

**FALSEHOODS NOT INTENDED TO DECEIVE:
POPULAR SOVEREIGNTY AND HIGHER LAW**

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“Any discussion of the political laws of the United States has to begin with the dogma of popular sovereignty,” Tocqueville wrote in *Democracy in America*.¹ But what meaning does the phrase “popular sovereignty” have in practice as opposed to dogma? Perhaps it has no pragmatic meaning at all and is merely, as Richard Henry Dana suggested, part of “the metaphysics of popular government.”² For enlightenment on these questions, one may turn to a series of lectures on “The Living Constitution” delivered by the eminent legal scholar Bruce Ackerman at Harvard Law School in 2006.³

Condensing and extending his magisterial work on American constitutional history, *We the People*,⁴ Ackerman focuses attention on both terms of the phrase “popular sovereignty.” He draws a sharp distinction between acts of popular sovereignty and ordinary participation by the people in their government. Acts of popular sovereignty include only those actions of the people that can reasonably be called sovereign, that is, definitive of the form and scope of government, the allocation of power among institutions and constituencies, and the constraints that the majority imposes on itself. Like Jefferson, Ackerman believes that democratic governments must periodically be reminded that the

people are capable of raising their collective voice. And like Justice Holmes, he believes that the law is capable of profiting from experience. Yet because law, though made by the people's representatives, is pronounced by judges, he wants to remind the latter that the experience by the light of which they are to shape their conclusions is not their own but that of the American people in its actual history of higher lawmaking.

Ackerman's thesis is arresting, but I believe that the model of government it implies is inadequate, in ways that I will explain. The paper is organized as follows: I first lay out Ackerman's doctrine of the "living Constitution" that arises from the interaction between politics and jurisprudence. I then argue that his account assumes that the relation between people and government in democratic society is that of principal to agent, to borrow the jargon of economics, a model in which I discover shortcomings and therefore propose what I hope is a better one, based on another idea from economics: the theory of incomplete contracts. This second model yields an account of constitutional bargaining as a way of allocating power and control rights among elements of a governing coalition. Such allocation of power is one of the basic functions of a constitution. Equally important, however, are protections for minorities established by self-imposed constraints on majority power. These protections arise in a different way from the majority-enabling constraints embedded in incomplete contracts. To elucidate this distinction, I draw on the work of a follower of Ackerman's, Gerard Magliocca, and his notion of "pre-emptive" judicial decisions emanating from courts dominated by residual elements of a displaced majority.

POPULAR SOVEREIGNTY AND THE LIVING CONSTITUTION

Let us begin, then, with "the dogma of popular sovereignty." Popular sovereignty enters Ackerman's reflections by way of a simple historical question. Why, he asks, has the route to amendment envisioned by the Framers in Article V of the Constitution of the United States fallen into disuse?⁵ For Ackerman, this question is crucial, because he believes that the ultimate exercise of popular sovereignty consists not in the day-to-day business of governing, nor even in the periodic selection

of governors, but rather in rare yet supremely important modifications of the nation's higher law.

Higher law is fundamental, in Ackerman's view, because it defines the legitimate scope of routine lawmaking. Throughout the nineteenth century, politics revolved around constitutional issues of the "necessary and proper" scope of ordinary legislation. What was the federal government's role in internal improvements, or in the regulation of currency and banking? To what extent could the federal government control each state's power over individuals and groups residing within state boundaries? How did such jurisdictional questions impinge on the status of Indians and slaves?

The Bill of Rights and the post-Civil War amendments fit Ackerman's definition of what popular sovereignty really is: the expression of a people's provisional consensus as to the proper scope of its government. But do the textual amendments to the Constitution tell the whole story of our higher lawmaking? If the basic scope-defining constraints in the American political system must have a basis in either the text of the Constitution or in some amendment approved by the Article V process, then true exercises of popular sovereignty have been relatively rare in American history and have become increasingly rare since around 1930. If the Article V amendment process has lapsed, does it therefore follow that popular sovereignty has also lapsed?⁶

No, answers Ackerman, because it is seriously misleading to think that the interpretation of the Constitution is controlled solely by the Founders' text together with the twenty-seven existing amendments.⁷ Rather, there exists a "living Constitution," which results from the combination of acts of popular sovereignty with acts of judicial interpretation. These acts of popular sovereignty are not limited to those defined in Article V. There is a broader class of constitution-amending actions that can be discerned in retrospect by historical analysis. The living Constitution is not embodied in any text, hence efforts to set limits to constitutional jurisprudence by invoking canons of textual interpretation are fundamentally misguided.⁸

"Popular sovereignty is not a matter of a single moment," Ackerman maintains. "It is a sustained process that passes

through a series of stages – from the signaling phase through culminating acts of popular decision to consolidation.”⁹ Here, “signaling” belongs to the first or “movement” stage of what Ackerman calls a “three-part pattern of popular sovereignty,” whose components are movement, party, and presidency.¹⁰ Later, a fourth stage of “ratification” or consolidation is mentioned.¹¹ A movement is defined by “activists,” citizens “who are willing to invest enormous time and energy in pursuit of a new constitutional agenda.”¹² Through their investment they transmit a signal to the wider polity, drawing together like-minded comrades in a “movement party.”¹³ Most movements die at or before this stage, but a few succeed and move to the next stage, electing a president, who in turn appoints judges reflecting the movement’s constitutional agenda. Through “landmark statutes” instigated by the movement-president and enacted by the movement-dominated Congress, as well as “landmark decisions” handed down by movement-inspired justices, certain “super-precedents” are erected, which alter the boundaries that judges draw between settled law and law in flux.

