

## The President, the Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman

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*The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy*,  
Bruce Ackerman. Harvard, 2005. Pp 368.

*The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* is a stunning book. It is a must read for anyone who wants to understand *Marbury v Madison*,<sup>1</sup> the office of the presidency, the role of the Supreme Court, or the early history of nineteenth century America. Professor Ackerman's research into original historical sources has yielded a treasure trove of new information. He advances at least six important historical claims that are not part of the received wisdom on the history of the election of 1800 and its aftermath.

First, Professor Ackerman shows convincingly that some Federalists, possibly including John Marshall himself, may have hoped that the election of 1800 would end with Secretary of State Marshall being sworn in as acting President to preside over a new, special election to fill the presidency (pp 36–54). Second, Professor Ackerman shows that Vice President Thomas Jefferson may have used his constitutional power to count the electoral votes after the election of 1800 to guarantee that only his name and Aaron Burr's would go to the House of Representatives, and not the names of Federalists John Adams, Charles Cotesworth Pinckney, or John Jay (pp 55–76).<sup>2</sup> Third, Professor Ackerman shows the significance of the fact that John Adams had abolished Alexander Hamilton's standing army. Then, when a constitutional crisis arose in 1801, the Republicans had military force at their fingertips, because of the mobilization of Republican state militias, while the Federalists had

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† George C. Dix Professor of Constitutional Law, Northwestern University. I have benefited in writing this book review from the helpful and generous comments of Bruce Ackerman, Akhil Amar, Tom Grey, Gary Lawson, Stephen Skowronek, and Robin West. This Review is dedicated to my former teacher Bruce Ackerman, from whom I have learned and continue to learn a great deal. While we may not always agree, I always learn and benefit from Bruce's work.

<sup>1</sup> 5 US (1 Cranch) 137 (1803).

<sup>2</sup> Ackerman discusses Jefferson's reaction as President of the Senate to a technically invalid Georgia ballot. Had Jefferson rejected the ballot, no presidential candidate would have had an electoral majority, and three Federalist candidates would have entered the runoff in the House.

no troops at their disposal (pp 95–100, 107–08).<sup>3</sup> Fourth, Professor Ackerman shows convincingly why *Marbury* was completely inconsistent with, and was totally undermined by, *Stuart v Laird*<sup>4</sup> (pp 163–98). Although *Stuart* always gets a footnote in any discussion of *Marbury*, Ackerman shows that it deserves much more attention. Fifth, Professor Ackerman shows that the Federalists' restraint in *Stuart* was the result, not of John Marshall's wisdom, but rather of the wisdom and restraint of Justices William Paterson and Bushrod Washington (pp 169–72, 185–88).<sup>5</sup> Had it not been for these two justices, Marshall might well have overplayed his hand in *Stuart* with the result that he and Samuel Chase could have been removed from office by the Jeffersonians. Sixth, and finally, Professor Ackerman shows that, contrary to the received wisdom, the Jeffersonians did have an impact on the jurisprudence of the Marshall Court, specifically by repudiating the idea that there could be a federal common law of crimes in *United States v Hudson and Goodwin*<sup>6</sup> (pp 233–40).<sup>7</sup> All in all, Professor Ackerman adds greatly to our understanding of American history during the first decade of the nineteenth century, and this book is invaluable for that reason alone.

Unfortunately, great history does not necessarily lead to sound constitutional theory or even to a sound understanding of the original meaning of words in the constitutional text. I have substantial reservations about two parts of Professor Ackerman's argument. First, I address the implications of this book for our understanding of constitutional theory and of the role the Supreme Court plays in our polity.

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<sup>3</sup> Adams, perhaps on the basis of nonpartisan conviction, disbanded Alexander Hamilton's army in 1800 to avoid war with France.

<sup>4</sup> 5 US (1 Cranch) 299 (1803) (rejecting a challenge to the constitutionality of justices of the Supreme Court hearing circuit court cases without separate commissions as circuit court judges).

<sup>5</sup> Ackerman argues that Marshall and Chase favored a Supreme Court strike to protest the Jeffersonians' repeal of the Federalists' Judiciary Act and to incite support for the Federalists. Marshall backed off his plan, however, when Washington and Paterson indicated that they would not participate in a strike.

<sup>6</sup> 11 US (7 Cranch) 32, 32 (1812) (finding that it is "long since settled in public opinion" that federal courts cannot exercise common law jurisdiction in criminal cases).

<sup>7</sup> Ackerman explains that *Hudson and Goodwin* completed the Jeffersonian constitutional transformation by broadly rejecting federal jurisdiction over common law crime. He also notes that the Madison administration refused to argue *United States v Coolidge*, 25 F Cases 619, 620 (CC D Mass 1813) (Story) ("[N]othing is more clear, than that the interpretation and exercise of the vested jurisdiction of the courts of the United States must, in the absence of positive law, be governed exclusively by the common law."). Doing so would have required the Court either to overturn *Hudson and Goodwin* or allow "pirates" to go free during the War of 1812. Thus, Ackerman argues, both *Hudson and Goodwin* and the Jeffersonian constitutional revolution were effectively affirmed.

And, second, I address the implications of this book for our understanding of the presidency.

