the opposite, that Presidential Reconstruction was enabling the South to wrench victory from its defeat. In many parts of the South, the "reconstructed" governments were led by members of the Confederate establishment that had sought to destroy the Union, men whose loyalty to the nation was doubted, whatever oaths they might be willing to take. Those with whom the North identified, Southern Unionists and Northerners who had gone South, were excluded and, worse, were not even secure in their person and property. The ascendancy of Confederate loyalists even threatened continued control of Congress by the Republicans,<sup>17</sup> the party that had led the nation to victory in war and was associated with the new sense of national identity.<sup>18</sup>

Sections 2 and 3 of the amendment addressed precisely these concerns. The latter, by denying state or federal office to any person who had taken the constitutional oath and later participated in the rebellion, both exacted retribution from traitors and seemed to offer at least the potential for new political leadership in the South. The former, by reducing the representation in the House of states that denied blacks the right to vote, sought to ensure either that Southern blacks, who might be expected to vote Republican, would be able to influence Southern politics toward the election of loyal officials or, if the vote were denied, that at least Southern influence in the House and the electoral college would be reduced.

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17. With the end of slavery, Southern influence in the House and in the electoral college would have been increased because of the lapse of three-fifths clause of Article I, section 2.

18. See Foner, *Reconstruction* at 216-27 (cited in note 16); William E. Nelson, *The Fourteenth Amendment* 40-47 (Harv. U. Press, 1988).

The emotional intensity of the issues addressed by these provisions strongly suggests that they were an important influence on Northern support for the amendment, further complicating the task of interpreting the election results. Since Ackerman has deferred a full account of his investigation of the events leading to the adoption of the amendment to a subsequent volume, it would be premature to dismiss the possibility that he can, despite the other influences at work, adduce persuasive evidence that the election should be interpreted as, in effect, a (Northern) referendum on section 1. The preview of his argument in a recent article, however, contains no hint he is aware of the difficulty of the task.<sup>19</sup>

Similar difficulties are, in any event, all but certain to arise whenever a claim is made that an election should be treated as a referendum. Ackerman, for example, once again hears the voice of the People in the 1964 election, which he interprets as expressing their "considered judgment about civil rights." (110) Though he does not describe that judgment, scattered references throughout the book suggest that he interprets the election as an endorsement of the civil rights movement's goal of racial equality. The struggle for racial equality was, of course, the great domestic issue of the 1960s and doubtless a salient, even though a muted, issue during the presidential campaign. The candidates had secretly agreed to avoid emotional appeals concerning the issue, and each addressed it in only one major speech during the campaign. Nevertheless, President Johnson had supported, while his opponent, Senator Goldwater, had voted against the Civil Rights Act of 1964, a well-known difference in their positions that, on balance, probably benefitted Johnson. But Johnson's crushing defeat of Goldwater owed much, and almost certainly more, to a host of other factors—the fears that Goldwater would increase American involvement in Vietnam and that he could not be trusted with command of the nuclear arsenal, the additional fear that he would weaken and perhaps destroy the Social Security system, and the continuing emotional impact of the Kennedy assassination.<sup>20</sup> To hear the voice of the People on the single issue of civil rights in these circumstances is, in a phrase of Ackerman's, "to play constitutional history backwards." (137)

In retrospect, the '64 election can be seen to have been a crucial event in the civil rights revolution of the '60s, leading directly to vigorous enforcement of the school desegregation provisions of the 1964 Civil Rights Act and to the enactment of voting rights and fair

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19. See Ackerman, 99 *Yale L. J.* at 500-510 (cited in note 8).

20. For a contemporary account, see Theodore H. White, *The Making of the President 1964*, esp. 233-37 and 294-314 (Jonathan Cape, 1965).

housing legislation. The election had these consequences, however, not because it unambiguously expressed a popular commitment to the ideal of racial equality, but because, for reasons largely unrelated to civil rights, it strengthened the position of an Administration and a Congress prepared to act in furtherance of that ideal. Public attitudes toward civil rights were, in fact, quite complex, which is hardly surprising when one considers the diverse interests affected by a comprehensive civil rights program. Equal access to public accommodations, employment and housing discrimination, affirmative action in employment and higher education, voting rights, and public school desegregation might all be considered facets of a single problem to those most deeply and single-mindedly committed to the goal of racial equality, but large segments of the public sharply distinguished among them. The complexity and perhaps the ambivalence of the public response to these and other dimensions of the nation's racial problems can be recaptured by recalling that 1964 was not only the year in which major civil rights legislation was enacted, but also the year in which "backlash" entered our political vocabulary.

