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DELIBERATING ABOUT DELIBERATION

*Frederick Schauer**

WE THE PEOPLE: 1: FOUNDATIONS. By *Bruce Ackerman*. Cambridge: The Belknap Press of Harvard University Press. 1991. Pp. x, 369. \$24.95.

It starts on the cover. Before the reader of Bruce Ackerman's *We the People*¹ even gets past the dustjacket, she is confronted with a late eighteenth-century aquatint entitled *Election Day at the Statehouse*, portraying a street scene in front of the Pennsylvania statehouse on election day. The artwork perfectly exemplifies a major theme of the book, in that it portrays most of the features that we associate with public political deliberation. One person is holding up a banner. Another is making a political speech to an audience questioning and responding to the speaker. Several people carry handwritten or simply printed political tracts, a number of small groups are engaged in serious discussion, and a somber and elderly gentleman is plainly dispensing the political wisdom he has accumulated over many decades. Although the participants are all white, the presence of clearly engaged women and children makes the point that active participation is not limited to those who then had the franchise.

It's a nice picture. Indeed, without explicitly referring to this cover at all, Ackerman himself describes

a pretty picture . . . in which a rediscovered Constitution is the subject of an ongoing dialogue amongst scholars, professionals, and the people at large; an America in which this dialogue between theory and practice allows the citizenry, and its political representatives, a deepening sense of its historical identity as it faces the transforming challenges of the future.
[p. 5]

Although much in this book is worthy of note, I want to concentrate on Ackerman's pervasive and self-conscious treatment of this deliberative ideal, one that stresses public discourse as a method of value formation and governance, and one that dominates not only the picture on the cover, not only this book, and not only much of Ackerman's work, but also much of contemporary constitutional and political theory. For although the normative desirability of deliberation in the ideal setting that this book's cover portrays is hard to chal-

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1. Bruce A. Ackerman is Sterling Professor of Law and Political Science, Yale University.

lenge, more difficult issues arise when nonideal deliberative settings reinforce rather than mitigate the darker side of public political life. To the extent that this occurs, deliberation may present problems rarely addressed in the celebrations of deliberation that dominate so much of contemporary constitutional and political theory.

I

In concentrating on deliberation, certainly one of Ackerman's main themes, I slight two others that deserve some note. One, the most explicit in the book, is Ackerman's description and endorsement of what he calls "dualist" democracy. Ackerman first distinguishes dualism from monism, the more conventional majoritarian conception of democracy that stresses the role of elections and the relationship between the political legitimacy of a program and the success of its promoters in "the last general election" (p. 8). To the monist, departures from majoritarianism are suspect, and the common phrase "countermajoritarian difficulty" suggests that when an institution (such as judicial review) operates other than to reinforce the results of the last general election, its legitimacy is suspect and in need of affirmative justification.²

Ackerman's dualist challenge to monism rests on the premise that the unique contribution of American political thought lies in its rejection of the European model of parliamentary sovereignty. Consequently, Ackerman makes the empirical claim that Americans are not normally very much involved in the political decisions that affect them, the interpretive claim that this degree of noninvolvement in normal politics is consistent with American constitutional and political history, and the normative claim that such a state of affairs is nothing to worry about. Dualism is based on the proposition that not being politically involved on a regular basis is a perfectly legitimate life choice, that it is the life choice of most Americans, and that governance on the normal track proceeds by virtue of the hopefully public-minded performance of duties by political professionals who use their own best judgment subject only to sporadic electoral validation or invalidation. Normal politics is, with the consent of the people, largely the business of the politicians.

But sometimes things are different. On occasion the people become mobilized, creating and participating in a public-minded and actively engaged process of "higher lawmaking" that produces constitutional transformation. This process of higher lawmaking has produced — and indeed constitutes — the Constitution, which consists of some combination of canonical texts, interpretive cases, and

2. See especially ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* (1975); see also ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

political understandings. Because these and only these products truly represent the considered wishes of the people, judicial enforcement of the products of higher lawmaking — even to strike down the products of normal politics — cannot fairly be described as countermajoritarian. Rather, judicial review is the way in which the population keeps watch on the process between those less frequent times when it desires to become more actively engaged (pp. 9-10, 139-62, 266-319).