Ackerman thus describes a broad national-centered paradigm for constitutional change rather than a narrow, formalistic, state-centered procedure such as that set forth in Article V. Under Ackerman’s definition, the conceivable avenues of constitutional change become as multifarious as the political system will allow and as diverse as society itself, with all its resources for autonomous association, political innovation, and remonstrance in the face of perceived inequity. In this way the Constitution evolves, if not quite as a living organism does, then at least as a source of the axioms, lemmas, and propositions that constitute the stuff of judicial logic. For Ackerman will have none of Oliver Wendell Holmes Jr.’s famous dictum that “the life of the law is not logic; it is experience.” He prefers to say that the life of the law “is *not only* logic but [also] experience.”¹⁴ Less cavalier than Holmes, he wants judges to be constrained by the logic embodied in the nation’s higher law, precisely because he believes that this higher law is periodically brought into harmony with the will of the people *as a whole*, We the People *of the United States*, not of the several states (as in the Article V process); for otherwise We the People would be at the mercy of jurists who, however vast their

experience, are no more to be trusted with incarnating the Sovereign's will than any other fallible creature of flesh.

Ackerman underscores his allegiance to the *demos* as opposed to the heroic theorist of justice in a pithy passage: "The aim of interpretation is to understand the constitutional commitments that have actually been made by the American people in history, not the commitments that one or another philosopher thinks they should have made. On this key point, I am closer to Justice Scalia than to Professor Ronald Dworkin."¹⁵ Since Justice Scalia is associated with the application of textual canons to constitutional interpretation that Ackerman opposes, it is important to note that what Ackerman means to highlight here is his difference with Scalia as to where the "actual commitments" of the American people are to be found. For Scalia, the answer is, "in constitutional texts." For Ackerman it is rather, "in history."

Throughout, Ackerman reveals a Lockean inspiration: We the People have no earthly master but our own will – an awesome force expressed in rare thunderclaps, of which the decisions handed down in hushed courtrooms are but muffled reverberations. On the rarity of those thunderclaps the stability of the system depends, but were it not for the periodic storms, our fundamental law would eventually wither in barren formalist desiccation.

If the idea of a "movement presidency" is to serve as a guarantee of a nation-centered popular will, an effective substitute for the mechanism of ratification by the states envisioned by Article V, there is a difficulty that must be overcome. Ackerman confronts it squarely. He calls it "the bundling problem."¹⁶ Presidential elections are never decided on a single issue, so how can the presumed constitutional commitments of a candidate purporting to reflect the views of a movement in favor of some constitutional reform be taken as a mandate for sweeping changes in the interpretation of higher law? Ackerman's response is twofold. First, he argues that the Article V ratification procedure is just as problematic in this respect: "Voters generally don't focus on candidates' positions on potential amendments when casting ballots for Congress and state legislatures."¹⁷ A "deeper philosophical" objection follows: unlike some other constitutional

systems, the American does not invoke special referenda for constitutional amendment. The Founders preferred to rely on the ordinary mechanisms of representative democracy as opposed to exceptional mechanisms of direct democracy. From the beginning, the amendment process was meant to partake of the rough-and-tumble of ordinary politics. To make "higher law" is thus to hurdle a raised bar, not to elicit by extraordinary means a putatively purified and ennobled *vox populi* somehow elevated above the low babble of everyday politics.

Ackerman thus answers his own initial question – why has the use of the Article V amendment procedure declined? – by arguing that popular sovereignty has found another way to assert itself, through the movement party and the presidential mandate for constitutional reform. He also explains why this was necessary: "We have become a nation-centered People stuck with a state-centered system of formal amendment."¹⁸ The origin of this mismatch, Ackerman maintains, lies in the "realism" of the Founders, whom he describes as "revolutionary nationalists." Knowing that their nationalism provoked fears of central usurpation of local powers, however, they offered a federal system with numerous veto points, including in particular a state-centered amendment procedure, to limit the prerogatives of the central government. As people began to identify more with the nation, as the Founders themselves had done, than with the states, as was the case with too many of the ratifying generation, the restrictive framework of Article V clashed with the need for government to expand its range of action to deal with an economy integrated on a larger scale than in antebellum times and with demands for equal rights stemming from what he calls the Second Reconstruction (the post World War II agitation for civil rights for African-Americans). Whence the two "acts of popular sovereignty" that he regards as the real focal points of higher lawmaking in the twentieth century, the elections of Franklin D. Roosevelt and Lyndon B. Johnson.

Ackerman's movement-centered analysis of higher lawmaking has the interesting consequence, when read back into the founding moment itself, of casting the Constitution as the prophetic assertion of "a nation-centered People" that does not yet know itself as such. On this view, the elaborate federal

structure and the intricate distinctions and divisions of power it established expressed not the will of We the People but something like the neurotic anxieties of a still immature national consciousness clinging with infantile tenacity to the comforts of localism. Paradoxically, however, it is the plethoric symptoms of this very identity crisis – the extended ratification debate and ultimate approval of the Constitution by conventions in the several states – that serve to guarantee the Constitution as the expression of the popular will rather than merely the lucubrations of a self-selected cadre of avant-garde revolutionaries. The process of drafting and ratification is the paradigm of the “extended process” of higher lawmaking that Ackerman would substitute for Article V.