Ackerman comes closer to capturing the process of change wrought by the civil rights movement when he writes that "[a]s the 1950s moved on, this mobilized appeal for racial justice struck deepening chords amongst broadening sectors of the citizenry—*enabling the Presidency and Congress* of the mid-1960s finally to [enact] the Civil Rights Acts of 1964 and 1968 and the Voting Rights Act of 1965." (137) (emphasis added) If the election did not express the People's commitment to achieving racial equality, it did furnish evidence of a growing constituency for reform. No less significantly, it demonstrated that intense opposition to reform was concentrated in a handful of Southern states, and it provided evidence that large segments of the public who were ambivalent about the measures necessary to achieve racial equality might not rise up in protest against reform because other issues had greater salience for them. The President and Congress were thus freed to move forward with reform, beginning not surprisingly with the Voting Rights Act, legislation that would enlarge the constituency for reform and yet not be perceived as threatening by Northern whites.

To question Ackerman's account of the 1866 and 1964 elections is not, obviously, to deny that the 1860s and the 1960s were transformative periods in American history. The Civil War fostered a new sense of national identity, a change in public attitudes toward the nation symbolized, as every schoolchild knows, by the singular pronoun replacing the plural in references to the United

States. It profoundly influenced economic life in ways that accelerated the economic integration of the nation.<sup>21</sup> The civil rights movement, similarly, brought about seismic changes in public attitudes toward relations between blacks and whites and, especially with the enactment of the Voting Rights Act, a new political dynamic at the federal level in responding to racial issues. The process of constitutional change initiated during those periods was, however, a good deal more complex than is captured by Ackerman's conception of "higher lawmaking." In neither is it evident that the People laid down, or even approved, principles to guide the subsequent course of their government, and in both the subsequent conduct of government was significantly shaped by political influences that were to emerge only thereafter.

The claim that the People, by their votes in the 1866 election, had charted a new constitutional course for their government is especially puzzling in light of the subsequent history of the amendment. The campaign, after all, was not fought over the issue whether some abstraction called the fourteenth amendment should be added to the Constitution, but over the nature of Reconstruction and the federal government's responsibility for the freedmen. Within little more than a decade, however, the amendment fell into near desuetude (at least with respect to its animating purpose), where it remained for well over a half-century.

Ackerman obliquely recognizes the importance of this history, though not the difficulty it creates for his thesis, when he considers *Brown v. Board* and the civil rights movement "the most successful act of popular transformation in recent history" (108) and apparently the only instance of what he regards as "higher lawmaking" since the New Deal. *Brown*, he argues, forced the issue of racial equality to the center of the national agenda,<sup>22</sup> but it remained an "embattled and problematic symbol" until the 1964 Presidential election, when the People, in response to the civil rights movement, "made a considered judgment about civil rights." (110) The judgment that the civil rights movement produced changes of constitutional significance in American life is, I think, fundamentally sound, but it does not sit comfortably with Ackerman's thesis. If his arguments regarding the significance of the 1866 and 1936 elections are accepted, adequate constitutional foundations for *Brown* and the civil rights legislation of the 1960s were laid at those times. No further decision by the People was required. Yet, to organize con-

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21. See Foner, *Reconstruction* at 18-24 (cited in note 16).

22. For a contrary view, see Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, esp. ch. 4 (U. Chi. Press, 1991).

stitutional history in that way, as Ackerman implicitly recognizes in characterizing the civil rights movement as an instance of successful "constitutional politics," would ignore nearly a century of history and miss the significance of the profound changes that occurred in the 1960s.

The source of these inconsistencies in Ackerman's argument is his insistence upon locating constitutional change in a decisive expression of the People's will at a single election. The Civil War and its aftermath, the New Deal, and the civil rights movement were, obviously, critical periods in American history, but in attempting to codify their meaning, Ackerman falls into the same error as those who seek to fix the meaning of the written Constitution by the way it was understood at the time of its adoption. The legacy of those periods, like the meaning of the written constitution, is importantly influenced by the emergence of issues unforeseen at the time, by institutional imperatives and commitments in responding to those issues, and by the response to those issues by the population in general and the political class in particular. Of course, the critical periods in our history, like the provisions of the written Constitution, do exert an influence on subsequent events, an influence that is no doubt greater than that exerted on the future by more quiescent periods in history. That is why we label them critical. Understandings formed and decisions taken at these times, like the provisions of the written Constitution, furnish both a lens through which subsequent generations perceive their problems and the materials from which they attempt to fashion solutions for those problems. Nothing in our history, however, supports the view that the decisions serve as a blueprint, a set of instructions by which one generation binds its successors until such time as one of the latter deliberately alters the blueprint.

