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“Grand Theory” and Constitutional Change

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We the People: Foundations. By Bruce Ackerman.** Cambridge, Mass: The Belknap Press of Harvard University Press., 1991. Pp. x, 369. Cloth, \$24.95.

INTRODUCTION

As the first of a projected three-volume study of the American Constitution, *We the People: Foundations* introduces us to the author's theory of “dualist democracy.”¹ Dualism is “grand theory” in the sense that it is offered as a comprehensive synthesis, both normative and descriptive, of American constitutional law. As grand theory, it must offer a satisfying solution to the master-problem of constitutional law: How shall we read our Constitution so that it is sufficiently stable and binding to serve as fundamental law, while still being sufficiently organic and dynamic to last over multiple generations? If its meanings are wholly malleable it cannot bind. If it binds too rigidly it cannot last.

For Ackerman, the solution begins with the recognition that the Constitution is uniquely American, and is historically rooted in a distinct tradition and evolving historical practice. His dualist hypothesis is therefore situated historically and is dynamic.

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1. *WE THE PEOPLE* is, in a sense, the culmination of the author's evolving constitutional philosophy previously presented in shorter form. See, e.g., Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453 (1989); Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013 (1984).

This first volume, *Foundations*, is an elaboration and defense of his dualist thesis and a search for its roots at the founding of our nation. This search for historical confirmation culminates in a final chapter of justification: Dualism does and ought to inform our constitutional thought. The second volume, *Transformations*, will seek to confirm the dualist spirit by displaying its working through our constitutional history, especially at the crucial moments of Reconstruction and the New Deal.² The third volume, *Interpretations*, promises a fresh look back at our constitutional law, especially in the Supreme Court's hands, through the dualist scope.³ Altogether, *We the People* has a prophetic vector for it looks to our future and to what can and should be done with our Constitution.

In a literal sense, Ackerman's project is incomplete and, therefore, in all fairness cannot be definitively judged. Yet, as this first volume fully lays out the dualist thesis, seeks to confirm its pedigree and defend its value, and foreshadows future volumes by way of example and sketch, at least tentative comments are in order.

And they have not been wanting. The Ackerman thesis and this book already have been much discussed.⁴ Although broadly respectful, the commentary has generally ranged from challenging and skeptical to negative and even carping.

I will first set out the dualist model in a straightforward manner in Part I. In Part II I will distill the critical commentary. In Part III, I will attempt to come to grips with dualism as grand theory and to set Ackerman and his critics in some perspective.

I. DUALIST DEMOCRACY

Ackerman is emphatic about the distinctive nature of our constitutional history. European categories will not capture our unique American experience, and their somewhat promiscuous application has befogged us. Only a careful attention to our tradition will reveal our constitutional essence.⁵

Ackerman uses what he deems to be the three prevailing schools of modern constitutional thought as foils for the introduction of his dualist thesis.⁶ For the "monist,"⁷ primacy must be given to popular democracy

2. BRUCE ACKERMAN, *WE THE PEOPLE, FOUNDATIONS* 44, 162 (1991).

3. *Id.* at 99, 162.

4. *See infra* Part II.

5. ACKERMAN, *supra* note 2, at 3.

6. *See* ACKERMAN, *supra* note 2, at 6-7 for a brief summary of the thesis.

7. Among the monists he includes Woodrow Wilson, James B. Thayer, Charles Beard, O. W. Holmes, Robert Jackson, Alexander Bickel, and John Hart Ely.

principally as it is manifested in a free and fair election process. Electoral winners have plenary authority, and any checks upon that authority are "presumptively antidemocratic."⁸ Hence, judicial review of the political branches—the counter-majoritarian difficulty—is a discomfiture the monist is never quite able to resolve.⁹

For "foundationalists,"¹⁰ by contrast, democratic principles, although honored, "are constrained by deeper commitments to fundamental rights."¹¹ Rights trump the decisions of the democratic institutions.¹² If for foundationalists the counter-majoritarian difficulty does not cause great anxiety, they must meet charges of being antidemocratic, rootless, vague, and elitist.¹³

Finally, what Ackerman labels the historicist or "Burkean" school prescribes a common law approach to the constitution that is strongly precedential, organic, and evolutionary.¹⁴ Although himself a historicist of a sort, Ackerman accuses the Burkeans of a misplaced distrust of popular democracy and a blindness to the essential role of principles and transformative moments in the American constitutional experience.¹⁵

Each school then prizes a crucial aspect of our constitutional thought—democracy, rights and tradition—but is in some senses defective and incomplete. Democratic dualism holds the key.

