

# Review of We the People

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Eighteenth Century Studies, Summer 1993

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A review of *We the People*, Volume 1: Foundations by Bruce Ackerman. Cambridge: Harvard University Press, 1991. 369 pp. \$24.95.

Publication of Alexander Bickel's *The Least Dangerous Branch* in 1962 marks the beginning of the era of contemporary constitutional theory. Bickel, a distinguished professor at Yale Law School, argued that judicial review, the power of the Supreme court to invalidate the acts of other branches of government as inconsistent with the U.S. Constitution, conflicted with the basic tenets of democracy. Judicial review is undemocratic because "it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it" (p. 17). For the last three decades academic constitutional theory has been preoccupied with figuring out how to reconcile judicial review with democratic theory. One sensible response to this whole enterprise might be to acknowledge that judicial review is "countermajoritarian" but to deny that this contradicts the theory of government on which the Constitution is based. Judicial review cannot be fully reconciled with democracy, according to this response, because it is not nor was it meant to be a purely democratic institution. The Supreme Court was from the beginning and by design a check on democratic or popular will. This should not be seen as either a moral or theoretical disaster, since the United States is not a democracy pure and simply but rather a constitutional or liberal democracy in which majority will is limited by reason, by right, and by substantive purposes.

Rejection of the terms in which Bickel framed the problem of judicial review, however, is not quite the approach that Bruce Ackerman, a former student of Bickel and now Sterling Professor Law and Political Science at Yale, adopts in his acclaimed new book *We the People*. Like many law professors before him, Ackerman picks up the gauntlet thrown down by Bickel and sets out to show that within a proper understanding of American democracy judicial review is a democratic institution. Despite his ambition to lead a revolution in constitutional theory, Ackerman remains firmly within the orthodoxy established by Bickel, inasmuch as he does not question the equation of political legitimacy with democratic will.

Already very influential and destined to have a major impact on how the present generation of law professors and political scientists understand the connection between constitutional law and American politics, Ackerman's book is also much more than an attempt to reconcile the work of the Supreme Court with democratic theory. For Ackerman aims at nothing less than to reveal the "most distinctive features" of "American Constitutional history" (p. 3) and

to remain faithful to "the distinctive principles of American democracy" (p. 4) by constructing a narrative "that is truer to the historical facts and the constitutional ideals that animate our ongoing experiment in self-government" (p. 5). Ackerman aspires to provide a "theory of American government" that, better than any of its rivals, "captures the spirit" of the American political tradition in its complexity and continuity from the Revolutionary era down to the present" (p. 321).

Ackerman's multifaceted account draws impressively on scholarship in political science, history, and philosophy. At the core of his argument is a theory of "dualist democracy" based on a distinction between "normal politics" and "constitutional politics" that Ackerman finds inscribed in the American Constitution and expounded authoritatively in *The Federalist*. Dualist democracy provides for a two-track law-making system. During the long periods of "normal politics," representatives of a relatively disengaged and uninvolved Citizenry enact statutes that imperfectly express the will of "the People." During the rare moments of "constitutional politics," a mobilized majority of engaged citizens makes "higher law" by successfully enacting its considered judgment about fundamental principles into constitutional law. According to Ackerman, the American political tradition reveals three great moments of constitutional politics: the Founding, Reconstruction, and the New Deal. Although the paradigm of "higher law-making" for Ackerman is the American Founding, the theory of dualist democracy recognizes that constitutional politics can transpire in a variety of ways: "revolutionary reform" of the established Constitution can take place both through the formal Amendment procedures specified in Article V of the Constitution, but also outside them, through, for instance, a presidential mandate that subsequently becomes codified in statutes and Supreme Court decisions. Ackerman reconciles judicial review with democratic theory by arguing that the Supreme Court fulfills its "preservationist function" by striking down laws enacted by representatives in periods of normal politics when those laws conflict with the basic principles of "higher law" constitutionalized by a mobilize majority in the past. Judicial review is democratic because it exercises control on behalf of a genuine or supermajority of "the People" achieved in the past against a temporary and shifting majority of the actual people of the here and now. Note that Ackerman makes not only the legitimacy of the Supreme Court but also that of the entire Constitution ride on the super-democratic character of the transformative or revolutionary moments that define constitutional politics and the making of "higher law."

This, in rough outline, is the argument of volume 1 of *We the People*, subtitled *Foundations*. There is much that is admirable, illuminating, and deserving of careful consideration in Ackerman's *Foundations*: especially the analysis of the variety of extra-legal but politically or democratically legitimate moments of constitutional reform that have left their mark on the American political tradition; the sensitive account of the "preservationist function" of the Supreme Court and the sympathetic reconstruction of the interpretive dilemmas that the Court faces in synthesizing fundamental Constitutional principles from different eras; and

the exposition of the political economy of virtue embodied in the Constitution, according to which the need for and the scarcity of virtue are given their institutional due. Each of these notable contributions plays a key role in Ackerman's general theory.

The foundation of Ackerman's Foundations is an account of the American Founding. Faithfulness to the textual sources (pp. 36, 57) and fidelity to the historical record (pp. 5, 22, 46-49, 91-92) are the worthy criteria by which Ackerman measures and finds wanting previous efforts to understand the foundations of the American constitutional tradition. How do Ackerman's own reflections on the "Founding achievement" measure up to the standards by which he measures others?