### I. FAILINGS OF THE DUALIST DEMOCRACY ACCOUNT OF CONSTITUTIONAL CHANGE

*The Failure of the Founding Fathers* is an important work in constitutional theory as well as being a great work of legal history.<sup>8</sup> Professor Ackerman achieved fame as a constitutional theorist with the striking claim he set out in *We the People* that the United States has had three and only three constitutional regimes or constitutional moments.<sup>9</sup> First came the Founding in 1787 and with it the text of our original Constitution. Second came the Civil War and Reconstruction and with it the texts of the transformative Thirteenth, Fourteenth, and Fifteenth Amendments. And finally came the New Deal constitutional moment of 1937, which yielded no new constitutional text whatsoever but did lead to a radical change in the Supreme Court's case law. Ackerman's project seemed to be to put the New Deal constitutional changes on par with the constitutional changes of the 1780s and 1860s, even though the latter led to new constitutional texts while the former did not.

*We the People* was criticized for overlooking other episodes in American history where there were major changes in Supreme Court case law but no new constitutional texts were adopted. Thus, Michael McConnell argued that there had been a forgotten constitutional moment after the election of 1876, during which Reconstruction came to an end, and the Supreme Court embraced a jurisprudence of Jim Crow.<sup>10</sup> Similarly, Gerard Magliocca argued that the Jacksonians ushered in a whole new era of Supreme Court case law much as Franklin Roosevelt had done in 1937.<sup>11</sup> Most recently, Mark Tushnet has argued

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<sup>8</sup> See especially the last chapter, "Reverberations" (pp 245–66), where Ackerman warns that the constitutional mechanism for presidential election is flawed and that the Supreme Court's intervention in the election of 2000 prevented the American public from squarely addressing this flaw. Ackerman also compares the Jeffersonian revolution's presidential leadership for constitutional change with the ascension of Franklin Roosevelt and the New Deal.

<sup>9</sup> See generally Bruce Ackerman, 1 *We the People: Foundations* (Belknap 1991) (arguing that the professional wisdom is incorrect and that the Founding Fathers, the Reconstruction Republicans, and the New Deal Democrats are equally responsible for altering the constitutional fabric of the United States); Bruce Ackerman, 2 *We the People: Transformations* (Belknap 1998) (arguing that popularly mandated constitutional change occurred during the Founding, Reconstruction, and the New Deal).

<sup>10</sup> See Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 Const Comm 115, 122 (1994).

<sup>11</sup> See Gerard Magliocca, *Veto! The Jacksonian Revolution in Constitutional Law*, 78 Neb L Rev 205, 248 (1999) (arguing that "Jackson's use of the presidency foreshadowed FDR's informal methods of constitutional amendment during the New Deal").

that Ronald Reagan ushered in a fourth constitutional order.<sup>12</sup> The Jim Crow, Jacksonian, and Reagan eras on the Supreme Court seemed to have come into being in much the same way and with about the same degree of legitimacy as FDR's constitutional revolution of 1937. Once McConnell, Magliocca, and Tushnet had identified these three additional constitutional moments, it was easy enough to argue that perhaps there had been other constitutional moments as well, including perhaps a Progressive constitutional moment in the early twentieth century, a Warren Court constitutional moment in the 1950s and 1960s, and a get-tough-on-crime constitutional moment after 1968. If so, the distinctiveness that Ackerman claimed for the New Deal could no longer be maintained. One was left to wonder how many constitutional moments the nation had had and how many it could take!

*The Failure of the Founding Fathers* is important to constitutional theory because Ackerman ends the book by comparing the constitutional changes wrought by the Jeffersonians to those wrought by the New Deal. In both cases, Ackerman notes that there was presidentially led constitutional change, transformative appointments to the Supreme Court, and finally a transformative Supreme Court opinion—*Hudson and Goodwin* for the Jeffersonians and *United States v. Carolene Products Co.*<sup>13</sup> for the New Deal (pp 245–66). While Ackerman is quite careful not to say that there was a Jeffersonian constitutional moment, and while he never claims the changes accomplished by the Jeffersonians were of the magnitude of those accomplished by FDR, he does seem to suggest that the Jeffersonians accomplished at least a mini-constitutional moment. This is a big shift or refinement in Ackerman's constitutional theory. If there was a presidentially led Jeffersonian mini-constitutional moment then perhaps McConnell, Magliocca, and Tushnet were right to argue that the advocates of Jim Crow, the Jacksonians, and the Reaganites accomplished mini-constitutional moments as well. One thing that I hope will come out of the publication of this book is some further explanation by Professor Ackerman as to how he sees the constitutional changes wrought by the Jeffersonians as fitting into his broader constitutional theory set forth in *We the People*.

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<sup>12</sup> See Mark Tushnet, *The New Constitutional Order 2* (Princeton 2003). See also Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 *Georgetown L J* 1023, 1024 (2005) (“Tushnet sees the movement toward that [new constitutional] order as having begun with Ronald Reagan's election as president in 1980 and as having been confirmed only in 1994 when the Republicans for the first time in forty years swept both Houses of Congress in the mid-term elections.”).

<sup>13</sup> 304 US 144, 154 (1938) (upholding a federal statute prohibiting the interstate shipment of filled milk).