Political decisions must be understood as operating on two tracks: that of "normal politics" and that of "higher politics." The existing government controls in the first setting, the People in the second. The great portion of our lives is lived in the atmosphere of normal politics.¹⁶ The ordinary political institutions—periodic elections, public officials, public and private interest groups, bureaucracy, the media, and political parties—grapple for advantage and votes. The ordinary voter or citizen spends most energy and time as a private citizen going about his or her private life. With respect to the public sphere the average citizen is only

8. ACKERMAN, *supra* note 2, at 8.

9. Ackerman suggests that the monist views the British parliamentary design as "the essence of democracy" and takes considerable pains to argue the competing virtues of the American system in the American context.

10. Among the Foundationalists, Ackerman lists Richard Epstein, Ronald Dworkin, Owen Fiss, John Rawls and Robert Nozick.

11. ACKERMAN, *supra* note 2, at 11.

12. The Foundationalist is apt to invoke Kant and Locke and other western philosophic resources.

13. ACKERMAN, *supra* note 2, at 12.

14. ACKERMAN, *supra* note 2, at 17.

15. For Ackerman's depiction of a Burkean justice at work, see Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5 (1991).

16. See, e.g., ACKERMAN, *supra* note 2, at 230-65.

half-attentive, remotely engaged and imperfectly informed. Private interests remain dominant, and the citizen's vote, if he or she votes, is "soft."¹⁷ Elections are held and the government governs (that is, engages in "normal lawmaking") but does not represent, in any deep sense, the People.¹⁸ At best the elected officials are stand-ins or temporary licensees of the People.¹⁹ Therefore, a successful polity must economize on its evocation of civic virtue because the People cannot sustain their role as public citizens for any extended period.²⁰

Only very rarely do the People speak in their sovereign capacity, but when they do, we have switched to the "higher lawmaking" track.²¹ In the broad interims between episodes of higher lawmaking the Supreme Court performs a special role as preserver: It safeguards against government depredations upon the periodic decisions of the People as sovereign.²² In so doing, the Court must look back and see what the People have wrought in their moments of higher lawmaking.²³

Before examining the sources and consequences of the dualist thesis, it is well to note how it purports to resolve the defects of the dominant schools previously described. Like the monist, the dualist accords primacy to the People, but only in the infrequent context of higher lawmaking. Like the foundationist, the dualist honors fundamental rights as trumping normal political decisions. Although ultimately the People define, create and abolish the fundamental law, they do so only when operating on the special plane of higher lawmaking for only then do they exhibit true civic virtue. The Court is now seen as, far from being antidemocratic, the very palladium of popular sovereignty. Yet it is not set on a free philosophical quest for the right and the good. Rather it must examine the constitutional tradition, seen not through Burkean eyes as merely an incremental growth, but as growth informed by principle and punctuated by the rare "jurisgenerative" event when the People engage in higher lawmaking.²⁴ The dualist synthesis then appears to preserve the major emphasis of the prevailing schools at the same time that it purports to resolve their dilemmas.

Is dualism "true"? What does it do for us?²⁵

17. ACKERMAN, *supra* note 2, at 240.

18. ACKERMAN, *supra* note 2, at 6.

19. ACKERMAN, *supra* note 2, at 181-86, 236.

20. ACKERMAN, *supra* note 2, at 198.

21. See ACKERMAN, *supra* note 2, at 266-94.

22. ACKERMAN, *supra* note 2, at 86-87.

23. ACKERMAN, *supra* note 2, at 86-94.

24. See ACKERMAN, *supra* note 2, at 44.

25. In assaying Ackerman's answers to these questions it is well to keep in mind that two-thirds of his project is yet to be completed.