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. Thus, the People, in Ackerman's terms, did not exist during the long night of civil rights that lasted from 1877 to the 1960s, but it seems hardly open to question that a combination of popular attitudes and institutional forces during the period exerted a shaping influence on the racial Constitution of the "middle republic." Other illustrations of the point are familiar. A mobilized citizenry did not arise to demand greater sexual freedom, but changing sexual mores—a grow-

ing belief that sexual life, like debate on public issues, should be “uninhibited, robust, and wide-open”<sup>23</sup>—nonetheless led to substantial restrictions on governmental power to interfere with sexual conduct. A mobilized citizenry did arise to demand that government cease discrimination on the basis of sex, but it failed to persuade the People, apparently leading Ackerman to regard the effort as a failed attempt at “higher lawmaking.” Yet, changing societal attitudes toward the social role of women yielded constitutional limits on sex discrimination that are, at most, only marginally different from those that would have existed if the equal rights amendment had been adopted.

Ackerman is obviously aware of these and similar developments, but he regards them as mere interpretations, elaborations of the full implications of the People’s decisions on the discrete (and rare) occasions when they have expressed themselves. It seems rather odd, however, to suggest that a constitutional change would have resulted from, for example, a decision by the People to adopt the equal rights amendment and yet to deny that constitutional change has occurred when virtually identical consequences flow from Supreme Court decisions. More generally, Ackerman’s insistence on locating all constitutional change in a decisive expression of the People’s will merely reintroduces the same problems encountered by those who attempt to ground all constitutional decisions in the text of the Constitution. His attempt, like theirs, can succeed only if the canonical expression is stated at a sufficiently high level of abstraction to account for profound changes in the actual practices of government that occur thereafter.<sup>24</sup> Doing so, however, sacrifices the point of the project—in Ackerman’s case, to establish limits on “normal politics” that can meaningfully be attributed to the People.

More significantly, to bring all such changes under the rubric of “interpretation” cloaks important issues concerning the assignment of institutional responsibility for responding to social change. As our governmental system has evolved, interpretive questions are generally regarded as questions to be resolved by courts. Perhaps for that reason, arguments characterizing an issue as one calling for interpretation often seem driven by a desire to place it in the hands of judges. The question of substance, however, is not whether an issue can be related to some pre-existing principle or practice by a process plausibly regarded as interpretive, but how best to assign institutional responsibilities for addressing the issue.

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23. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

24. Not surprisingly, Ackerman makes just that move. See p. 328, *infra*.

Before turning to that question, I want to consider another set of issues raised by Ackerman's account of "higher lawmaking." Ackerman repeatedly describes the process as characterized by a relatively high level of popular deliberation and public-spiritedness. Though distinct, the two characteristics are related. "Deliberation," for Ackerman, involves serious consideration of the "rights of citizens and the permanent interests of the community," (272) while "public spiritedness" entails a willingness to sacrifice private interest to those goals.<sup>25</sup> He clearly regards both as important, but it is unclear just how they relate to his account of "higher lawmaking."

At least three possibilities are immediately evident. First, Ackerman stresses that "most Americans identify our great popular struggles as culminating in the nation's greatest constitutional achievements." (19) He may, therefore, intend nothing more than historical description: As a nation, we are fortunate that each instance of what he regards as "higher lawmaking" has been marked by public-spirited deliberation, a happy but contingent circumstance. Alternatively, he may intend a different kind of descriptive account, that it is in the nature of public debate that citizens will, by participating in it, ultimately be led to set aside their personal interests and consider the public interest. Finally, he may mean that the two characteristics are constitutive of the concept of "higher lawmaking," so that whatever the level of popular support for a change in the course of government, the People should not be deemed to have spoken unless they have exhibited the characteristics in requisite measure.

Each interpretation raises issues that Ackerman fails to confront. To the extent that he is engaged in historical description, it is perhaps sufficient to observe that he has yet to offer any evidence that the instances of what he regards as "higher lawmaking" were, in fact, characterized by public-spirited deliberation. But more fundamentally, it should be evident that any attempt to make out such a case would face formidable, very likely insurmountable, evidentiary difficulties akin to those I have already discussed. Illustratively, even if one interprets the Democrats' massive 1936 electoral victory as Ackerman does, as evidencing wide and deep support for

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25. Ackerman's emphasis on deliberation and public-spiritedness reflects the influence of renewed interest in civic republicanism, but his treatment of the latter element of republican theory suggests the possibility that he may understand it quite differently from the way in which it is conventionally understood. The conventional understanding of civic virtue is that it comprises both the sacrifice of private interest involved in participating in public affairs and the willingness to sacrifice private interest to the public interest in determining which policies to support. Ackerman, however, repeatedly draws attention only to the former. See, e.g., 236-40 and 270. I am uncertain whether he means to limit the concept in this way, but because of the way he defines "deliberation," I assume he does not.