Dualism differs not only from monism, but also from what Ackerman calls “rights foundationalism,”³ the view that there are human rights antecedent to the decisions of a given polity and, further, that the enforcement of those rights is a significant part of a proper understanding of American constitutionalism. In contrast to rights foundationalism, dualism treats as paramount the decisions of the people so long as they are made on the constitutional track, and thus requires the courts to enforce even those decisions of the people that the rights foundationalist would see as immoral violations of fundamental human rights (pp. 10-16).

Ackerman’s distinction between dualism and monism seems sensible enough,⁴ but his treatment of rights foundationalism is curious. At various times Ackerman offers some half hearted sympathy with rights foundationalism, especially when he argues that he would have no objection to the entrenchment of constitutional rights against even constitutional change,⁵ but the general tenor of this book plainly

3. Pp. 10-16. *Foundationalism* is a bit of a pejorative in some modern legal and political theory, e.g., DON HERZOG, *WITHOUT FOUNDATIONS: JUSTIFICATION IN POLITICAL THEORY* (1985), and perhaps another term would have been preferable. Although some people who believe in prepolitical rights believe that those rights include or are limited to rights of property, not all so-called “foundationalists” take their guide exclusively from Locke and *Lochner*. Instead, as Ackerman quite properly recognizes, theorists like Ronald Dworkin and John Rawls, neither of whom places property rights near the center of his project, are foundationalists in Ackerman’s sense. So also, I should note, are most of those who can talk without difficulty about international human rights.

4. By which I mean that I think I agree with it, and I think as well that agreement with it undergirds far more of American constitutional theory than Ackerman seems to acknowledge. Although I agree with him that actual governmental practice seems hardly to justify the adulation and concomitant presumption of validity that pervades too much of the majoritarian tradition, I am not sure why those who would have the Court apply the text of the Constitution with some vigor but be reluctant to depart from it, see, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981), cannot also be seen as dualists in Ackerman’s precise sense. Given that both Ely and Ackerman see the roots and legitimacy of judicial review in terms of judicial enforcement of considered and entrenched popular choices, the difference between them turns on the question, which I take up below, whether those choices may be entrenched other than through the procedures of Article V. This is an important question, but nevertheless the difference between Ackerman and most modern constitutional majoritarians is considerably less than Ackerman supposes.

5. Pp. 15-16, 319-22. Neither Ackerman nor I is a logician, but the logical paradoxes of entrenchment and self-amendment are worth noting. Can that part of a written constitution making all or part of the same document unamendable be amended? See, e.g., Denis V. Cowan, *The Entrenched Sections of the South Africa Act*, 70 S. AFRICAN L.J. 238 (1953). If so, then

clashes with the notion that there is enforceable law higher than the people's constitutional decisions. This tension strikes me as curious for several reasons. First, the rejection of rights foundationalism, at least as a point about metaethics and moral epistemology and not a point only about the power of the courts, causes one to wonder from whence comes the normative value of Ackerman's deliberative ideal. Moreover, the rejection of rights foundationalism presents a difficulty in explaining how the nonfoundationalist argues that we *ought* to have these rights and not those, for such arguments need some pre-deliberative purchase. Finally, Ackerman's rejection of rights foundationalism avoids the question *why* rights foundationalism has been rejected. Ackerman's answer appeals to tradition, relying on American constitutional and political history to make the claim that, whatever the allure of rights foundationalism, it is not now and has never been the approach adopted by the people of the United States in understanding their Constitution (pp. 13-16).

To the rights foundationalist, however, this is no answer at all. If there are rights antecedent to the decisions of the people, the absence of any popular decision to recognize those rights, even over an entire constitutional tradition, is hardly even persuasive, let alone dispositive. In the context of questions about international human rights, a context in which rights foundationalism is increasingly a global ideal, a nation's wholesale denial of a body of rights thus appears only as evidence of that nation's failure. One rarely hears arguments against condemning or sanctioning a nation because it has merely failed to enforce the rights that *its* constitutional tradition does not recognize.