For Ackerman dualism truly captures the essential nature of our original constitution. The principal support for this claim is built upon a close reading of the *Federalist*, which he deems to "represent the Founders' most reflective effort."²⁶ The key to discerning the dualist nature of the Federalist vision is to be discovered in Publius' solution to the revolutionry's dilemma:²⁷ Having achieved power, how does one justify consolidation of the revolutionary movement without succumbing to revolutionary amnesia or falling victim to escalating or permanent revolution?²⁸ In particular, how does one justify the extra-legal nature of the Constitution of 1787? Publius' central response is found in *The Federalist No. 40*, in which James Madison transcends his somewhat feeble legal arguments and his somewhat discomfiting appeal to exigency by positing a third defense. The convention mode of drafting and popular ratification are, far from illegal or merely extra-legal, in fact the supra-legal means by which the People speak in their sovereign capacity upon "solemn and authoritative" occasions.²⁹ In dualist parlance it is the stage of higher lawmaking. What is particularly crucial for Ackerman is that the door to such jurisgenerative events is never closed by the Constitution. This open-ended aspect of higher lawmaking is critical because the founding, contrary to the popular "bicentennial myth," is only the first of three such jurisgenerative moments in our history.³⁰ Each of these moments involved a transformative event in which we underwent fundamental constitutional change apart from, one might say, above and beyond, the classical recourse to Article V. Acknowledging the legitimacy of such moments opens up our constitutional future.

How are we to recognize these moments of higher lawmaking, these departures from normal politics? Such times are marked by four stages. The first involves the "signaling" of a desire for important change.³¹ The signaling period evokes a broad, deep, and decisive shift in the approach to politics of a significant number of voters. They now become truly deliberative and rise above their normal half-attentive, self-centered state. This stage is followed by concrete proposal, an effort to implement the operative aspects of the change.³² The third stage involves the high deliberation in which an array of citizens are mobilized as the institutions

26. See ACKERMAN, *supra* note 2, at 167.

27. ACKERMAN, *supra* note 2, at 200-29.

28. ACKERMAN, *supra* note 2, at 169-71.

29. See ACKERMAN, *supra* note 2, at 195. See also G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, CH. VIII (1965) (constitutional convention as perhaps the foremost American contribution to politics).

30. ACKERMAN, *supra* note 2, at 36.

31. ACKERMAN, *supra* note 2, at 272.

32. ACKERMAN, *supra* note 2, at 266.

of government contend over the desirability and wisdom of change.³³ Finally, if the change wins sufficient, broad support, the final stage of codification witnesses the incorporation of the shift into our fundamental law.³⁴ In short, what has happened is constitutional amendment, modern style, as an alternative to the classical, Article V mode of change.³⁵

Beyond the founding, two moments in history stand out as moments of successful higher lawmaking—Reconstruction³⁶ and the New Deal.³⁷ From the traditional perspective, each of these episodes shares with the founding an aura of dubious legality.³⁸ Recognition of the truly transformative nature of these moments shatters the “bicentennial myth” or dominant “professional narrative,” which sees our constitutional past as flowing steadily from the single creative event of the founding, although importantly punctuated by the Civil War Amendments, the failure of the post-Reconstruction Court, and the judicial rediscovery of constitutional truth in the 1930s. Ackerman, the dualist, marks out three transformative times, each ushering in a new constitutional regime. “Reconstruction was just that: the rebuilding the Union from the ground up,”³⁹ a process in which Article V was paid only lip service as the amending process was truly nationalized and the national government was put forward as the guarantor of rights. The New Deal introduces the third regime in which the activist national state is consolidated without even a formal nod at Article V. For Ackerman, of course, the dualist perspective reveals these moments as involving wholly appropriate modes

33. ACKERMAN, *supra* note 2, at 385.

34. ACKERMAN, *supra* note 2, at 288.

35. ACKERMAN, *supra* note 2, at 267-68. Ackerman suggests an addition to Article V that would codify this modern mode of amendment:

During his or her second term in office, a President may propose constitutional amendments to the Congress of the United States; if two-thirds of both Houses approve a proposal, it shall be listed on the ballot at the next two succeeding Presidential elections in each of the several states; if three-fifths of the voters participating in each of these elections should approve a proposed amendment, it shall be ratified in the name of the People of the United States.