an active federal role in the management of the economy, how is one to know whether that support was the product of public-spirited deliberation by the electorate? Ackerman acknowledges the problem, but, curiously, responds to it by reminding us of the institutional hurdles that must be surmounted by politicians before they earn the right to speak on behalf of the People. (292) The question he has put in issue, however, is not whether a reform proposal has the support of the electorate, but whether it is supported by a "citizenry that deserves the respect owing to We the People." (291) He has, however, yet to suggest what evidence might be brought forward to support such a conclusion. And even if such evidence can somehow be adduced, the happy circumstance that we have been fortunate in the past is insufficient reason to suppose that we will be as lucky in the future.

We come, thus, to the second interpretation. Whether citizens are led to engage in public-spirited deliberation when they enter the public realm is an empirical question, but Ackerman offers neither supporting evidence nor reasons to believe that they invariably are. Participation in public debate does, doubtless, tend to elicit public interest arguments, since proponents of a policy are not likely to gain support for it if they invoke only their private interests. But the arguments may be only a pretext, or largely—though not necessarily consciously—shaped by private interest.<sup>26</sup> Instances of what Ackerman regards as "higher lawmaking" tend to occur, as he recognizes, during periods of crisis. 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.

The last interpretation, though conceptual, ultimately confronts similar evidentiary problems. If the question whether the People have spoken turns, in part, on whether they have engaged in public-spirited deliberation, how is anyone to know whether that condition is satisfied? Moreover, who is to make that determination? Ackerman rejects the "foundationalist" view that the People's decisions are limited by external moral or political principles, but subjecting popular decisionmaking to a test of public-spirited deliberation comes perilously close to doing just that. Especially because

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26. I have argued elsewhere that motives are generally too complex to be neatly divided between those that are public-regarding and those that are selfish. See Terrance Sandalow, *The Distrust of Politics*, 56 N.Y.U. L. Rev. 446, 455 (1981). Ackerman makes the same point (251), but his argument that civic virtue is enhanced during periods of "constitutional politics" presumably rests upon the assumption that participation in public debate somehow reduces the risks identified in the text.

of the evidentiary problems that are presented, a substantial risk exists that anyone called upon to determine the quality of public deliberation will confuse that question with the question whether the public's decision meets the test of some external principle.<sup>27</sup>

Questions about the relationship between civic virtue and "higher lawmaking" are worth pursuing because the moral force of the latter conception—and therefore of "dualist democracy"—depends upon the claim that the People's civic virtue warrants treating their decisions with a respect not owed to decisions made during periods of "normal politics." If decisions made during periods of "constitutional politics" are not characterized by a markedly increased measure of public-spirited deliberation, or if there is no way of knowing whether they are, the argument for according them special status, as "higher law," is greatly weakened. In that event, grounds would no longer exist for distinguishing between the handful of decisions Ackerman attributes to the People and the more numerous governmental decisions, during the long periods of "normal politics," that also enjoy widespread popular support. Absent any grounds for such a distinction, there is no apparent reason that the former should serve as a measure of the legitimacy of the latter.

Ackerman's claim that the decisions he attributes to the People deserve special respect, as "higher law," is further weakened by doubts about whether those decisions can plausibly be regarded as "deliberate." Inevitably, he characterizes the principles that emerge from the process of "higher lawmaking" at a very high level of abstraction—a necessary move if they are to encompass all of the actual decisions that, over time, will be made in their name. Thus, he writes that in the 1866 election the People decisively resolved the issue "whether state sovereignty was more important than individual rights." Thereafter, the only question would be "which individual rights were sufficiently fundamental to warrant national protection." (82) Except in a brief reference to "the nationalistic, egalitarian, and libertarian themes of the Reconstruction amendments," (140) he gives no further content to the decisions he attributes to the People. The constitutional decisions supposedly made by the People in approving the New Deal are described at a similar level of abstraction: a "repudiation of . . . laissez-faire capitalism" and an affirmation of an "activist national government" engaged in "ongoing bureaucratic intervention in economic and social life." (49, 141)

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27. See, e.g., Justice Marshall's dissent in *Gregg v. Georgia*, 428 U.S. 153, 232 (1976), arguing that public attitudes toward the death penalty would be different if the public were better informed.