I have two main criticisms of the constitutional moment idea. First, I think there is a big difference between those constitutional moments that produce significant new constitutional texts and those that do not. The Founding and Reconstruction are key moments in our constitutional history because the production of the original Constitution and Bill of Rights and the Reconstruction Amendments fundamentally, permanently, and irrevocably altered our legal system in a way that no future Supreme Court could undo. The Jeffersonians and Jacksonians tried to undo the nationalism of the Founding but they failed when later presidents like Abraham Lincoln and the two Roosevelts revived broad textual Founding conceptions of the scope of national power. Similarly, the Jim Crow Supreme Court tried to undo Reconstruction, but ultimately the text of the Reconstruction amendments helped lead to a second Reconstruction with *Brown v Board of Education*,<sup>14</sup> the Civil Rights Act of 1964,<sup>15</sup> and the Voting Rights Act of 1965.<sup>16</sup>

The New Deal constitutional moment, in contrast, was never codified, and so the Warren, Burger, and Rehnquist Courts were able to undo it quite substantially. Thus, the New Dealers tried to bury substantive due process, but the Warren, Burger, and Rehnquist Courts all revived it in cases like *Griswold v Connecticut*,<sup>17</sup> *Roe v Wade*,<sup>18</sup> and *Lawrence v Texas*.<sup>19</sup> The New Deal demoted economic liberty to second class status,<sup>20</sup> but the Rehnquist Court revived constitutional protection of economic liberty with expansive new doctrines on commercial speech,<sup>21</sup> takings of private property,<sup>22</sup> and substantive due process

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<sup>14</sup> 347 US 483 (1954).

<sup>15</sup> 42 USC § 2000 et seq (1964).

<sup>16</sup> 42 USC § 1971 (1965).

<sup>17</sup> 381 US 479 (1965) (establishing a constitutional right to privacy).

<sup>18</sup> 410 US 113 (1973) (concluding that a state may not regulate the performance of abortions prior to viability).

<sup>19</sup> 539 US 558 (2003) (invalidating a Texas statute that criminalized homosexual sodomy).

<sup>20</sup> See, for example, *Carolene Products*, 304 US at 154.

<sup>21</sup> See, for example, *44 Liquormart, Inc v Rhode Island*, 517 US 484 (1996) (invalidating on First Amendment grounds a Rhode Island statute that prohibited price advertising by liquor retailers).

<sup>22</sup> See, for example, *Nollan v California Coastal Commission*, 483 US 825 (1987) (holding that a state cannot condition a building permit on the granting of an easement because doing so would constitute a taking without just compensation). See also *Dolan v City of Tigard*, 512 US 374, 385 (1994):

Under the well-settled doctrine of “unconstitutional conditions,” the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

limits on punitive damages awards.<sup>23</sup> The New Deal buried the notion that the federal government was one of limited and enumerated powers and labeled the Tenth Amendment<sup>24</sup> a truism. Byron White and Robert Bork were the ultimate children of the New Deal because they repudiated substantive due process and believed in broad national power, but the Rehnquist Court repudiated both these ideas,<sup>25</sup> and Bork was not even able to get confirmed by a Democratic Senate. The man confirmed instead, Anthony Kennedy, breathed new life into substantive due process<sup>26</sup> and was one of five critical votes on the Rehnquist Court for limiting national power.<sup>27</sup>

But, Professor Ackerman might say, “big government” of a kind unknown before the 1930s is clearly here to stay, and the so-called Reagan Revolution has done nothing to change that and has certainly not ushered in an era of neo-Coolidgism. That is true, but the reason big government is here to stay is not because of *Carolene Products* or *United States v Darby*,<sup>28</sup> but is because during the Progressive Era three transformative constitutional amendments were ratified and made part of the constitutional text: the Sixteenth Amendment authorizing the progressive income tax, which provided the revenue base for big government;<sup>29</sup> the Seventeenth Amendment, which eliminated the Senate’s role as a bulwark of federalism;<sup>30</sup> and the Nineteenth Amend-

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<sup>23</sup> See, for example, *BMW of North America v Gore*, 517 US 559 (1996) (holding that a \$2 million punitive damage award for injuries resulting from failure to notify dealers of pre-delivery repairs violated the Due Process clause of the Fourteenth Amendment).

<sup>24</sup> US Const Amend X (“The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people.”).

<sup>25</sup> See, for example, *Alden v Maine*, 527 US 706 (1999) (holding that Congress cannot statutorily subject a nonconsenting state to suit in the state’s own courts); *Printz v United States*, 521 US 898 (1997) (holding that a provision of the Brady Bill requiring chief law enforcement officers to administer background checks unconstitutionally required a state to administer a federal regulatory program); *City of Boerne v Flores*, 521 US 507, 536 (1997) (overturning the Religious Freedom Restoration Act, noting that “[the Act] contradicts vital principles necessary to maintain a separation of powers and the federal balance”); *Seminole Tribe of Florida v Florida*, 517 US 44, 47 (1996) (“[N]otwithstanding Congress’ clear intent to abrogate the States’ sovereign immunity, the Indian Commerce Clause does not grant Congress that power.”); *United States v Lopez*, 514 US 549 (1995) (invalidating, as action not authorized by the Commerce Clause, a criminal statute that punished knowing possession of a firearm in a school zone); *New York v United States*, 505 US 144 (1992) (holding that a “take title” provision of the Low-Level Radioactive Waste Policy Act, which required a state to either regulate waste according to Congress’s instructions or accept ownership of waste created within the state’s borders, violated the Tenth Amendment).

<sup>26</sup> See *Lawrence*, 539 US at 578–79.