ACKERMAN, *supra* note 2, at 54-55. This proposal, which Ackerman never takes great pains to support, does, however, capture his notion of the modern “plebiscitarian presidency” and the crucial role of the People. The states, of course, cease to have a function except as polling places.

36. ACKERMAN, *supra* note 2, at 44.

37. ACKERMAN, *supra* note 2, at 47.

38. See ACKERMAN, *supra* note 2, at 50. Making the case for these moments as truly transformative is apparently the task of the next volume, TRANSFORMATIONS. Ackerman also sketches an episode of a “failed constitutional moment”—President Reagan’s constitutional ambitions being “rejected in the battle precipitated by his nomination of Robert Bork.” Also see ACKERMAN, *supra* note 2, at 84, in which the author discusses the “failed moment” of William Jennings Bryan.

39. ACKERMAN, *supra* note 2, at 44.

of constitutional change, as "solemn and authoritative" moments when the People, as sovereign, operate above normal law. Crucially, he exhorts us to see that constitutional creativity is a reserved capacity of the People, ongoing and ever available.⁴⁰

In addition Ackerman's three regime narrative provides a different perspective of our constitution past by fashioning "a model of interpretation which can do justice to the complexity of American judicial practice."⁴¹ The interpretive impact he captures in a happy metaphor:

Think of the American Republic as a railroad train, with the judges of the middle republic [i.e., post Reconstruction] sitting in the caboose, looking backward. What they see are the mountains and valleys of dualist constitutional experience, most notably the peaks of constitutional meaning elaborated during the Founding and Reconstruction. As the train moves forward in history, it is harder for the judges to see the traces of volcanic ash that marked each mountain's political emergence onto the legal landscape. At the same time, a different perspective becomes more available: as the second mountain moves into the background, it becomes easier to see that there is now a mountain range out there that can be described in a comprehensive way.

This changing perspective over time is the engine driving the shift from particularistic to comprehensive synthesis. As this shift is occurring, lots of other things are happening. Old judges die, and new ones are sent to the caboose by the engineers who happen then to be in the locomotive. These new judges' views of the landscape are shaped by their own experiences of life and law—as well as the new vistas constantly opened up on the mountains by the path that the train takes into the future. The distinctive thing about the judges of the middle republic is that they remained in the caboose, looking backward—not in the locomotive arguing over the direction the train should be taking at the next crossroads, or anxiously observing the passing scene from one of the passenger cars. Doubtless, the relationship between the mountains in the mountain range will be seen differently over time. The crucial question is whether it is fair to view the judges of the middle republic as engaged in this process of retrospective synthesis.⁴²

40. See ACKERMAN, *supra* note 2, at 319, in which the plea for conscious constitutional change is made most emphatically; see generally *id.* at 295-322.

41. ACKERMAN, *supra* note 2, at 159; see also *id.* at 63-66, 101, 142 (recasting of the place of *Lockner v. New York*, 198 U.S. 45 (1905) and *Plessy v. Ferguson*, 163 U.S. 537 (1896) decisions).