To the rights foundationalist, the morally responsible agent must act consistently with those rights of others that exist prior to and above the decisions of the political state. If that rights foundationalist

entrenchment is illusory. If not, then why not? One answer is that there would be no procedure *in* the document for such amendment. But then the entire document could be replaced by one that resembled the original one in all respects except for the relevant amendment. In that case, the same type of political decision that caused the constitution to be the constitution in the first place could change that constitution, even those parts of the constitution that seemed explicitly unamendable. So entrenchment turns out to be less a legal concept than a political fact, but if it is a political fact then it may be so even if a constitutional text does not have explicit entrenchment provisions. As an example, note the recent debates about amending the First Amendment, particularly in the context of the defeated H.J. Res. 350 and S.J. Res. 332 (1990), both of which sought to overturn the result in *United States v. Eichman*, 496 U.S. 310 (1990). Although the First Amendment is not one of the two or three explicitly unamendable provisions of the U.S. Constitution (Article V provides that no amendment shall deprive a state without its consent of its equal representation in the Senate and that no amendment can alter those provisions allowing slavery until the year 1808; somewhat more ambiguously, Article VI provides that "no religious Test shall ever be required as a Qualification to any Office . . ."), the public and political discourse leading up to the recent rejection of the so-called Flag Burning Amendment lends support to the view that the First Amendment is politically even if not textually entrenched. Ackerman himself should be sympathetic to this claim, since, if the Constitution can be amended outside of the provisions of Article V, then parts of the Constitution might be entrenched outside of the provisions of Article V. I pursue this issue further below, *infra* notes 8-18 and accompanying text.

rejects a strong sense of role morality, pursuant to which certain roles preclude agents from enforcing the rights they would enforce if they did not occupy those roles, then she will at least avoid contravening those rights regardless of the role she holds.⁶ Therefore, even if the rights foundationalist is a judge, she will not — in judging or elsewhere — take actions inconsistent with the antecedent rights she recognizes. And if told that most of the society in which she operates has not recognized antecedent rights in general or some particular antecedent right, she is likely to respond that this is no argument against either their existence or her enforcement of them.

This is not to say that rights foundationalism is right or wrong. Nor is it to say that Ackerman might not be correct in his interpretive claims about what is at the heart of the American political and constitutional tradition. But unlike his predecessors in the enterprise of offering comprehensive and profound accounts of the American constitutional tradition,⁷ Ackerman's historical, explanatory, and interpretive claims have an explicit normative overlay. Political and constitutional prescription dominates this book in a way that it does not dominate others to which it otherwise might be compared. As a result, Ackerman's normative claims invite normative and not merely historical or interpretive evaluation. When we use normative terms to evaluate Ackerman's normative claims, we see that his observation that this society has in its constitutional text⁸ and tradition rejected rights foundationalism is, even if empirically correct, question-begging in the extreme. There are strong arguments against foundationalism, but one that takes antifoundationalism as its unargued premise is hardly likely to persuade the foundationalist.

II

As in his previous work,⁹ Ackerman makes much of those moments of great constitutional engagement that have produced extratextual constitutional transformations. In particular, he sees both the

6. On role morality, see FRANCIS H. BRADLEY, *ETHICAL STUDIES* 160 (2d ed. 1927) (viewing morality from the perspective of "my station and its duties"). For skepticism about role morality, see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988). See also THOMAS NAGEL, *Ruthlessness in Public Life*, in *MORTAL QUESTIONS* 75 (1979) (discussing the differences between private and public, role-centered morality).

7. E.g., CHARLES A. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* (1912); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969).

8. In light of Ackerman's own endorsement of the idea of amendments outside of Article V, it is intriguing that he relies almost exclusively on the text in comparing the American rejection of entrenchment with the German acceptance of it. If the Constitution can be amended outside of Article V, then it can be amended outside of Article V to entrench all or part of itself. If so, it is possible, as some of the flag-desecration debates suggest, that parts of the Constitution are already entrenched. See *supra* note 4.