Abstractions such as these may not be meaningless, but such meaning as they have is quickly exhausted in any serious consideration of the issues they raise. Even a sophomore would be unlikely to escape unscathed were he to announce that individual rights are more important than state sovereignty, though he has not yet considered "which rights are sufficiently fundamental to warrant national protection." Or, without more, that he favors an "activist national government." Judgments such as these, to the extent that they have any content, do not gain our respect because they seem to involve neither an assessment of consequences nor a consideration of alternatives and—perhaps for those reasons—because they seem to resolve so little.

In the presence of these doubts about whether the decisions Ackerman attributes to the People are (or can be shown to be) the product of public-spirited deliberation—or even whether they can meaningfully be regarded as deliberate—there is little reason for confidence that the process of "higher lawmaking" he describes can safely be entrusted with the important responsibility of defining "the rights of citizens and the permanent interests of the community." The contrast with Article V is instructive. Independent examination of a proposed constitutional amendment by the multiple legislative bodies whose approval is required by that article is certain to provide a far more focused, reflective consideration of the issues than the People are capable of undertaking. Of at least equal importance, the national consensus required to achieve approval by those bodies offers significant assurance that—whether or not the participants are public-spirited—the interests of the entire population will have been taken into account. Neither objective is served very well by the process of "higher lawmaking" Ackerman describes.

To summarize: Ackerman's account of the role of the People in "higher lawmaking" confronts at least three major problems. First, it is doubtful that the People made, or can be shown to have made, the decisions he attributes to them. Second, even if that hurdle can somehow be overcome, the process of "higher lawmaking," as he describes it, appears inadequate to bear the weighty responsibility assigned to it in his "dualist democracy." Third, and perhaps most significantly, Ackerman's effort to locate all constitutional change in decisive expressions of the People's will on rare and discrete occasions fails to capture the reality of constitutional change and thereby cloaks important questions that arise during periods of so-called "normal politics," questions that concern the appropriate sources of constitutional judgment and the assignment of institu-

tional responsibility for dealing with social change. I turn now to the bearing of Ackerman's thesis on those questions.

#### IV

Ackerman, it will be recalled, maintains that the Supreme Court serves a "preservationist function," protecting "the higher law solutions reached by the People against their erosion during periods of normal politics." (60) Of course, if the People did not make the decisions he attributes to them, or if they cannot be shown to have done so, there is nothing for the Court to preserve. Although I think that difficulty alone is likely to prove fatal to his argument concerning the Court's role, I propose to proceed on the contrary assumption, giving full weight to his description of those decisions, in order to explore other issues raised by his thesis.

On the surface, Ackerman advances a conception of the Constitution that differs markedly from the one that has dominated academic discussion during the past generation. As evidenced by their emphasis on rights and their concern for protecting the interests of minorities, most academic commentators in recent years have conceived of the Constitution primarily as an instrument for limiting the power of overbearing majorities. Ackerman, in contrast, insists that the Constitution must be grounded in popular consent. Rather than an instrument for controlling majorities, it is, in his view, the People's instrument for controlling their government. The protection of rights and of minority interests is, he acknowledges, an important function of constitutional law but, he maintains, the "Constitution is democratic first, rights-protecting second": "[J]udicial protection of rights [depends] on a prior democratic affirmation" of those rights. (13)

Taken at face value, this aspect of Ackerman's thesis is one of its most attractive features, in part because of its continuity with ideas prevalent at the time the Constitution was adopted, but more fundamentally because it recognizes the nation's continuing democratic commitments. Given those commitments, no other source of authority is available to legitimate the Constitution. It seems to follow, as a corollary of the proposition that the Constitution's legitimacy depends on popular consent, that if constitutional law is to evolve over time—as our history demonstrates it will—the changes must have a purchase on values reasonably attributable to the society. Of course, to call attention to the corollary is not to furnish answers to questions about the appropriate content of constitutional law, but to pose a series of problems. American society is not monolithic. How are values attributable to "the society" to be distilled

from the discordant voices by which it is constituted? Moreover, just as an individual's values are not revealed by every momentary inclination, societal values are not determined by every majoritarian impulse. How, then, are transitory expressions of majority will to be distinguished from the more reflective, enduring beliefs that we have in mind when we refer to "values?" The overarching difficulty, as I put it some years ago, is that societal values "are not a 'brooding omnipresence' merely awaiting discovery by a sufficiently keen observer. They must be constructed and, inevitably, their construction must be effected through some process."<sup>28</sup> The central problem of constitutional theory, accordingly, is to define and justify a process for constructing the societal values to be expressed through constitutional law.