42. ACKERMAN, *supra* note 2, at 98-99.

Each regime is layered upon the past and requires a new synthesis. At first the new is particularized and confined to the particular context from which it grew. Over time, as the moment recedes and old book learning loses influence, the broad, underlying principles emerge and are applied. The Court's task is to determine what is new and what remains from prior regimes. Thus, if at first, as in the *Slaughter-House*⁴³ Cases, the Civil War amendments were confined to the newly freed, over time the broad commitment to equality and process inherent in the amendments was grasped. Ackerman provides a pair of demonstrations of the modern interpretative synthesis in his acute analysis of the *Brown v. Board of Education*⁴⁴ and *Griswold v. Connecticut*⁴⁵ cases.⁴⁶ Thus, he revises *Griswold*, especially Justice Douglas' opinion for the Court, as a synthesis of regime one's emphasis on rights, regime two's turn to the national government as primary guarantor of rights, and a recognition of the critical role privacy must play against regime three's activist state.⁴⁷

The book closes with an iteration of the arguments for dualism—among them the Federalists' ever valid insight on the shortage and inconstancy of civic virtue.⁴⁸ Ackerman rejects the notion that the Framers somehow betrayed the Revolution of 1776. Rather their end product, the Constitution, was a culmination of the revolutionary ideals annealed in the heat of lived experience.⁴⁹ Although suggesting the inescapable nature of our constitutional tradition, he concludes, without denying episodes and patterns of injustice, that our dualist democracy is a good thing not least because it provides an engine for change.⁵⁰

Perhaps enough has been said to suggest the richness of Ackerman's book. It is in essence an optimistic, but open-eyed, essay celebratory of the American constitutional experience. But, for all that, it has not been altogether well-received.

II. THE CRITICS

Historian Edmund Morgan clearly likes Ackerman's book, praising it as "a fresh and convincing view not only of our constitutional history but of our will to believe."⁵¹ Although Morgan leaves room for possible

43. 83 U.S. (16 Wall.) 36 (1873).

44. 347 U.S. 483 (1954).

45. 381 U.S. 479 (1965).

46. A full-scale display and application of the dualist interpretive synthesis is apparently the task of volume three, *Interpretations*.

47. ACKERMAN, *supra* note 2, at 150.

48. ACKERMAN, *supra* note 2, at 311.

49. ACKERMAN, *supra* note 2, at 200.

50. ACKERMAN, *supra* note 2, at 321.

51. Edmond Morgan, *The Fiction of the People*, in *THE NEW YORK REVIEW OF BOOKS* 46, 48 (1992) (book review).

disagreement with particulars, he concludes that Ackerman's central "distinction between normal and constitutional politics fits the way in which American government has operated over two centuries."⁵²

Ackerman's legal compeers have not been so generous. Terence Sandalow finds the book "inflated, self-important, and self-congratulatory."⁵³ He judges the history too schematic⁵⁴ and the role of citizens in higher politics unconvincing.⁵⁵

Indeed, much criticism has focused on Ackerman's (mis)use of history. At best it is seen as controversial⁵⁶ or "flawed,"⁵⁷ at worst it is "simplistic",⁵⁸ "mired in a fictional past"⁵⁹ or just "discredited."⁶⁰ In particular, his reading of *The Federalist* is charged as overly-aggressive and as providing but a slim or slender reed of support for his dualist thesis.⁶¹

Michael Klarman deems his readings of *Brown* and *Griswold* to be "fantasy"⁶² and his explication of *Plessy* to rest on a distorted history.⁶³ Sanford Levinson criticizes Ackerman's failure to wrestle with the difference between interpretation and amendment.⁶⁴

More fundamentally, the reviewers doubt whether he has really resolved the countermajoritarian difficulty or made the prescriptive case for the deliberative ideal which informs dualism.⁶⁵ Indeed, for Sherry, his thesis is, at bottom, "trivial."⁶⁶

52. *Id.*; see also Leif Carter, Book Review, 16 *Legal Stud. F.* 111 (1992). Carter, a political scientist, also has general praise for the book.

53. Terence Sandalow, *Abstract Democracy: A Review of Ackerman's We The People*, 9 *CONST. COMM.* 309 (1992) (book review).

54. *Id.* at 318.

55. *Id.* at 326.

56. David R. Dow, *Where Words Mean What We Believe They Say: The Case of Article V*, 76 *IOWA L. REV.* 1, 47 (1990).

57. William W. Fisher, III, *The Defects of Dualism*, 59 *U. CHI. L. REV.* 955, 956 (1992) (book review).

58. Suzanna Sherry, *The Ghost of Liberation Past*, 105 *HARV. L. REV.* 918, 919 (1992) (book review).

59. *Id.* at 918.