9. E.g., Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013 (1984); Bruce A. Ackerman, *Transformative Appointments*, 101 *HARV. L. REV.* 1164 (1988).

Reconstruction and the New Deal as periods in which popular engagement on the higher constitutional track has properly produced radical revisions not only in the way the Constitution was viewed, but also and consequently in the Constitution itself (pp. 81-130). And although the Reconstruction period produced the Thirteenth, Fourteenth, and Fifteenth Amendments, the New Deal was no less a transformation for having produced no modifications to the text of the document.

As a matter of legal theory this is plainly right. As Hans Kelsen first recognized in his discussion of the *Grundnorm*,¹⁰ and as H.L.A. Hart thereafter elaborated in his treatment of the ultimate rule of recognition,¹¹ laws gain legal validity by virtue of other and higher laws. When this progression runs out, however, leaving in question only the validity of the highest law of all, the notion of *legal* validity is meaningless. The validity (if that is even the right word at this point) of the highest law — and thus of the legal system itself — is a political and sociological fact and not a legal question.¹² I could write a constitution tomorrow, literally appearing in all respects to be a constitution for the United States, and could incorporate within it conditions for its technical validity (when I sign it, or when the Yankees next win the World Series, for example) that would differ in no logical or textual way from the internal validity conditions contained in Article VII of the existing Constitution of the United States and satisfied in 1787. Thus the two documents would appear equally internally valid. An English-speaking visitor from Mars, for example, would not be able to discern merely from examining the documents and being told that each of their internal conditions for validity had been satisfied which one really constituted the constitution of the United States.

The reason, of course, that our visitor from Mars would be confused is that the acceptance of the Philadelphia-generated Constitution of the United States and not Fred's constitution of the United States as the constitution of the United States is a political and sociological fact. It is not a legal matter at all, but rather a set of circumstances about the empirical conditions under which a population and its officials treat the indications of a piece of paper as relevant.¹³

Once we see this, a number of conclusions follow. First, a whole range of understandings about *what the Constitution says*, including, for example, how we treat Supreme Court decisions, how we treat lower court decisions, how we treat historical executive and legislative

10. HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (Anders Wedberg trans., 1945); HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., 1970).

11. H.L.A. HART, *THE CONCEPT OF LAW* 97-120, 245-46 (1961).

12. See Iain Stewart, *The Basic Norm as Fiction*, 1980 JURID. REV. 199.

13. In somewhat different terms, this is what I see as one of the significant messages of SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

practices, the relevance of original intent, and why Ronald Dworkin is an acceptable citation in a Supreme Court opinion and Jeanne Dixon is not, are determined by the political and social decisions that produce the fact of those sources' acceptance or rejection. Second, if all of these are "part of" the Constitution, or not, because of supratextual or extratextual social decisions, then when society modifies its decisions in this regard the Constitution in any interesting sense changes as well.¹⁴ Third, if the "small c" constitutionality of the "big C" Constitution is a matter of social acceptance or nonacceptance, then there is no formal or logical reason why social acceptance or nonacceptance must necessarily be all-or-nothing. The social act that produces social acceptance could be a social act of accepting two thirds or three quarters or all but one provision of a particular text that happens to be headed "The Constitution of the United States." If the *Grundnorm* or the ultimate rule of recognition recognized all of the Constitution of the United States except the Third Amendment as the constitution of the United States, we would then say, neither illogically nor inconsistently with these enduring lessons from two of the great figures of modern jurisprudence, that the constitution of the United States consists of all of those provisions contained in a document headed the Constitution of the United States except for that part designated as "Amendment III."

If the legal theory of social subtraction from the textual constitution is thus sound, then there is also no reason to suppose that there could not be an equally sound legal theory of social addition.¹⁵ As long as society by its political act, and not the text by its own words, determines that the text, and how much of it, counts as the constitution, then society could by a parallel political act also determine that all of that text, *and more*, counts as the constitution of the United States. Indeed, the constitution of the United States might plausibly consist of the text of the Constitution itself; the *Federalist Papers*; Supreme Court decisions interpreting the Constitution of the United States; and parts of the Mayflower Compact, the Declaration of Independence, and the Emancipation Proclamation.