Not always as well as one might hope. For, to take one important example, the historical record contradicts Ackerman's central thesis that the Constitution was established on the basis of the deep, broad, and decisive popular support that his dualist democracy requires and his historical narrative affirms (pp. 10, 41, 74, 211, 218, 220, 262).

While Ackerman throw light on the theory of "popular sovereignty" expounded in *The Federalist*, he confuses a theoretical defense of the Constitution with actual political history. He slides illegitimately from the Founders' claim to speak in the name of "the People" to the actuality of their having done so. Ackerman emphatically wishes to make it "very clear that it is the intentions of the People that count, not those of the small number of "Framers" who proposed the Constitution or its early amendments" (p. 88). Yet he offers scarcely a shred of historical evidence to support his fundamental factual claim that a majority of American citizens did mobilize in 1787 (p. 88), that the Constitution represented the "considered judgments" of "We the People" (p. 242), that popular support for the Constitution was deep, broad, and decisive (pp. 272-278). Nor could he do more, since the historical record is clear: in the contest over ratification the proponents of the Constitution achieved a victory, in some crucial states by narrow margins, that depended on healthy doses of bullying, bribing, politicking, propaganda, and good fortune. According to Forrest McDonald, not more than about 25 percent, or 160,000 of 640,000 adult males, participated in the elections for delegates to the ratifying conventions (*E Pluribus Unum*, 1965, p. 319). Voter turnout on the question of Union was unimpressive even by standards of the time: state elections from the period tended to attract a slightly higher, and local elections a markedly higher turnout. In several states participation in the elections to decide the fate of the Constitution was below 20 percent; and a significant number of the delegates opposed the Constitution. Although Ackerman wishes to see the establishment of the Constitution as a paradigmatic instance of a democratic revolution in which "the People" rose up and spoke in a loud, clear, and deliberate voice, the fact is that in the contest over ratification a great majority of eligible Americans hardly spoke at all. As the eminent historian Edmund Morgan argues, in eighteenth-century America the doctrine of popular sovereignty functioned primarily as a fiction, on a par with the divine right of kings, crafted by the few to govern the many, a plausible fiction skillfully deployed by the *Federalist* to win popular consent for their scheme of limited constitutional government and thereby to secure the blessing of liberty for all

(*Inventing the People*, 1988, pp. 239-88). This is not to argue that the constitution was illegitimate or counterrevolutionary, but rather that its legitimacy cannot rest primarily on the claim that it represented the voice of "the People." What drives Ackerman to betray his promise to remain "truer to the historical facts" (p. 5) by perpetuating the old fiction of "the People" dressed up in the new language of "dualist democracy" and "higher lawmaking"? What prevents Ackerman from recognizing the complicated combination of consent and right in which many from the Revolutionary and Founding era thought that authority of the Constitution was grounded?

The answer, I think, lies in Ackerman's wish to democratize the Founding. In a dualist democracy as Ackerman conceives it, there is no political principle superior to the will or the authentic and general will of "the People." To be sure, Ackerman speaks a great deal about "higher law" and "higher lawmaking." Yet from the standpoint of opinions about mankind, nature, and God that prevailed in the Revolutionary and Founding Era, Ackerman suppresses a basic tension inhering in the idea of "higher lawmaking." To take one prominent example: the "Laws of Nature and Nature's God" which, according to the Declaration of Independence, serve as the foundations for equality, and the "unalienable rights" which, according to the same Revolutionary document, governments are instituted to secure, are not made by human beings, but rather impose limits on what human beings may make and do. Ackerman drastically narrows the meaning of "higher law" by secularizing and democratizing it; instead of limiting the human will, Ackerman makes higher law, contrary to fundamental and widespread ideas of the era whose spirit he purports to capture, whatever many wills proclaim in unison. To be sure, the Constitution was regarded as a higher, supreme, or fundamental law. But Ackerman occludes the rich ambiguity in early American political thought concerning the foundation and constraints on the fundamental law made by the people. The Christian and liberal dimensions of the Revolutionary and Founding era may present inconvenient facts and awkward embarrassments for contemporary democratic theorists, but Ackerman's avowed aim is historical accuracy, not political propaganda on behalf of a democratic theory reconstructed in light of the moral convictions that he finds attractive and defensible.

Ackerman's overall account of American constitutional politics has the great merit of firmly placing the Constitution at the center of the study of constitutional law and American politics. *We the People*, through its provocative account of the continuities and breaks in the American constitutional tradition, its perceptive justification of the Supreme Court's interpretive task and institutional role as preserver of Constitutional principle, and its measured exposition of the public and private dimensions of American citizenship, should make it indefensible for law professors to study constitutional law in isolation from politics, history, and philosophy; and disreputable for political scientists to study American politics without taking the Constitution seriously. Yet Ackerman betrays the worthy aims he repeatedly invokes. His distinctive claims about the Founding are based on fanciful history and tendentious political theory. Although foundations are not everything, Ackerman himself

stresses that foundings determine the shape of things to come. Thus, to profit from its many notable constitutions, his general theory, because it rests on flawed foundations, must be approached with skepticism and caution.