Ackerman’s account of higher lawmaking might thus be described as a “legal fiction,” to use a term that he himself borrows from Lon Fuller: A legal fiction, Fuller wrote, is “not intended to deceive.”¹⁹ It is meant rather to force “upon our attention the relation between theory and fact, between concept and reality ... to furnish a kind of general starting point, an original impetus, to thought.”²⁰ Ackerman’s fiction of an alternative amendment process fulfills precisely this function. It provides a general starting point, an original impetus, to thought. It does more than that. It describes a model of higher lawmaking.

Once thought is started down these lines, however, it need not necessarily end where Ackerman ends it. There is a Whiggish quality to his reading of the “logic and experience” of higher lawmaking, culminating as it does in the progressive landmarks of the New Deal and the civil rights movement. With this expansion of the scope of government and inclusion of a formerly excluded minority, Americans simultaneously achieved their ineluctable destiny to become a “nation-centered people” and found themselves confronted with a “state-centered” amendment process inimical to the need for regular adaptation of their higher law to a continuously evolving society. To be sure, Ackerman allows that another cycle of constitutional revision may have been initiated by a more recent “movement presidency,” Ronald Reagan’s, but the whole tenor of his argument is directed against the constricted textualism that is the hallmark of that movement’s influence on constitutional law.

It is worth pausing a moment to consider the full sweep of Ackerman's historical tableau. The legal historian perceives "eight cycles of popular sovereignty" in American history.²¹ These begin with the American Revolution proper, followed by the "second American Revolution" (Jeffersonianism); the Jacksonian revolution; the free-soil Republican revolution that brought Lincoln to power and led, albeit at the cost of a Civil War, to the Reconstruction era amendments; the Progressive movement (which failed to consolidate its gains in a plebiscitary election and transformation of the Constitution); the New Deal; the civil rights revolution, or Second Reconstruction, as Ackerman calls it; and the Reagan-Bush revolution (or reaction), which may or may not succeed in consolidating itself.

Eight cycles in 230 years, each spanning a period long enough to spawn a reform movement, elect a president (or, more rarely, make a revolution or a civil war), and eventuate in major legislation and/or court decisions: Ackerman's account suggests a constitutional regime in more or less permanent crisis, subject to major overhaul at roughly thirty-year intervals – that is, with each new generation. Madison had hoped that the difficulty of amending the Constitution would diminish the frequency and therefore the cost of institutional change. As Stephen Holmes paraphrases Madison's argument on this point, "if we can take for granted certain procedures and institutions fixed in the past, we can achieve our present goals more effectively than we could if we were constantly being sidetracked by the recurrent need to establish a basic framework for political life."²² Yet we have allowed ourselves repeatedly to be sidetracked. Why?

REALISM, FAIRNESS, AND CONTRACTUAL BARGAINING

Perhaps the answer to Madison's worry is that there is a benefit as well as a cost to frequent institutional change. What might that benefit be? In order to answer this question, we must first strip Ackerman's legal fiction of a misleading implication. Ackerman says that his cyclical account of constitutional change is the only "way to understand how the American people have *in fact* sought to maintain control over their government for the past two centuries."²³ The opposition here of *people* and *government* is problematic. It mischaracterizes the relation between people and

government by casting it as what economists call a “principal-agent problem,” which arises whenever the interests of agents may diverge from the interests of their employers.

On theoretical, historical, and moral grounds I find this model unduly narrow. First, from a theoretical point of view, the problem that democratic societies face is not only or primarily a principal-agent problem but a problem of fair allocation of power and control. If we abandon the misleading assertion of a unitary people having a discernible interest, as I think we must, then it becomes clear that the principal-agent model is too simple to capture the complexities of the relationship between people and government. What is needed is a model oriented to the more complex problem of maximizing the welfare of numerous parties with disparate interests, of whom the agents in government are but one. I shall suggest a candidate for such a model in a moment.

Second, if we look at the question historically, Ackerman’s formulation suggests that all cycles of constitutional reform are reenactments of the American Revolution, in which a corrupt agent, grown alienated from the honest people he serves, has his grip on the mechanisms of power pried loose by an aroused and momentarily unified people. This will not do as a general paradigm for American history.

Third, in moral terms, the image of a virtuous people rising up to reassert control over a corrupt government suggests that corruption is always an affliction of government, never of the people. Ackerman’s fondness for the hypostasizing words of the preamble, “We the People,” indicates more than a taste for “the metaphysics of popular government”; it is a rhetorical trope intended at once to unify a disparate and opaque multiplicity (“We the People”) and to encourage identification with the unitary actor thus conjured up by the narrative.