<sup>27</sup> See *Flores*, 521 US at 511; *Lopez*, 514 US at 569 (Kennedy concurring).

<sup>28</sup> 312 US 100 (1941) (holding that Congress may, under the Commerce Clause and the Fair Labor Standards Act, regulate the hours and wages of employees who produce lumber that is eventually shipped in interstate commerce).

<sup>29</sup> See US Const Amend XVI.

<sup>30</sup> See US Const Amend XVII.

ment, which gave women the vote.<sup>31</sup> I think the Sixteenth, Seventeenth, and Nineteenth Amendments were transformative amendments in the same way the Thirteenth, Fourteenth, and Fifteenth Amendments were, and that they are the reason why big government is here to stay as a constitutional matter. It is Supreme Court-centric to focus on *Carolene Products* and *Darby* and not on the revenue base created by the Sixteenth Amendment or the blow to federalism dealt by the Seventeenth Amendment. Professor Ackerman's original positive account that we have had three and only three constitutional moments was thus right, but the third constitutional moment was accomplished by the Progressive movement, not the New Deal.

What then of such mini-constitutional moments as the one that Ackerman ascribes to the Jeffersonians? I think this was a failed constitutional moment because no important new constitutional text was generated by it. Ackerman says a key tenet of the Jeffersonians was their belief in states' rights (pp 149–50), but they produced no new constitutional texts protecting those rights. Similarly, Ackerman says another key tenet of the Jeffersonians was belief in a plebiscitary presidency (pp 101–02), but the Twelfth Amendment,<sup>32</sup> which is the only new constitutional text produced between the Federalist era and Reconstruction, does not create a plebiscitary presidency. The Twelfth Amendment does *not* institute direct election of the president: instead it retains the Electoral College. Indeed, to the best of my knowledge it was not until the Jacksonian era that politicians even began to talk about an amendment calling for direct election of the President,<sup>33</sup> and obviously that proposal has never been adopted. Nor did the Twelfth Amendment augment presidential power in any other way, for example, by confirming presidential removal power or power to issue executive orders. The Twelfth Amendment was a relatively nontransformative amendment because it made one small technical change in the Framers' machinery of government. Admittedly, the Twelfth Amendment does contemplate a two-party system, which the Framers had not an-

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<sup>31</sup> See US Const Amend XIX. The gender gap among voters has been a frequent phenomenon observed over the past twenty-five years, with women voting more for Democrats and active government and men voting more for Republicans and limited government. Obviously, there are many exceptions, but if the observation that there is a gender gap is correct, then the Nineteenth Amendment has at the margins led to an electorate that is somewhat more sympathetic to government activism.

<sup>32</sup> US Const Amend XII (providing a procedure for electing the president that preserves the Electoral College, and describing the procedure for electing the president in the House of Representatives when no candidate obtains a majority in the Electoral College).

<sup>33</sup> See Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 Case W Res L Rev 1451, 1528 (1997).

anticipated. But, as I will show below, a two-party system was an inevitable consequence of the Founding text of 1787 anyway.

Ackerman is thus right that the Jeffersonian period is analogous to the New Deal because both were eras when politicians with transformative constitutional ambitions failed to realize those ambitions by generating any new constitutional text. In this respect, the Jeffersonian period is also like the Jacksonian moment discussed by Magliocca, the Jim Crow moment discussed by McConnell, and the Reagan moment discussed by Tushnet. All were periods when ambitious politicians with transformative goals failed to accomplish those goals by failing to write them into the text of the Constitution.

My second argument against Ackerman's constitutional moment and dualist democracy<sup>34</sup> idea is that it is not an accurate account of what causes the changes that appear in Supreme Court doctrine. Ackerman describes the Jeffersonian and New Deal constitutional revolutions as follows. First, there is a strong social movement for constitutional change that culminates in the election of a President and Congress with a transformative agenda: Jefferson in 1801, and FDR in 1933 (pp 256–58).<sup>35</sup> Then there is a conflict between the nascent constitutional order struggling to be born and holdovers from the prior constitutional order on the Supreme Court. The conflict escalates and is taken to the “We the People” in another set of elections—1802 and 1804 for the Jeffersonians, and 1934 and 1936 for the New Dealers. The forces of the triumphant new constitutional order stage a showdown with the Supreme Court, which executes a “switch in time” (p 260). The old Supreme Court justices retire and the forces of the new constitutional order appoint their ideological allies to the Court, which then issues a transformative opinion like *Hudson and Goodwin* or *Carolene Products*. With the issuance of this transformative opinion the move to a new constitutional order is complete (pp 258–66).<sup>36</sup>

The problem with this story as a positive account is that not every nascent political movement gets the same opportunity to reshape the membership of the Supreme Court. Some presidents with transformative agendas, like Franklin Roosevelt, get nine appointments to the

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<sup>34</sup> Ackerman argues that the American Constitution allows for “dualism” in lawmaking. He finds two distinct lawmaking tracks in the Constitution. The first, or “normal,” lawmaking track addresses the more day-to-day needs of a stable society, while the second, or “higher,” lawmaking track requires a committed political movement backed by broad and deep popular support for more permanent systemic changes. See Bruce Ackerman, 1 *We the People* at 6–7 (cited in note 9). See also Ackerman, 2 *We the People* at 5 (cited in note 9).

<sup>35</sup> Ackerman discusses the differences and similarities in the political environments in which Jefferson and Roosevelt ascended to the presidency.