14. This leads to difficult questions about when we can and cannot say that a legal order or constitutional system has changed or remained the same. See J.M. Finniss, *Revolutions and Continuity of Law*, in OXFORD ESSAYS IN JURISPRUDENCE 44 (2d series, A.W.B. Simpson ed., 1973). Although this may seem like a substantively irrelevant semantic excursus, the question whether today's legal order is the "same" as yesterday's despite some changes has great import in the context of the question of the persistence of prerevolutionary laws after a legal and political revolution. See F.M. Brookfield, *The Courts, Kelsen, and the Rhodesian Revolution*, 19 U. TORONTO L.J. 326 (1969); J.W. Harris, *When and Why Does the Grundnorm Change?*, 29 CAMBRIDGE L.J. 103 (1971). The relevance of this question to current issues regarding Eastern Europe, the former Soviet Union, and South Africa should be apparent.

15. On the possibilities of extra-textual addition and subtraction, see Sanford Levinson, *Accounting For Constitutional Change (Or, How Many Times Has the United States Constitution Been Amended?)* (A) <26; (B) 26; (C) >26 (D) All of the Above), 8 CONST. COMMENT. 409 (1991).

Ackerman is thus right in maintaining that there can be amendments to the Constitution outside of Article V, even though his insight is perhaps less novel to the traditional legal theorist than to the modern American constitutionalist.¹⁶ And to suppose that the period of Reconstruction and the New Deal Era produced such amendments is hardly implausible. But it is also possible that there were other extratextual amendments, or even that the process of extratextual amendment is continuous. The plainly publicly engaged process — constitutional politics — that led to the denial of confirmation of Judge Bork, for example, may itself have been a process of extratextual amendment¹⁷ that made rights foundationalism, for example, somewhat more a part of the Constitution than it had been previously (and than Ackerman would suppose). And it is further possible that the “natural rights” debate accompanying Justice Thomas’s confirmation was also a constitutional moment (or might have become so, were it not overshadowed by other events) that led to somewhat less rights foundationalism than had existed in the era after Bork but before Thomas.¹⁸

Acknowledging the continually evolving character of the *Grundnorm* that supports the constitutionality of the Constitution is consistent with Ackerman’s notion of amendments outside Article V — but less so with the stress that Ackerman places on a small number of constitutional moments different in kind from other constitutional transformations. Although Ackerman gives us criteria for when higher lawmaking exists, and thus may be enforced by the courts even if not consistent with Article V, he fails to come to grips with the political and constitutional import of shifts in background understandings that do not meet these criteria. To appreciate this problem, it might be useful to draw a distinction between how the Constitution looks to the external observer and how it looks to a court considering whether to invalidate the product of a legislature. With respect to the former, it seems implausible to suppose that the Constitution changes

16. In the existing literature, the most jurisprudentially sophisticated treatment of constitutional transformations in the American context is Robert Justin Lipkin’s. See Robert J. Lipkin, *The Anatomy of Constitutional Revolutions*, 68 NEB. L. REV. 701 (1989); Robert J. Lipkin, *Conventionalism, Pragmatism, and Constitutional Revolutions*, 21 U.C. DAVIS L. REV. 645 (1988); see also Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

17. Ackerman describes the Bork nomination fight as a “failed constitutional moment.” P. 56. But what was a failure for the President who nominated Bork may have been a success to Bork’s opponents. My point is that in Ackerman’s terms the defeat of Bork may have been more than just an attempt at a constitutional moment that misfired, but rather a constitutional moment that succeeded in entrenching the idea of unenumerated rights in general and the right to privacy in particular, as subsequent nomination hearings have made clear.