Despite these flaws, Ackerman’s account of constitutional change has the signal advantage of focusing attention on a specific benefit not only of our penchant for frequent revision of our higher law but also for recognizing a higher law in the first place,²⁴ namely, that *controversy* over its *fairness or unfairness* encourages the active engagement of citizens, including those otherwise excluded from the power-distributing arrangements of

the constitutional understanding in force at any given moment. It is the *disunity* of the people, not the unrestrained and abusive autonomy of government agents, that accounts for the recurrent salience of higher law. Constitutional passions serve as an antidote to what Tocqueville called "individualism," which "dries up ... the source of public virtues."²⁵

A DIGRESSION BY WAY OF TOCQUEVILLE

Tocqueville and Ackerman share a conviction that civic engagement is necessary to the health of democracy, yet Tocqueville would have been quite wary of reposing as much confidence in We the People as Ackerman does. It is therefore worth taking a moment to explore the difference between the way in which Tocqueville envisioned the expansion of trust through direct, local, and face-to-face association and Ackerman's more diffuse model of a national social movement. As we shall see, Ackerman's nation-centered view offers a needed corrective to Tocqueville's, but its advantages emerge more clearly when a different model of government is substituted for Ackerman's.

Unlike Ackerman, Tocqueville was reluctant to encourage large numbers of people to take an interest in transcendent constitutional affairs. He feared the threat to stability inherent in asking people with no experience of dealing with the abstractions of higher law to reason about matters remote from their daily lives: "If the goal is to foster the interest of citizens in the public good and make them see that they need one another constantly in order to produce it, it is far better to give them responsibility for the administration of minor affairs than to put them in charge of major ones."²⁶ The reason Tocqueville gives for preferring the local to the national, the minor to the major, for the inculcation of public spirit is that "it is difficult to draw a man out of himself to interest him in the destiny of the entire state, because he has little understanding of what influence the destiny of the state can exert on his lot."²⁷

This assertion is, I think, inaccurate when applied to the United States. Tocqueville's own discussion of the formation of political associations and parties contradicts it.²⁸ He failed, moreover, to anticipate the effects of technological change on the nature and scale of public goods. Idealizing village life in a time

of high-cost labor, he conceived of such public goods as roads and schools in terms of the labor needed to construct them, as onerous *corvées* to be levied on the beneficiary population in the form of labor services or significant sacrifices of income to the taxes needed to hire the necessary workers; the only transcendent public good that Tocqueville considers is national security, which uncoordinated local polities could not provide, thus requiring appropriate sacrifices in the national interest.

Cooperation and sacrifice require trust, which self-governing local populations must develop to a sufficient degree. They could do this, Tocqueville imagined, as a byproduct of regular and direct transaction of public business of direct local interest. Yet such local decisions quickly became routine. The cost of local undertakings decreased relative to the income of local populations as productivity rose rapidly. The benefits gained wide and easy recognition and no longer called for face-to-face deliberation to thrash out the merits of rival proposals or sustained participation to manage enterprises that had become routine and affordable. They aroused less passion than when cash and labor were scarce and the benefits of a schoolhouse or primitive road were less cut and dried. When neighbors did meet to discuss public goods, the conversation frequently turned to interests that enlisted livelier passions and to the unequal distribution of rewards.²⁹ How were funds for non-local "internal improvements," to use the jargon current in Tocqueville's time, allocated? How were the relevant decisions made? Already it seemed to many that the key political decisions were taken not in the towns but in state capitals or in the national capital.

The problem of scale and the problem of distribution are related. A small-scale project can be decided and managed by those whom it benefits directly. A large-scale project requires delegation. By its very nature, it will benefit some more directly than others, and the benefits, especially the indirect benefits, are difficult to measure. A road or canal in one region will reduce transportation costs for producers in that region. This cost reduction may benefit consumers in other regions, and the potential for greater productivity of the economy as a whole may ultimately benefit all, albeit indirectly. Thus a question of *fairness* arises in such decisions. It may frequently (if not always) be

impossible or, for reasons of efficiency, undesirable to attempt to apportion costs according to benefits. One may prefer to assume that in the long run projects will be distributed in such a way as to disperse benefits and costs more or less equally. But what if this assumption proves to be unwarranted? What if experience reveals that the political system responds to social inputs in such a way as to produce an overabundance of projects of a certain type, bringing direct benefits more to one group of citizens than to another?³⁰ Suppose that the way of life in one region of the country yields a larger number of restless entrepreneurs, eagerly seeking and promoting commercial opportunities, while in another region, where natural river transportation suffices to move the entire product to market at low cost, the chief form of growth is the clearing of new land, which can be financed and managed privately by those whom this activity benefits, rather than the building of new roads and canals, which requires public investment and coordination. Is it *fair* to tax citizens of the latter region to build a transport network in the former?

The question of fairness is not exclusively economic, moreover. The issue is not simply who will pay and who will benefit in the short term but whose way of life and general conception of the purpose of political society will be favored in the long run. Suppose that an entrepreneurial economy based on commerce and manufacturing dominates in one region and a plantation economy growing for export subsists in another (leave aside the question of slavery). Suppose, further, that the market staple is exported on ships owned by merchants inhabiting the first region and that banks in this same region profit from the trade owing to their role as financial intermediaries.³¹ To protect this trade, which clearly benefits citizens of both regions to one degree or another, a navy is put to sea and paid for with duties levied on imports, which can be made high enough to protect nascent manufacturing firms in region one from foreign competitors whose prices they otherwise could not match, owing to the scarcity of local labor. Benefits from intensified manufacturing spill over to draw new inhabitants into the first region, which thus grows at the expense of the second, or so citizens of the second region may come to feel.