From this perspective, Ackerman's thesis reveals rather less of a commitment to democratic values than his argument about the People's role in "higher lawmaking" might lead one to expect. Despite his claim that he means to shift attention away from the Supreme Court, toward other actors on the constitutional stage, the Court, in his "dualist democracy," continues in a starring role. In the end, responsibility for determining the shape and direction of constitutional law does not rest with the People—and surely not with the (more mundane and, therefore, lower case) people and their elected representatives—but with the Justices. Although Ackerman does not purport to cast the Court in so dominant a role, its presence at center stage, with other actors relegated to at most supporting parts, is a necessary consequence of the way in which the various roles are structured. Actors other than the Court—the electorate and its representatives—appear only during the infrequent episodes of "constitutional politics." Decisions taken by them during the long intervals of "normal politics" are regarded as irrelevant to the content of constitutional law. At such times, the Court is the only player on the constitutional stage.

Since the Court's democratic credentials are not especially impressive, Ackerman's claim that the Constitution is "democratic first" rests entirely on his argument that the Justices are only elaborating decisions by the People on the occasions when the latter have spoken. Yet, given the character and infrequency of those decisions, the contention that the Court is merely pursuing a course set by the People seems implausible, serving mainly to cloak the important choices that must be made if those "decisions" are to be given any meaningful content. The People have simply decided too little

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28. Terrance Sandalow, *Judicial Protection of Minorities*, 75 Mich. L. Rev. 1162, 1185 (1977).

to nourish judicial judgment on the issues that arise during the long periods of "normal politics."<sup>29</sup> A closer look at Ackerman's argument will reveal just how large a role he has fashioned for the Court—and how little, on his account, its decisions owe to prior decisions by the People.

Ackerman approaches issues of constitutional interpretation by way of what he calls "the problem of multigenerational synthesis." (88) The problem arises in this way. During the early republic, the task of constitutional interpretation, though not free of difficulty, was relatively straightforward, "[to elaborate] the constitutional principles" approved by the founding generation. (88) With the adoption of the Reconstruction amendments, and especially the fourteenth amendment, the task became considerably more complex. Unlike, say, the eleventh and twelfth amendments, they did not address narrow, well defined issues. Rather, Ackerman maintains, they altered a fundamental premise of the original Constitution. At the same time, they did not represent a comprehensive repudiation of the existing governmental system, like that which occurred when the Constitution replaced the Articles of Confederation. The interpretive problem, accordingly, was to determine how much of the constitutional landscape the People had altered, a problem whose difficulty was compounded by the fact that the "legal premises and social life" of the "Republican world of the nineteenth century was very different from the Federalist world of the eighteenth." (89) The constitutional transformation wrought by the People during the New Deal adds to the complexity of the interpretive problem. Once again, the People did not approve an entirely new constitutional order, but they did demand a change in some of the fundamental premises of the old order. The problem is "[h]ow to put together a constitutional whole out of such discordant parts," how to "reconcile . . . the disparate historical achievements of the American people." (89, 160)

In a democracy, one might suppose, a problem of that magnitude would be understood as the continuing responsibility of the entire political system. Especially because of the open-ended character of the decisions Ackerman attributes to the People, representatives accountable to the citizenry might be expected to play an important, though not necessarily an exclusive, role. In Ackerman's "dualist democracy," however, responsibility for addressing the problem rests exclusively with the Supreme Court. It alone is empowered to make all of the mid-level decisions that are required to translate the abstractions he attributes to the People into princi-

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29. See p. 328, *supra*.

ples of sufficiently determinate content to guide the operations of government.<sup>30</sup> The breadth of the choices left open for the Court is illustrated by Ackerman's discussion of *Lochner v. New York* and *Griswold v. Connecticut*, both of which he regards as having been correctly decided.

*Lochner*, Ackerman argues, was a justifiable synthesis of the original Constitution and the fourteenth amendment. The latter, it will be recalled, he regards as expressing the People's decision that the federal government should henceforth be responsible for safeguarding fundamental rights from infringement by the states. The Court's decision that "freedom of contract" was sufficiently fundamental to warrant national protection, Ackerman maintains, merely recognized the "high constitutional value" that the "Founding Federalists placed [on] market freedom."<sup>31</sup> (116) "This constitutional understanding," he continues, "was reinforced by the Reconstruction amendments." (100) The thirteenth amendment, for example, "was understood, first and foremost, in legal terms that relied on the language of . . . contract. At a minimum, it meant that blacks . . . could freely contract for their labor." (Id.) Since slavery and freedom were in large part distinguished by freedom of contract, he concludes, legislation depriving individuals of their right freely to contract regarding the term of their labor might reasonably have been understood as "a kind of slavery." (Id.)