<sup>36</sup> Here, Ackerman compares the “switch in time” of 1937 and to the guarded judicial retreat of *Marbury* and *Stuart*.



Supreme Court while others, like Jefferson, get three.<sup>37</sup> Moreover, there is no connection whatsoever between the strength of a political movement or the charismatic appeal of its presidential leader and the number of Supreme Court seats he gets to fill. This point is dramatically illustrated by Supreme Court appointments during the first quarter of the twentieth century. There were two charismatic presidents during this period, Theodore Roosevelt and Woodrow Wilson, who led a great movement for constitutional change with deep popular appeal. Indeed, their popular appeal was strong enough to produce radical changes in the constitutional text like the adoption of the Sixteenth, Seventeenth, and Nineteenth Amendments. Yet in fifteen-and-one-half years as president, Theodore Roosevelt and Woodrow Wilson appointed only six justices to the Supreme Court—one of whom, James McReynolds, was hostile to the Progressive movement. In contrast, two other early twentieth century presidents, William Howard Taft and Warren G. Harding, in six-and-one-half years appointed ten justices to the Supreme Court. Taft and Harding served less than half as long as Teddy Roosevelt and Woodrow Wilson, but they appointed almost twice as many justices. Moreover, Taft and Harding were not charismatic, plebiscitary leaders of great popular movements or spokesmen for We the People to nearly the degree that Teddy Roosevelt and Woodrow Wilson were.

The problem then with a positive account that stresses the importance of dualist democracy and of presidentially led constitutional change is that some tribunes of the people get few appointments, as happened with Teddy Roosevelt and Woodrow Wilson, while other presidents with no particular popular appeal like Taft and Harding get ten between them. If one wants to understand where the *Lochner*<sup>38</sup> era Court that sat until 1937 came from, the answer is in part William Howard Taft and Warren G. Harding. If we were truly a dualist democracy with presidentially led constitutional change, as Ackerman claims, then Teddy Roosevelt and Wilson ought to have beaten the pants off of Taft and Harding, but they didn't.

Nor is my point only descriptively accurate during the first quarter of the twentieth century. Federalist presidents George Washington and John Adams held the presidency for twelve years, during which time they appointed fourteen Supreme Court justices. Their Democratic-Republican successors Thomas Jefferson, James Madison, and James Monroe held the presidency for twenty-four years—twice as

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<sup>37</sup> For a table of Supreme Court appointments organized chronologically by appointing president, see Elder Witt, ed, *The Supreme Court A to Z: A Ready Reference Encyclopedia* 471–75 (Cong Q 1993).

<sup>38</sup> *Lochner v New York*, 198 US 45 (1905).

long—and appointed only six justices, less than half as many, and one of those six, Joseph Story, turned out to be a Federalist (p 239). Can anyone doubt whether that is part of the reason why the Marshall Court issued such great nationalist opinions as *McCulloch v Maryland*,<sup>39</sup> *Gibbons v Ogden*,<sup>40</sup> and *Osborn v Bank of the United States*?<sup>41</sup> Jefferson, like Teddy Roosevelt and Woodrow Wilson, was a very popular man with constitutionally transformative ambitions, but he simply did not get as many vacancies to fill as did lucky presidents like Washington, Adams, Taft, and Harding. As a positive matter, dualist democracy thus succeeds or fails not because of the degree of support that We the People provide to a nascent political movement for constitutional change, but because of sheer luck.

Other examples abound. The Jacksonians succeeded in transforming the Court where Jefferson failed because Jackson and Van Buren made eight appointments to the Supreme Court in twelve years. Similarly, Lincoln and Grant made nine appointments in sixteen years and Franklin D. Roosevelt made nine appointments in twelve years. Between 1968 and 2004, Republicans held the White House for twenty-four years, during which time they made eleven appointments to the Supreme Court. Democrats held the White House for twelve years—half as long—during the same time period but made only two appointments to the Supreme Court.

As a positive matter, it is at least somewhat true, as Robert Dahl and many others have argued, that the Supreme Court follows the election returns.<sup>42</sup> But some presidents are a lot luckier in their opportunities to reshape the Court than are others and this luck bears no relationship to whether the presidents in question are deeply popular, or to whether they have transformative constitutional ambitions. Accordingly, I think Professor Ackerman's positive account of the processes of constitutional change and synthesis needs amending. That account is less satisfying as a matter of democratic theory than it appears to be in Ackerman's writing.

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<sup>39</sup> 17 US (4 Wheat) 316 (1819) (upholding, under a broad reading of the Necessary and Proper Clause, Congress's power to create a national bank).

<sup>40</sup> 22 US (9 Wheat) 1 (1824) (invalidating, on Commerce Clause grounds, a state law that granted exclusive waterway navigation rights to two private individuals).

<sup>41</sup> 22 US (9 Wheat) 738 (1824) (holding that a state cannot levy a tax against the Bank of the United States, and that federal courts may enjoin any attempt to collect such a tax).

<sup>42</sup> See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J Pub L 279, 285 (1957) (finding that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States"). Dahl does not cite it, but the exact quote is "no matter whether th' constitution follows th' flag or not, th' supreme court follows th' illection returns." Finley Peter Dunne, *Mr. Dooley's Opinions* 26 (R.H. Russell 1901).