Is this an unfair arrangement? If so, is the unfairness a result of the divergence of the interests of government from the interests of the people, as Ackerman would have us infer? Such a description becomes problematic when the people are divergent among themselves. The democratic dilemma is thus not, as the Ancients had it, that empowering the many might result in the plundering of the few.³² Nor is it precisely, as one interpretation of Ackerman's pattern might suggest, that the few, having been granted power by the many, become corrupt and abuse their position as agents to reign despotically over their erstwhile principals.³³ The issue is rather whether an arrangement fairly arrived at under a set of rules accepted in advance as binding by the citizenry still deserves to be adjudged fair if the system changes, particularly with respect to the *ex post* distributive implications of its *ex ante* allocation of power and control. If the evolution is such that a portion of the people will very likely find themselves at a permanent disadvantage with respect to another portion of the people, challenges will inevitably be raised.

Conceivably, then, the notion of fairness, on which constitutionalism depends, suffers from a form of dynamic inconsistency, in which rules expected to yield fairness at time t_1 generate outcomes perceived to be unfair at time t_2 .³⁴ Is such a dynamic inconsistency grounds for changing the rules, or is the clamor for constitutional change in such circumstances a form of "sore loser" behavior that should be resisted on the Madisonian grounds that frequent rule changes impose debilitating costs on society?

The repeated invocation of "fairness" in the foregoing paragraphs may call to mind John Rawls' concept of "justice as fairness," but the similarity of terminology masks deep differences between the Rawlsian vision, which is sometimes arraigned as a mere rationalization of American practice, and the fairness norm as embodied in the pragmatic constitutionalism of the United States.³⁵ Both draw no doubt on a common psychological core: the tenacious desire for reciprocity in human relations encapsulated in the Golden Rule. But Rawls assumes that this desire can be satisfied once and for all by an *a priori* thought experiment in which prospective parties to a constitutional contract strip themselves of all resources and empty their minds

of all predilections and hopes in order to agree on rules they could accept as honoring the requirement of reciprocity no matter how desires and capabilities might turn out to be distributed *ex post*.

To be sure, the Framers may at times have nursed the utopian wish to create a "machine that would go of itself."³⁶ Tocqueville on occasion seems to entertain a similar notion.³⁷ Yet as Ackerman notes, the Founders were "realists"; indeed, they were realists of the particular kind known as politicians, who are rarely in a position to bracket interests in pursuit of a synthetic *a priori* of perfected ethical judgment, since unless they are elected by self-interested voters, their ethical commitments have no purchase on reality and exist only in the realm of the hortatory. That is one reason why the Constitution is so full of devices to protect the particular interests of small states, slave owners, parties to contracts, state governments, government creditors, etc. The Founders were negotiators who could not forget that they had interests or ignore that those interests were in some respects complementary to the interests of other parties, in other respects antagonistic. Nor could they disregard the fact that future contingencies would arise as to which their agreement would remain ambiguous or silent: the contract to which they were to commit themselves was *incomplete*, in Oliver Hart's terminology. Generally, Hart argues, "contracts are incomplete ... [and] because of this, the *ex post* allocation of power (or control) matters."³⁸

INCOMPLETE CONSTITUTIONAL CONTRACTS

Hart is of course speaking of contracts governing economic relationships, but the point is true *a fortiori* for political contracts – constitutions – where the contingencies are presumably even less well-defined. The risk of entering into an incomplete contract is that an unforeseen state of the world might arise in which the fulfillment of responsibilities engaged by the terms of the contract might seriously undermine the position of one of the contracting parties. In order to reduce this risk to a level such that the parties are not deterred from agreeing to the contract at all, power and control in various contingencies may be apportioned in advance. If an unforeseen state of the world should arise that damages the

interests of a contracting party, that party may invoke some reserved power. For concreteness, assume that the financing of the central government rests on a tariff, say, and that, over time, the tariff burden evolves in such a way as to fall disproportionately on a group of states. Several potential forms of control are available under the pre-existing agreement. The affected states may league together in Congress to block an increase in the tariff; they, or one of their citizens, may convoke a constitutional convention or form a movement party to seek the presidency and inflect policy; they may seek redress in the courts; or they may divine in the existing incomplete contract a useful power, as John Calhoun did when he derived from the original intent of the Framers a power to nullify unwelcome federal legislation within the boundaries of each of the contracting states.

At this point, the principal-agent problem that I earlier dismissed as a metaphor for the relation of people to government reasserts itself, but in a complex and novel form. For there are many principals – the People are not unitary but may be divided up in ways limited only by the imagination of their would-be agents – and the agents, not their principals, are the real parties to the constitutional compact, which is only notionally a social contract. Its direct sanctions fall on the people's officers, not the people: it is to elected officials that courts say, "Your nullification of a federal statute is void, you may not bar the schoolhouse door, you may not exclude a voter from the polls on such and such grounds, you must not prohibit collective bargaining, you must incorporate the Bill of Rights as a constraint upon your free agency as governors, you may not authorize slavery."

Ackerman describes these contractual limitations on the prerogatives of agents as constraints intended to align their actions with the people's wishes. But any such constraint is also an opportunity for one of the many agents or would-be agents of the people to construct a plausible chain of legal reasoning that would entail a shift in the allocation of powers in some future contingency. Agents, in other words, use the specter of unacceptable future risk to mobilize, indeed to conjure up *ex nihilo*, principals (constituents) here and now with an interest in modifying (tightening or reconfiguring) an existing incomplete contract. Constitutional issues, which always involve uncertainty

about the future, are powerful mobilizing tools because they engage the existential fears of segments of the electorate.