60. Fisher, *supra* note 57, at 973.

61. Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 *STAN. L. REV.* 759, 776 (1992) (book review); see also, Fisher, *supra* note 57, at 964.

62. Klarman, *supra* note 61, at 785.

63. Klarman, *supra* note 61, at 787.

64. Sanford Levinson, *Accounting For Constitutional Changes (Or, How Many Times Has The United States Constitution Been Amended? (A) <26; (B) 26; (C) >26; (D) all of the above)*, 8 *CONST. COMM.* 409, 430 (1991) (book review).

65. See Dow, *supra* note 56; Fisher, *supra* note 57, at 968, 978; Sandalow, *supra* note 53, at 330; Frederick Schauer, *Deliberating About Deliberation*, 90 *MICH. L. REV.* 1187, 1190, 1197 (1992) (book review).

66. Sherry, *supra* note 58, at 927.

The final dismissal of Ackerman and his dualist theory is accomplished with a variety of labels: he's a plain old activist;⁶⁷ an originalist, a utopian, a liberal on the ropes;⁶⁸ an originalist whose obeisance to the past is "fundamentally conservative."⁶⁹

Why this chilly rejection of dualism, especially in the face of warm praise from such an eminent historian as Edmund Morgan? Is it perhaps that there lately has been a surfeit of grand theory with its inherent essentialism; that, at least among legal scholars, grand theory is on the rocks? Perhaps we are seeing a return to more modest tasks for legal scholars. If so, that might be all for the good. Yet grand theory may still have a useful role.

III. THE USES AND ABUSES OF GRAND THEORY

Ackerman's dualist thesis may be regarded as "grand theory." By grand theory I mean "comprehensive normative theories of constitutional law"⁷⁰ that, among other things, seek to justify the institution of judicial review within a democratic system. Such theory seeks to enlighten us about the nature of our constitutional law and while normative in purpose, its justification rests upon some discovered truths in our constitutional past.

What, then, should we expect from grand theory? Must it be comprehensive, pure, internally coherent and, above all, true?⁷¹ Ackerman's critics seem to demand as much—some crystalline, hard, elegant code-cracking theorem, essentialist in nature and ultimately resistant to critique,—the equivalent, as it were, of "grand unified theory" in the physical sciences. Is that to expect too much, or is it to expect the wrong thing? Certainly many of the criticisms we have canvassed are telling and some of the epithets and labels do fit in the loose way such labels fit, but it is not the critical points so much, if at times they seem carping, but the dismissive tone of the reviews that may be said to be beside the point and ungenerous.

Grand theories are and ever will be more humble affairs than critics (and theorists) like to think. In law grand theory will never deliver on its promise if we take its promise to be inarguable truth. As Ackerman himself, in his more modest moments, admits, grand theory offers a model, a hypothesis—really a tool for shedding new light on and helping

67. Sandalow, *supra* note 53, at 335.

68. Sherry, *supra* note 58, at 918, 933.

69. Klarman, *supra* note 61, at 765.

70. MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* at 1 (1988).

71. *Id.* at 88.

us come to grips with its subject.⁷² Grand theory begins with a building upon a selected past from which it is distilled. Its terms are more prescriptive and linguistic than essentialist, not so much predictive as hortatory.⁷³ In its building it is an imaginative and interpretive foray into the past, and so always subject to dispute, and we can ask only that it be, within our tradition, a plausible way of selecting and looking at the data. Its distillation must involve rational inference. Its application should provide fresh insight and, within our legal culture, a satisfying (and good) narrative. It should ring true rather than be true. It is more hermeneutic, rhetorical, and poetic than scientific. Indeed, it is at its weakest when it pretends to be quantitative.⁷⁴ Grand theory can never wholly capture an ongoing political and intellectual tradition as complex and organic as our constitutional law nor dissolve the ineradicable tensions inherent in it. It does much if it brings its subject into new relief and suggests a coordinating vision of our constitutional past with which we can be comfortable as we turn again to the future. In a sense it proposes a belief system more than a body of information, a symbolic paradigm for ordering our understanding and our future. Who but a deep down formalist, ever to be disappointed, could expect more? No one thing is true except the idea that no one thing is true—in law at least.