## II. THE PRESIDENCY AS THE DOMINANT OFFICE AT THE TIME OF THE FOUNDING

My second main point of disagreement with Professor Ackerman goes to his claims about the presidency. Ackerman's book at least implies the following two claims, both of which I disagree with. First, he suggests that the Framers did not intend the presidency to be a powerful, plebiscitary office and that they thought Congress and Congress alone would speak for the People. Ackerman claims that Jefferson had a vision of a plebiscitary presidency that was at odds with the Framers' vision and that Jefferson succeeded in selling that new vision of the presidency to the American people in 1801. Ackerman describes this all as a triumph of the living Constitution of 1801 over the Framers' original weak-presidency Constitution of 1787. Second, Ackerman makes the related claim that the Framers were completely unfamiliar with party systems and that the development of the two-party system in America in the 1790s represented a failure of Founding ideals and another triumph of the living Constitution (pp 17–18). Once again, Ackerman argues that it was Jefferson in 1801, not the Founding Fathers in 1787, who set in motion our venerable two-party system. Both of these claims raise complex questions, as I shall now briefly endeavor to show.

First, it is simply not true that the Founding Fathers in 1787 meant the presidency to be a weak office. In fact, the exact opposite was the case. After 1776, there had been a lot of sentiment in America to the effect that a strong executive was inimical to liberty and that only the legislature spoke for the people.<sup>43</sup> As a result, all of the constitutions proposed and ratified soon after 1776 created weak executives. This was the case with the federal "Constitution," the Articles of Confederation, and most state constitutions approved between 1776 and 1787, as the research of Charles Thach shows.<sup>44</sup>

The Founding Fathers deliberately and self consciously chose to break with this post-1776 preference for weak executives when they created the American presidency in 1787.<sup>45</sup> Thus, whereas many post-1776 executives had no veto power, the president was given a veto overridable by a two-thirds vote of Congress. The veto power was

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<sup>43</sup> See, for example, Gordon Wood, *The Creation of the American Republic 1776–1787* 135 (North Carolina 1969) (noting that post-Revolutionary Americans viewed the executive power—even when the holder of that power was democratically elected—as naturally inclined towards despotism).

<sup>44</sup> See Charles Thach, *The Creation of the Presidency 1775–1789* 28 (Johns Hopkins 1969) ("With one exception, that of New York, [state constitutions] included almost every conceivable provision for reducing the executive to a position of complete subordination.").

<sup>45</sup> See *id.* at 52.

widely understood to have its roots in monarchy and many Antifederalists complained about the Federalists' reinvention of the royal veto, given that English monarchs had not used their veto power at all for decades.<sup>46</sup>

Similarly, many post-1776 state executives had no appointment or nomination power on their own and frequently had to share such powers with a plural executive council.<sup>47</sup> In contrast, the Constitution of 1787 created a unitary executive, provided for no executive council, and gave the president the power to nominate all officers of the United States and the power to make recess appointments.<sup>48</sup> Again, the Founding Fathers borrowed from the traditional powers of the English monarchy to make the president more powerful than pre-1787 executives had been.<sup>49</sup>

Other distinctly royal powers were given to the president to fortify him in his future struggles with Congress. Thus, the president was given the royal power to make treaties, so long as two-thirds of the Senate concurred.<sup>50</sup> The president was given the royal power to pardon those convicted of federal offenses<sup>51</sup>—a striking power restricted by many state executives under the initial post-1776 constitutions. The president was made commander in chief of the military<sup>52</sup> and was given the power to execute federal law. Here again we see a blatant attempt by the Founding Fathers to make the presidency a very powerful office.

So thoroughly did the Framers succeed in augmenting executive power in 1787 that a principal complaint of the Antifederalists was that the president would be as powerful as King George III and would

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<sup>46</sup> See Wood, *The Creation of the American Republic* at 552–53 (cited in note 43) Wood discusses the Framers' choice of a limited veto instead of a revisionary council composed of the president and the judiciary as a means of limited legislative power. He specifically notes that the Framers' purpose for the executive veto—to ensure proper deliberation in Congress and not to reject laws outright—was a “perversion of the ancestral English Crown's role in legislation.” *Id.*

<sup>47</sup> See Thach, *The Creation of the Presidency* at 35 (cited in note 44) (noting that in most states, save Maryland and Pennsylvania, “the legislature or the people” retained the power of appointment). See also Wood, *The Creation of the American Republic* at 148 (cited in note 43) (discussing post-1776 opposition to executive appointment power in state constitutions).

<sup>48</sup> See US Const Art II, §§ 1–2.

<sup>49</sup> For further discussion of the development of executive power in pre-1789 state constitutions, see John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* 62–73 (Chicago 2005) (arguing that early state constitutions only altered the structure—not the substance—of British executive authority).

<sup>50</sup> US Const Art II, § 2.

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

suffocate liberty.<sup>53</sup> Thus Alexander Hamilton, in *The Federalist*, writes one whole paper on why the president's powers more nearly resemble those of the Governor of New York, admittedly the most powerful governor in the thirteen States at the time, than they resemble the powers of the British monarch.<sup>54</sup> Hamilton describes the picture the Antifederalists were painting of the president as follows:

He has been decorated with attributes superior in dignity and splendor to those of a King of Great-Britain. He has been shown to us with the diadem sparkling on his brow, and the imperial purple flowing in his train. He has been seated on a throne surrounded with minions and mistresses; giving audience to the envoys of foreign potentates, in all the supercilious pomp of majesty. The images of Asiatic despotism and voluptuousness have scarcely been wanting to crown the exaggerated scene. We have been almost taught to tremble at the terrific visages of murdering janizaries; and to blush at the unveiled mysteries of a future seraglio.<sup>55</sup>

Although Hamilton rejected this caricature, this is not an office that was meant by its creators to be weak and ineffectual.