Andrew Jackson was an innovating agent in the sense I describe. "The Jackson movement," Stephen Skowronek writes,

carried a disparate coalition of discontents into the election of 1828. Southern planters hostile to high tariffs joined northerners who enjoyed the benefits of trade protection. Northern radicals hostile to federal systems of internal improvements joined westerners with a keen interest in public works. Western debtors hostile to the National Bank joined easterners with an eye on the stability of financial markets. "Old Republicans" hostile to anything that hinted of national consolidation joined commercial interests of all stripes seeking to widen the opportunities opened by the current economic expansion.³⁹

Now, the members of a crew this motley might be expected to fear one another and their captain as much as they reviled the opposition. Jacksonians had exploited what they took to be a "corrupt bargain" between John Quincy Adams and Henry Clay, whose perpetuation posed risks for various reasons to each of the groups listed above. *Without* those risks, these diverse principals would have had no reason to seek a common agent, and Van Buren would not have been able to manufacture a party out of a set of principals without a shared purpose. *With* a common agent whom they invested with power, however, these same diverse principals faced *new risks* inherent in the very power they created. Envisioning a number of possible ways in which their joint venture might evolve, they had to write into the contract binding them new clauses intended to cover in the most general way possible, and on terms upon which all could agree, contingencies not previously recognized. In formulating this revised contract, this (non-textual) Jacksonian revision of the Constitution, interests were subsumed in the abstract categories of higher law. Rather than pick and choose among internal improvement projects, each fraught with complex affiliations and antagonisms, it was expedient, for example, to evolve a "constitutional" principle that, while it might be "necessary and proper" for the federal government to fund certain ventures, those "too local" in nature, such as the Maysville Road, could properly be vetoed by

the president, who in so doing simultaneously asserted a right to interpret the meaning of the "necessary and proper" clause no less normative than that of the Court or Congress. "Easterners with an eye on the stability of financial markets" but perhaps unpersuaded that Nicholas Biddle's Second Bank of the United States was the sole or best way of achieving it, and eager to avail themselves of a share of the discounts skimmed from the flow of bills through Biddle's counting room, were glad to lend their services to Jackson's "proof," as Thomas Hart Benton would later write, that a national bank was not a necessary and therefore quite an improper use of congressional power.⁴⁰ "Constitutional" innovations such as these solved very practical problems for constituencies with physiognomies too distinct to be subsumed under the single rubric "the People."

FAIRNESS AND "THE MINORITY"

Ackerman wants us to turn our attention from texts to political processes in order to understand how the Constitution has actually been used, modified, and interpreted over the course of American history. I have suggested that this is a good idea but that the description of constitutional bargaining needs to be thickened if we are to grasp what commitments these political compacts actually entail. Yet my redescription of a constitutional compact as an incomplete contract among elements of a majority coalition leaves open the question of commitments to the minority, or constraints that the majority is prepared to impose upon its own future actions. The incomplete contract I describe constrains the actions of the majority toward its own sub-constituencies in various contingencies. This is consistent with Jon Elster's characterization of a constitutional commitment: "Constitutionalism refers to limits on majority decisions; more specifically, to limits that are in some sense self-imposed."⁴¹ But Elster further distinguishes between two types of constraint: those which are "forms without which majority rule could not exist"⁴² and those which limit the majority's ability to disadvantage those outside it.

The notion of an incomplete constitutional contract may be useful in accounting for the first type of constraint but not the second, at least not on the basis adduced thus far. Contractual

analysis can explain how a party can seek to protect itself in case of a future redrafting from which it might find itself excluded. But a group may find itself excluded or disadvantaged from the outset with little expectation of a future remedy. What bargaining power does it have then? Powerful players may of course wish to offer guarantees to the powerless out of largesse, particularly if there is a cost to refusal of cooperation by the excluded group (grant "voice" to forestall "exit," in Albert Hirschman's terms).⁴³ But forbearance, while a self-imposed limitation, is not binding in quite the same sense as the rope with which Ulysses bound himself to the mast in order to resist the Sirens.⁴⁴

Interestingly, a legal historian influenced by Ackerman, Gerard Magliocca, proposes a mechanism that he calls "pre-emption," by which he means a reaction to constitutional revisionism by a group privileged under the prior arrangement but disadvantaged by the new dispensation. Defenders of the *status quo ante*, ensconced in the Supreme Court, "generally reach conclusions that are valid under existing precedent but restate those tenets in a grossly exaggerated manner that is more about negating the views of the rising generation than honestly evaluating the legal authorities." They then go on to develop "some new theory of equality or fairness that can overcome" the heavy burden of supporting "expansive and partisan reasoning."⁴⁵

Magliocca's analysis suggests that minority protections are in a fundamental way different from majority-enabling agreements about allocation of power and control in incomplete constitutional contracts. First, minority protections are inherently more abstract. Like majority compacts, they invoke ideas of fairness, but in the form of "new theory" that depends not on tangible exchanges but on invocations of ostensibly shared "values." They are introduced in reaction against new majority doctrines by an excluded or marginalized element of a former majority coalition. And in their frontal attack on the new order, these pre-emptive decisions generally fail: Justice Marshall ascribed group rights to Indians who had compacted with the United States as sovereign nations, but Jackson famously (if apocryphally) replied that "Marshall has made his decision; now let him enforce it."