In the most charitable terms I can muster, Ackerman's defense of *Lochner* fails, utterly and completely. To begin with, if the fram-

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30. Despite my disagreement with the way he employs the idea, in one important respect I regard Ackerman's discussion of "multigenerational synthesis" as a significant contribution to the literature. An amendment, by definition, alters existing law and, therefore, almost inevitably raises questions about the extent to which the latter has been displaced. The extent of the displacement has conventionally been understood to be limited to the terms of the amendment. Ackerman makes a deeper point, that some constitutional amendments (or "amendments") alter a fundamental premise of the existing constitutional structure and, therefore, have force beyond their terms.

Illustratively, in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Court confronted the question whether Congress, acting under the commerce clause, was empowered to abrogate a state's eleventh amendment immunity. Justice Scalia, in dissent, woodenly sought to distinguish an earlier case sustaining such a power under the fourteenth amendment on the ground that it dealt only with an amendment adopted after the eleventh and was, thus, irrelevant to the question of congressional power under the commerce clause. Ackerman's argument might have led Justice Scalia to understand that chronology does not determine the issue. The underlying question, common to the commerce clause and the fourteenth amendment, is whether in light of the fundamental changes in the premises of the federal system that have occurred during the past century, the states should be permitted to assert an eleventh amendment immunity against Congress.

31. Elsewhere, Ackerman writes that "[t]he Founders valued contract so highly that they protected it in the original 1787 Constitution." (152) And, at yet another point, "[e]ven during the early republic, the courts had marked out contract as a domain of freedom peculiarly appropriate for national protection." (100)

ers and the courts of the early republic put a "high constitutional value" on freedom of contract, they had a curious way of showing it. Article I, section 10—the only mention of contract in the Constitution—protected only reliance interests, not freedom from governmental regulation of the terms of contract. Nor did the courts of the early republic extend the protection any further.<sup>32</sup> Ackerman's attempt to draw upon the Constitution of the early republic as a justification for *Lochner* rests, quite simply, upon a fundamental misconception regarding the meaning of the contract clause and the uses to which it was put by the courts. His reliance on the thirteenth amendment, though not marked by a similar error, is no more persuasive. Even if one were to concede some points of similarity, slavery is manifestly a different phenomenon from the restrictions on laborers imposed by maximum hour or minimum wage legislation. The question whether the similarities or the differences are of greater importance poses significant issues of morality and public policy, issues surely not addressed by the People when the thirteenth amendment was adopted. Ackerman's analysis leaves the resolution of those issues entirely to the Court, but he suggests neither sources of judgment upon which it might appropriately have drawn in deciding those issues nor reasons for concluding that they were more appropriately decided by the Court than by the New York legislature.

Ackerman's defense of *Griswold* encounters similar difficulties. As he analyzes the case, the interpretive problem it presented was how to reconcile "the Founding's concern with individual freedom and the New Deal's affirmation of activist government." (152) From 1787 to the New Deal, he maintains, "property and contract were fundamental to the constitutional language of liberty." (Id.) After the People's repudiation of *laissez-faire* during the New Deal, however, liberty could no longer be understood in those terms. "This left the modern Court with a formidable problem. Given New Deal activism, what remained of the Founding values of individual self-determination formerly expressed in the language of property and contract?" (Id.) The Court's achievement in *Griswold*, he contends, was to recognize that areas of constitutionally protected freedom—areas captured by "the idea of privacy"—survived the New Deal. Rejecting "particularistic efforts to look upon the Bill of Rights as a series of disjointed rules," the Court viewed "the

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32. The *Dartmouth College* case, 17 U.S. (4 Wheat.) 518 (1819), which Ackerman cites in support of his claim that the courts of the early republic "had marked out contract as a domain of freedom peculiarly appropriate for national protection," raised only the very different question whether a royal charter was a contract protected against impairment by Article I, section 10.

rules as expressive of more abstract Founding values—values that retain their constitutional meaning despite the transformations and contingencies of two centuries.” (156)

Various objections might be raised to this defense of *Griswold*, but I want to focus on only one. Accepting Ackerman’s argument that the Court was right to abstract from the Bill of Rights a more general constitutional commitment to individual freedom, a question remains whether that freedom encompasses the sexual freedom protected by *Griswold* and its progeny. Just as in his defense of *Lochner*, Ackerman leaves that question entirely to the Court, with no indication of the sources to which the Court might look to inform its judgment. Within the framework of his thesis, the only resources available to the Court, apart from its own prior decisions, are the People’s judgments on the rare occasions when they have spoken. But those judgments are manifestly too thin to inform the Court’s judgment on the question whether and to what extent sexual activity—or any other activity for which immunity from regulation is claimed—is within the area of constitutionally protected freedom. Prior judicial decisions may in some instances—though surely not in *Griswold*—help to fill the void, but the need to rely on precedent for that purpose merely drives home the point that in Ackerman’s “dualist democracy” it is the Justices, not the People, who make the crucial constitutional decisions.