With our demands thus scaled down or shifted, what does Ackerman do for us?

For one thing, he confronts our predominant constitutional myth⁷⁵ and provides provocative correctives. No student of American constitutional law has been comfortable with the standard version of our post-reconstruction and New Deal history. He calls "change" change but avoids easy cynicism as he seeks to make it licit within our constitutional faith. In order to do so, he offers a plausible synthesis of the tension

72. ACKERMAN, *supra* note 2, at 159, 142.

73. More generally, grand theory may be attacked, especially insofar as it is descriptive and predictive, as suffering from the defect of "brilliance." Daniel Farber, *The Case Against Brilliance*; 70 MINN. L. REV. 917 (1986); *see also* Daniel Farber, *Brilliance Revisited*, 72 MINN. L. REV. 367 (1987). A "brilliant" idea is a new, startling and counterintuitive explanation of intentional phenomena which stands conventional understanding on its head. Farber's argument, which itself might be called "brilliant" (but see his defense at 70 MINN. L. REV. 930, n.56), is that the very nature of the brilliant idea — new, previously unthought of — makes it probably untrue, at least as an explanation of what is really going on in past legal phenomena. If it really explained what was going on it would presumably have been recognized by the lawmakers in which case it would be a commonplace. At the least, Farber's notion robs "brilliant" ideas of much of their predictive, if not of their exhortative power.

74. *See, e.g.*, ACKERMAN, *supra* note 2, at 274.

75. *See* ACKERMAN, *supra* note 2, at 36. I use "myth" here as Ackerman does: not as a mystification but as the necessary collective narrative we tell ourselves in the ongoing effort to define ourselves.

between popular democracy and individual rights, a synthesis which usefully illuminates—though it can never dissolve—the countermajoritarian tension: the Court guards the reserved sovereignty of the People and of the individual. The synthesis fits nicely our intellectual tradition. Does it rest too exclusively on the *Federalist*? But why should scholars ordinarily so jaded about original intent deny a selective mining of our past for the “best” view among many? His reading of the *Federalist* is really quite compelling.

A second merit is that he sets his theory within tradition, a setting which he quite rightly defends as all we have and as quite essential to any thought at all.⁷⁶ By tradition we mean a set of common experiences, terms, problems, explanations, and assumptions—“a narrative of inquiry and debate.”⁷⁷ It is not that tradition is sacred.⁷⁸ Rather, to be out of tradition is to be wholly deracinated—out of society, out of words and out of thought.

The attack upon the relevance of tradition sometimes takes the form of a plea on behalf of the People to be free of the bonds of prior generations—really an extreme form of “monism.” Thus, Klarman asks why we should privilege “yesterday’s voice of the People over today’s voice of the People’s ‘stand-ins’ (that is, our elected representatives)”⁷⁹ And answers that “there is no convincing reason why one generation should be bound by constitutional constructions imposed by its predecessors.”⁸⁰ These sorts of questions and answers which have gained especial currency in these times of passionate if self-refuting attacks on western, so-called white-male, culture are perhaps useful in asking us to think about our past, but somehow seem quite especially either sophomoric or disingenuous in the present context. Does Klarman really believe that one generation should not be at least presumptively bound by its predecessors? We are bound in part for the same reasons we are bound to play baseball by the rules. But in any case, when would a generation be free to disregard the past? What is a generation? Generations do not issue forth in neat cohorts upon the coincident demise of ancestors. The People come in an overlapping chain and is organic across generations. What would a polity be like without a presumptively binding past? Could it be called constitutional in any important sense?