Yet the legal craftwork in the articulation of these pre-emptive decisions is often of a high level, precisely because the professionalism of the new doctrine's articulation is generally its only support, the political tide already having turned (this is the very definition of a pre-emptive case: it is thrown down as a gauntlet to the new order). Hence the articulated doctrine, owing to its abstraction, refined reasoning, and roots in a displaced majority made keenly aware of the disabilities of minority status by its recent loss, has qualities that make it suitable for revival in quite unrelated contexts following some subsequent political realignment: it appeals to putatively shared values and communal identities; it is formulated in polished language and sharply honed logic; its rhetoric is ethical and universal rather than economic and allocative. In this respect, Magliocca's analysis of the relation between the *Worcester* case and later abolitionist arguments is exemplary. Marshall was unable to save the Cherokees, but opponents of slavery had reason to be grateful to him.⁴⁶

The astute reader will have noticed a problem here. Although Magliocca emphasizes *Worcester* as the paradigm of a pre-emptive case, *Dred Scott* also fits the model, as Magliocca notes.⁴⁷ How can the idea of a pre-emptive decision explain the origin of minority protections if the most notorious anti-minority case in Supreme Court history is included under the rubric? For Magliocca, the answer is that time winnows wheat from chaff. Pre-emptive decisions invoke "values" rather than interests: Magliocca asserts that "values determine the status of judicial decisions more than reason. Although some opinions are more logical than others, that is not what usually distinguishes the landmarks from the losers. The true distinction is whether an opinion's core ideals are accepted by the nation. *Dred Scott* is not wrong because it is unprofessional; it is wrong because its premises are no longer shared by our country."⁴⁸ This is a rather unsatisfactory formulation, in that it is premised on a category of "values" explicitly described as subject to temporal change yet adduced as the bedrock on which higher law may rest. But values become bedrock only after being admitted into the temple, the standard for which is merely to be "shared by our country." The inflation of "values" in this passage is thus no less problematic than the inflation of "We the People" in Ackerman's Whiggish history.

A more satisfactory explanation in terms of the contractual paradigm I have introduced above may be possible. It would involve an analysis of how successful political coalitions arise and how changing demographics oblige political entrepreneurs to revise the categories to which some measure of residual control must be allowed when the constitutional contract is revised. But a fuller account cannot be ventured here.

CONCLUSION

Bruce Ackerman's "legal fictions" of a sovereign people and a living Constitution have thus been shown to be stimulating legal fictions, falsehoods "not intended to deceive." His lectures serve the useful purpose of tethering higher lawmaking and legal reasoning to the realities of power politics. A more variegated sociology and a more elaborate analysis of the contractual basis of power in democracy can help, I believe, to provide a richer description of higher lawmaking in the United States. Even with these improvements, however, the explanation of the origin of minority rights remains unsatisfactory. As we have seen, minority protections emerge on a time-scale different from that of majority-enabling constraints. Power is reapportioned with each new generation if not each new election, but it is as if a minority right cannot be consecrated until several generations have passed, until it has been tested under a variety of power-allocating agreements. Perhaps because minority protections have the potential to hobble private as well as public power more seriously than other constitutional restrictions, they require a purgative process, a passage to abstraction and transmission across one or more changes of regime. Only then do they become effective impediments to impetuous majorities. Yet Ackerman is quite right to note that even profound constitutional change of this sort need not result, indeed has not resulted, in formal textual amendments of the kind envisioned by Article V. His effort to establish historical analysis of acts of popular sovereignty as a legitimate basis of constitutional interpretation thus assumes an importance in legal studies from which its possible deficiencies as political theory should not be allowed to detract.

[end: please direct comments to a.goldhammer@comcast.net]

NOTES

- [1] Alexis de Tocqueville, *Democracy in America*, trans. Arthur Goldhammer (New York: Library of America, 2004), I.1.4, p. 62. Cited hereafter as *DA*. The author wishes to thank Daniel Gordon, Peter Gourevitch, and Cheryl Welch for helpful comments on an earlier draft.
- [2] Richard Henry Dana, quoted in Daniel T. Rodgers, *Contested Truths* (New York: Basic Books, 1987), p. 95.
- [3] Having learned much from Ackerman over the years, I welcomed the invitation from the editors of *The Tocqueville Review* to respond to his lectures. I must, however, warn readers at the outset that I have interpreted my brief liberally. Since I am not a legal scholar, it would be presumptuous to engage with Ackerman's detailed constitutional readings. Instead, I take his text as a stimulus to develop some ideas about the fate of democracy in America since Tocqueville, a subject about which I am currently writing a book.
- [4] Bruce Ackerman, *We the People*, 2 vols. (Cambridge, Mass.: Harvard University Press, 1993, 2000).
- [5] Here is the text of Article V: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." The supermajorities required for ratification and the recourse to state conventions or legislatures make it clear why Ackerman is right to characterize this procedure as "state-centered."
- [6] The 27th Amendment, adopted in 1992, deals with the relatively insignificant matter of compensation of senators and congressmen. Between 1933 and 1971, there were seven amendments, which Ackerman persuasively argues had little bearing on the fundamental constitutional issues of this period, namely, the power of the government to regulate the economy and the question of civil rights for African-Americans.
- [7] Ackerman makes this point in an introductory dialogue, an imagined conversation with a fictive Islamic legal scholar whom he dubs Akhil Alfarabi, a name derived, he tells us, by combining a tenth-century