Well, if the Founding Fathers rejected the weak post-1776 executives of the Articles of Confederation and most of the state constitutions written between 1776 and 1787, where should we look to find the role model for the powerful presidential office they sought to create? One answer with important qualifications is the English monarchy. Constitutional monarchs like William and Mary were to be a part of the model upon which the presidency was built. The Framers clearly rejected executive tyranny of the kind exercised by George III and Charles I, but they favored a president who was a forceful but constitutionally constrained executive like William III. Their immediate role model for such a figure was, of course, George Washington, who everyone knew would be the first president. The presidential office was designed with him in mind (p 18), and he in turn further defined the office by the precedents he set as the first president.

Professor Ackerman contends that Washington, unlike Jefferson, was not a plebiscitary president who led his own political party. This seems to be an overstatement, because Washington led the Federalist Party first in its struggle with the Antifederalists and later in its struggle with Jefferson's nascent Democratic-Republicans. Admittedly, Wash-

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<sup>53</sup> See, for example, Wood, *The Creation of the American Republic* at 521 (cited in note 43) ("The Antifederalists saw themselves in 1787-88 fighting the good old Whig cause in defense of the people's liberties against the engrossing power of their rulers.").

<sup>54</sup> See Federalist 69 (Hamilton), in *The Federalist* 462-70 (Wesleyan 1961).

<sup>55</sup> Federalist 67 (Hamilton), in *The Federalist* at 452-53 (cited in note 54).

ington did not know that this two-party system he participated in was to become a permanent and valuable feature of American public life, but he was still in effect a party leader of enormous popularity. The Framers could have picked a distinguished thinker and constitutionalist like John Adams to be our first president, but instead they went with a former general, a man on horseback, who was “first in war, first in peace, and first in the hearts of his countrymen.” Sounds like a plebiscitary president to me.

What then of the Framers’ decision to forego direct election of the president and instead have the president be picked by the Electoral College? Doesn’t that suggest that the president was not to be an agent of We the People? Hear what Hamilton says about this in *Federalist* 68:

It was desirable, that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any pre-established body, but to men, chosen by the people for the special purpose, and at the particular conjuncture.<sup>56</sup>

Hamilton goes on to say:

They have not made the appointment of the President to depend on any pre-existing bodies of men who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment.<sup>57</sup>

Madison, too, makes this point in *Federalist* 51 when he famously argues that Congress and the president “should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another.”<sup>58</sup> The Electoral College, then, was a body whose members would not even meet in one place where they could deliberate or argue with one another. Its sole official purpose was to ratify the people’s choice for president, while unofficially it, coupled with the three-fifths rule, allowed white southerners to vote their slaves.

Was there any precedent the Framers might have had in the back of their minds when they created an Electoral College whose only purpose was to formally ratify the popular choice of a successful general and man on horseback to be president? Sure there was. Think

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<sup>56</sup> *Federalist* 68 (Hamilton), in *The Federalist* at 458 (cited in note 54).

<sup>57</sup> *Id.* at 459 (cited in note 54).

<sup>58</sup> *Federalist* 51 (Madison), in *The Federalist* at 348 (cited in note 54).

back to the Glorious Revolution of 1689 when the English people rose up by acclamation and chased James II out of the country, while welcoming plebiscitary Protestants William and Mary to assume the throne. To be sure, Parliament formally ratified the popular decision in 1689 when it gave the throne to William and Mary and established a Protestant succession, just as the Electoral College in 1789 formally ratified the popular desire that Washington be the first president. In both cases, however, these formal acts merely ratified a plebiscitary popular choice that really had already been made for other reasons.

Once George Washington became president, he continued to act like an agent of the people with his own mandate, more so even than Jefferson did. Washington gave one great speech to the country, his Farewell Address, and he issued the important Neutrality Proclamation (pp 22–33). Jefferson's only great speech was his first inaugural address. Washington and Adams delivered their State of the Union speeches in person to Congress, mimicking the royal practice of speeches to Parliament from the throne. Jefferson abandoned this practice, and it was not renewed until the administration of Woodrow Wilson.<sup>59</sup> Washington's treasury secretary, Alexander Hamilton, formulated and pushed through Congress an ambitious economic plan.<sup>60</sup> Jefferson's administration was famous for *not* having a legislative agenda. Jefferson believed, unlike Washington, in congressional supremacy in policymaking. In sum, it is simply not true that the Founding Fathers meant for the presidency to be a weak office and that the Jeffersonians reinvigorated that office. The truth is more nearly the other way around.

Second, Professor Ackerman argues that the Founding Fathers were totally unfamiliar with a regular two-party system and that the eventual emergence of that two-party system was a triumph of the living Constitution of 1801 over the original Constitution of 1787 (p 17). In one sense, Ackerman is certainly right. The Founding Fathers clearly did not realize that their presidentialist system of democracy would always, and automatically, lead to a two-party system. But it does not follow that the Framers were totally unfamiliar with two-party systems. First, and most obviously, there were of course parties in the thirteen original states. Well, Ackerman would say that what the Framers really thought was that there could be no continental party system across an expanse as vast as America (p 18). Yet, it is indis-

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<sup>59</sup> See Bernard A. Weisberger, *America Afire: Jefferson, Adams, and the Revolutionary Election of 1800* 291 (Morrow 2000).