In practical effect, therefore, Ackerman’s thesis differs little from theories advanced during the past generation by other commentators who, under the sway of the Warren Court, have sought to vest in judges responsibility for determining large and controversial areas of public policy. The role he assigns the Court cannot, however, be squared with the democratic aspirations of his thesis. A serious commitment to the idea that the Constitution should be “democratic first” requires attention to sources of judicial judgment that are both richer than those provided by Ackerman’s thesis and more realistically grounded in popular consent.

On Ackerman’s analysis, the Court’s decision in *Griswold* owes nothing to changing sexual mores or to the increasing importance the twentieth century has placed upon sexual expression as central to individual identity. Surely, however, *Griswold* and the decisions that followed in its wake cannot be understood apart from those changes. To see the issue in *Griswold* in this perspective is to raise *in limine* the question of institutional responsibility for responding to the changes. Why, to put the question bluntly, was the issue of whether Connecticut’s “uncommonly silly law”<sup>33</sup> should be put to

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33. 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

rest one for the Supreme Court rather than for the Connecticut legislature? The beginnings of an answer are to be found in the federal government's assumption of authority to define and protect fundamental rights, authority that owes a good deal less to decisions by the People in 1866 and 1936 than to the increasing social and economic integration of the nation over the course of the twentieth century and the steady accretion of federal power during the same period. Although the states continue to have important decision-making responsibilities, it has increasingly come to be accepted "that they—like administrative agencies or local governments—must act within the framework of norms that the larger society regards as fundamental, norms that are to be given legal expression by the institutions of the national government."<sup>34</sup>

The question remains whether the Court was justified in concluding that the Connecticut statute prohibiting the use of contraceptives violated such a norm. It is tempting to say that the answer to that question, especially in the limited context in which the question was presented, is too obvious to warrant discussion, but more was available to the Court than its ability to apprehend societal norms directly. The belief that consensual (heterosexual) sexual conduct is not a legitimate concern of government was reflected in the increasing number of states that had repealed restrictions on such conduct and the virtual desuetude of such restrictions in those jurisdictions in which they remained on the books. Of more immediate relevance, as Justice Harlan observed in *Poe v. Ullman*, was the "utter novelty" of the Connecticut statute:<sup>35</sup> No other state attempted to prohibit the use of contraceptives and few sought even to regulate their distribution, except in the interest of health. In these circumstances, surely, the Court was justified in concluding that American society had achieved a consensus that required invalidation of the Connecticut legislation.

This view of *Griswold* illustrates a more general point, that a good deal of legislation enacted during periods of so-called "normal politics" can serve as an important source of constitutional judgment, one that would permit the Court to ground the evolving content of constitutional law in decisions that may reasonably be understood as expressing contemporary societal values. When, to take another example, some three dozen states responded to the decision in *Furman v. Georgia* by reenacting the death penalty, the question of contemporary societal attitudes toward capital punish-

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34. Terrance Sandalow, *Federalism and Social Change*, 43 L. & Contemp. Prob. 29, 33-34 (Summer 1980).

35. 367 U.S. 497, 554 (1961) (dissenting opinion).

ment was pretty well put to rest. A mobilized citizenry did not arise to demand either greater sexual freedom or the reinstatement of the death penalty. Societal values were expressed, rather, in the only way they can be in a working democracy, through the deliberate, broadly based decisions of representative institutions accountable to the citizenry.<sup>36</sup>

By denying the Court access to such decisions, Ackerman strips it of the one resource that would allow it to claim democratic legitimacy for its judgments. More significantly, by denying the relevance of those decisions to constitutional judgment, he deprives representative institutions of any meaningful role in determining the values to be expressed through constitutional law. The exclusion of representative institutions from any part in that project might not represent a serious threat to democratic values if the Constitution were interpreted very restrictively, as imposing few limits on the operation of government, but that is not Ackerman's reading. As illustrated by his discussion of *Lochner* and *Griswold*, he reads the Constitution and the People's judgments capaciously, as expressing the abstract values that, in his view, lie behind their particulars. If the Constitution is to be understood in that way, sources of constitutional judgment are necessary that will, as Alexander Bickel once wrote, "securely limit as well as nourish"<sup>37</sup> those judgments. The sources available to the Court in a "dualist democracy" would do neither.

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36. The argument that lies behind this assertion is more fully, though still sketchily, set out in Sandalow, 75 Mich. L. Rev. at 1183-95 (cited in note 28) and Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. Chi. L. Rev. 653, 693-703 (1975). I expect to develop it more fully in work in progress.

37. Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 34 (Harper & Row, 1970).