- Islamic scholar with his Yale colleague Akhil Amar, the author of *America's Constitution: A Biography* (New York: Random House, 2005). Ackerman thus briefly reverts to the Socratic form of his earlier work, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1981).
- [8] By implication, historically-minded constitutional scholars are thus assigned a key role in defining the vital core of the nation's higher law at any given time.
- [9] Bruce Ackerman, "The Living Constitution," *Harvard Law Review* 2007:120(1737), p. 1807. Cited hereafter as *LC*.
- [10] *Ibid.*, p. 1759.
- [11] Ackerman also refers to the pattern of popular sovereignty as a "cycle" and identifies eight such cycles in American history. See *ibid.*, p. 1757.
- [12] *Ibid.*, p. 1760.
- [13] Ackerman's "signaling" metaphor is reminiscent of Tocqueville. See *DA* 11.2.6, p. 100 and 1.2.4, p. 220.
- [14] *LC*, p. 1756.
- [15] See *LC*, p. 1754.
- [16] *LC*, p. 1775.
- [17] *LC*, p. 1775.
- [18] *LC*, p. 1743.
- [19] Lon Fuller, *Legal Fictions* (Stanford: Stanford University Press, 1967), p. 6; quoted in Ackerman, *LC*, p. 1803.
- [20] Fuller, *Legal Fictions*, p. ix.
- [21] *LC*, p. 1758.
- [22] Stephen Holmes, "Precommitment and the Paradox of Democracy," in Jon Elster and Rune Slagstad, eds., *Constitutionalism and Democracy* (Cambridge, England: Cambridge University Press, 1988), p. 216. Madison is here responding to Jefferson, who opposed constraints on the majority as undemocratic.
- [23] *LC*, p. 1759.
- [24] The indispensability of higher law should not be taken for granted. In the discussions leading up to the adoption of a Constitution for the Fifth Republic in France, General de Gaulle expressly opposed a supreme court as undemocratic.
- [25] *DA* 11.2.2, p. 585.
- [26] *DA* 11.2.4, 592.
- [27] *Ibid.*
- [28] Arthur Goldhammer, "Tocqueville, Associations, and the Law of 1834," forthcoming, *Historical Reflections*, 2008.
- [29] Cf. Albert Hirschman, *The Passions and the Interests*. (Princeton: Princeton University Press, 1997).
- [30] This was the case with the construction of the Erie Canal, for example.

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Deleted: <http://www.people.fas.harvard.edu/~Ea-goldham/articles/Tocqueville.%20Associations.%20and%20the%20Law%20of%201834.pdf>.

- [31] Douglass C. North, *The Economic Growth of the United States: 1790 - 1860* (Boston: Norton: 1966), p. 3: "Regions or nations which remain tied to a single export commodity almost inevitably fail to achieve sustained expansion." The linkage between product differentiation and economic growth makes it essential to examine the political consequences of such differentiation in a democratic federal system whose structure encourages regional coalitions.
- [32] John Dunn, *Democracy: A History* (Boston: Atlantic Monthly Press, 2006).
- [33] This was the republican ideology of Trenchard and Gordon as analyzed by Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass.: Harvard University Press, 1992).
- [34] David Romer, *Advanced Macroeconomics*, 2nd ed. (New York: McGraw Hill, 2001), p. 482.
- [35] For an example of the allegation that Rawlsian justice embodies an apologia for the American system, see Raymond Geuss, "Liberalism and its Discontents," in *Outside Ethics* (Princeton: Princeton University Press, 2005), p. 22.
- [36] Michael Kammen, *A Machine that Would Go of Itself: The Constitution in American Culture* (New York: Alfred Knopf, 1987).
- [37] *DA*, I.1.3, p. 54: "Once [the legislator's] work has been set in motion, he can remove his hands from his creation. The machine acts under its own power and seems almost to steer itself toward a goal designated in advance." Also *DA* I.1.5, p. 79 "In America you find written laws; you see them enforced daily. Things seem to be in motion all around you, yet the force that drives them is not apparent. The hand that guides the social machinery constantly evades detection."
- [38] Oliver Hart, *Firms, Contracts, and Financial Structure* (Cambridge, England: Cambridge University Press, 1995), p. 3.
- [39] Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Cambridge, Mass.: Harvard University Press, 1993), p. 130.
- [40] Gerard N. Magliocca, *Andrew Jackson and the Constitution: The Rise and Fall of Generational Regimes* (Lawrence, KS: University Press of Kansas., 2007), p. 71.
- [41] Jon Elster, "Introduction," Elster and Slagstad, eds., *Constitutionalism and Democracy*, p. 2.
- [42] *Ibid.*, p. 3.
- [43] Albert Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, Mass.: Harvard University Press, 1970).
- [44] Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge, England: Cambridge University Press, 1984), and *Ulysses*

Unbound: Studies in Rationality, Precommitment and Constraints (Cambridge, England: Cambridge University Press, 2000).

[45] Magliocca, *Andrew Jackson*, p. 43. Later, comparing the *Dred Scott* and *Worcester* cases, he says that “the pressure of political competition forced the justices to propose a new concept of fairness to support their opinion” (p. 100).

[46] Magliocca, *Andrew Jackson*, pp. 89-98.

[47] *Ibid.*, pp. 99-112.

[48] *Ibid.*, p. 100.