Ackerman’s defense of tradition reveals a third of his offerings: a dynamic constitution and an optimistic exordium. Our past calls for

76. ACKERMAN, *supra* note 2, at 300.

77. See ALASDAIR MCINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY* at 350 (1988).

78. ACKERMAN, *supra* note 2, at 21.

79. See Klarman, *supra* note 61, at 765.

80. Klarman, *supra* note 61, at 793. Predictably, Klarman invokes Jefferson’s musings on the value of fresh starts for each generation.

presumptive respect but critical analysis.⁸¹ Our tradition carries us well-armed into the future.

Others of Ackerman's theoretic components also are noteworthy. His model of normal politics and the private citizen ordinarily going about daily life with only a fitful attention to politics rings true.⁸² It also provides a means of taming the more Jacobin overtones in the recent revival of civic republicanism which at times seems to call for a kind of illiberal and collectivist polis,⁸³ a vision surely cross-grained to our common faith in individual liberty. His exposure of the dominant professional narrative raises provocative questions about the canonicity of our constitutional law and especially how it is shaped by the standard casebook. His description of the judicial mode of intergenerational synthesis, felicitously captured in the railroad metaphor earlier set out, casts a fresh light on past cases and eras and upon the judicial task.⁸⁴

All of this is not to deny that grand theory invites testing. That is one of its roles. Many of the criticisms previously summarized are trenchant and surely useful to Ackerman as he proceeds to fill out his project and we may properly expect answers to many questions in succeeding volumes. One might indeed wonder what to make of his portrayal of Douglas' opinion for the Court in *Griswold* as a skillful synthesis of three great jurisgenerative eras. Were these Douglas' thoughts? His instincts? Can Ackerman's version somehow escape Farber's critique of brilliance?⁸⁵ What is the interpretive scope left for the preservationist court? How can he, in light of the primacy which he accords the People engaging in higher-lawmaking, imagine the possibility of a new bill of rights forever entrenched against amendment?⁸⁶ Would we be better off redomesticating constitutional change in a revision of Article V somewhat along the lines he sketches rather than remaining subject to the uncertainties of the extra-legal passage, a phenomenon only recognizable in retrospect and for which we surely pay a price? Why did the Framers, if dualists at heart, see a need for Article V? Then too one might wish for a keener attention to the very meaning of amendment and how it fits within the degrees of constitutional change

81. ACKERMAN, *supra* note 2, at 316.

82. ACKERMAN, *supra* note 2, at 230.

83. See, e.g., Steven G. Gey, *The Unfortunate Revival of Civil Republicanism*, 141 U. PA. L. REV. 801 (1993); James W. Torke, *What Price Belonging: An Essay on Groups, Community and the Constitution*, 24 IND. L. REV. 1 (1990).

84. ACKERMAN, *supra* note 2, at 98-99.

85. See Farber, *supra* note 73.

86. For an interesting discussion of this puzzle of constitutional entrenchment, see PETER SUBER, *THE PARADOXES OF SELF AMENDMENT: A STUDY OF LAW, LOGIC, OMNIPOTENCE AND CHANGE* § 9 (1990). Suber also compiles a list of several methods of constitutional amendment. See *id.* §§ 14-19.

that trouble our civic faith. This is a puzzle a book about constitutional change should try to solve.⁸⁷ As for the uses of history to confirm the dualist thesis, we must await his next volume; but if the reader awaits some apodictic demonstration he is sure to be disappointed. A rich, plausible and thought-provoking narrative and argument will do. As lawyers should know, there isn't any more to be had.

We The People: Foundations is itself the foundation of a grand theory about constitutional law and constitutional change. Whether Ackerman is a liberal on the ropes or an originalist seems beside the point. When the project is complete we may ask whether it gives us a coordinated vision of our past and future. What he calls for so far is,

An exercise of judgment, a recognition of the rightful superiority of those higher laws that have a more plausible claim than others to be acts of the people themselves, even though the claim can be no more than plausible. He has exercised his own judgment in discerning the occasions where we should suspend our disbelief, give our faith, and say that the people have acted. In doing so he has given us a fresh and convincing view not only of our constitutional history but of our will to believe.⁸⁸

I think he's made a pretty fair beginning.

87. See Levinson, *supra* note 64.

88. Morgan, *supra* note 51, at 48.