<sup>60</sup> See *id.* at 56 (discussing Hamilton's *Report on the Public Credit*, which called for gradual repayment of the United States' \$55 million debt, "assumption" of \$25 million worth of state debts, a national bank, a manufacturing stimulus package, and a consumption tax).

putably the case that the vast nation of Great Britain had just such a two-party system from at least the time of the Glorious Revolution up until 1787.<sup>61</sup> The two parties were the Court Party and the Country Party, and it was not until about 1760 that these two groups came to be known by their more modern (and initially derogatory) names: the Whigs and the Tories.

The English constitutional monarchy naturally led to this two-party system because one group of people invariably dominated the Court and Parliament while their opponents took succor in the countryside. I believe the American presidential system leads inevitably to a politics where there will always be a Court Party (today, the Republicans) and a Country Party (today, the Democrats). So long a majority of the Electoral College is required to be elected president, there will be a politics where one “in” group competes with one “out” group. This is just inherent in making the presidency the most powerful office and then giving control over it to a national majority. The two-party system, then, was *not* created by Jefferson in the 1790s or in 1801. It was an inevitable outgrowth of the Founding Fathers’ creation of a presidential system in 1787.<sup>62</sup> The fact that the Founding Fathers did not understand or approve of the fact that their Constitution would lead to a two-party system is beside the point. Laws and constitutions have unintended consequences all the time.

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<sup>61</sup> Ackerman acknowledges this, but he argues that the English parties were “extended groupings of elite families, locked in a factional struggle for power and patronage” (p 17). I think he would contend that the English arrangement was not analogous to the system that would develop in the United States.

<sup>62</sup> Maurice Duverger argues that “the simple-majority single-ballot system favors the two-party system.” Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State* 217 (Methuen 1961) (Barbara and Robert North, trans). This proposition is generally referred to as “Duverger’s Law.” See, for example, William H. Riker, *The Two Party System and Duverger’s Law: An Essay on the History of Political Science*, 76 *Am Polit Sci Rev* 753, 754 (1982). Duverger’s Law predicts that a first-past-the-post electoral system—like the system used to elect the president, the House, and the Senate—will lead naturally to the development of two dominant political parties. Duverger’s conclusion is based on a “mechanical” component and a “psychological” component. See Duverger, *Political Parties* at 224. The mechanical component is the fact that third parties in a first-past-the-post system will be systematically underrepresented in the legislature relative to their proportion of the popular vote. See *id.* at 224–26. The psychological component proposes that “the electors soon realize that their votes are wasted if they continue to give them to the third party: whence their natural tendency to transfer their vote to the less evil of its two adversaries in order to prevent the success of the greater evil.” *Id.* at 226. Duverger concludes that, operating together, the mechanical and psychological components lead to the deterioration of third political parties and the rise of a two-party system. There are, however, significant examples of first-past-the-post electoral systems that yield more than two competitive political parties. For example, the British Liberal Democrat Party continues to gain seats in the British Parliament despite the existence of the entrenched Labor and Conservative parties. Although Duverger’s Law is not absolute, it implies that a two-party system was the very likely result of the U.S. Constitution’s electoral procedure.



My point that presidentialism leads automatically to a two-party system is proven by the experience of France when it moved from the Fourth to the Fifth Republic. Under the Fourth Republic, France had a very fragmented multiparty system like Italy's or Israel's.<sup>63</sup> With the creation in 1958 of a presidential regime under France's Fifth Republic, however, the French party system completely rearranged itself so that today there are two broad party coalitions that compete with each other to control the presidency: a Left Coalition and a Right Coalition.<sup>64</sup> If presidential democracy could create a two-party system in France in 1958, we should not be surprised that it would do so in America after 1787. The American two-party system is an unintended consequence of the Constitution of 1787. It was not the creation of a living Jeffersonian Constitution in 1801.

#### CONCLUSION

Professor Ackerman has written a wonderful and enlightening book that no serious student of legal history or of the presidency can afford to ignore. He has uncovered vitally important facts about an important event, the election of 1800, that had somehow not been widely appreciated until now or had, at least, been forgotten. I think Professor Ackerman is on weaker ground, however, in the implications he seeks to draw from this history for constitutional theory, the role of the Supreme Court, and the role of the presidency. As I have sought to show, the supposed "failure" of the Founding Fathers was in fact a brilliant, if at times unintended, success.

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<sup>63</sup> See, for example, Robert Elgie, *Political Institutions in Contemporary France* 11–12 (Oxford 2003) (discussing the widespread partisan opposition to the Fourth Republic and the resulting absence of effective political leadership). See also Angelo Codevilla, *Modern France* 131 (Open Court 1972) (noting that, during the Fourth Republic, "at election time the public could not, by voting for any party, support or sanction any government or even necessarily take a stand on any given issue").

<sup>64</sup> See Elgie, *Contemporary France* at 39–45 (cited in note 63). France employs what is essentially a first-past-the-post system, see *id.* at 159–60, but if they did this during the Fourth Republic as well, it would seem to weaken the analogy.