18. See Robert F. Nagel, *No Show: Reform the Hearings*, NEW REPUBLIC, Oct. 7, 1991, at 20; Stuart Taylor, Jr., *Supreme Disappointment: What’s Really Wrong with the Way We Choose Supreme Court Justices*, AM. LAW., Nov. 1991, at 5; *The Thomas Nomination*, NEW REPUBLIC, Oct. 7, 1991, at 7.

only when either amended under Article V or by those few constitutional moments that satisfy Ackerman's criteria. But even if constitutional transformation is more fluid than sporadic, Ackerman could still maintain that a court self-consciously considering invalidating the products of a political process needs firmer moorings. He could argue that courts need criteria of constitutional recognition, some way of demarcating between those subtle shifts that transform all participants in a process and those more dramatic ones that change how an institution will see its own role. Otherwise, he might say, courts would see themselves as constrained only by the operation of an external political process, doing whatever they could get away with and in the process defining constitutionalism and their role only by the after-the-fact empirical identification of what they *did* get away with. Such an outlook, as the standard critiques of Realism make clear, would be of little help from the standpoint of the judge trying to decide what to do.¹⁹ In order to avoid this problem, Ackerman's position might include both the normative claim that judges *should* respect only those extratextual modifications of the text that satisfy his criteria, and the descriptive claim that they have in fact generally done so.

Although I have serious problems with the descriptive claim,²⁰ I want to focus instead on the normative. If courts operating in dualist mode should respect all of the products of normal politics except when those products interfere with the mandate of a textualized or nontextualized constitutional moment, then we need a normative account of why this should be so. Such an account would have to have two components, each of which suggests a possible alternative to Ackerman's perspective. One component would question the court's unwillingness to intervene in cases of normal politics, and here the rights foundationalist becomes a major figure. If normal politics generates a result that a court perceives to be morally wrong but that a constitutionally engaged public has never previously perceived to have been morally wrong, then judicial intervention without something that looks like rights foundationalism becomes puzzling.

Take, for example, Ackerman's defense of *Griswold v. Connecticut*.²¹ Because he rejects rights foundationalism, and because nothing

19. See HART, *supra* note 10, at 121-50. Hart's critique is adopted in Ronald Dworkin's rejection of "external skepticism." RONALD DWORKIN, *LAW'S EMPIRE* 34-35 (1986). On the crucial question of "standpoint," and on how the soundness of Legal Realism necessarily depends on standpoint, see WILLIAM TWining, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

20. Descriptively I do not challenge Ackerman's argument that a constitutional moment in his sense is a sufficient condition for judicial use of the substantive transformations of that moment. I do challenge, however, the view that constitutional moments are necessary conditions, and I believe instead that judges' views of the Constitution's substance and sources of interpretation change far more frequently than the focus on constitutional moments would indicate.

21. 381 U.S. 479 (1965), *discussed* at pp. 150-62; *see also* Richard J. Fallon, Jr., *Common Law Court or Council of Revision*, 101 *YALE L.J.* 949, 969 n.109 (1992) (book review). Acker-

resembling *Griswold*-variety privacy was ever at the fore of public debate during a process of constitutional lawmaking, Ackerman's defense must rely on what seems to me to be a strained interpretation of what the people were actually talking about in 1787, 1791, 1866, or 1937. Now others would describe what seems to me to be strained as "creative," but here that is exactly the point, because then Ackerman needs to claim not only that the people did such-and-such during their constitutional moment, but also that they authorized the court to interpret what they did with a considerable degree of creativity. Then things get even more sticky. If the people authorized the kind of creative synthesis that gets from the text, the founding, Reconstruction, and the New Deal to *Griswold*, then why not just say that the people authorized what is in effect rights foundationalism? If courts are authorized by and in the name of the people to identify rights that the people in their own constitutional moments did not identify, then judicial power turns out to emanate from the authority of the courts in Dworkinian fashion to make the people's actual choices *the best they can be*.²²

Two further possibilities present themselves. One can, like Dworkin, be without embarrassment a rights foundationalist of sorts, taking the court's power to operate in this way to be right because it is right, and not only because the people have deliberatively authorized that course. But if there is space between Ackerman and Dworkin — and much of Ackerman's interpretive method strikes me as quite Dworkinian — it is precisely because of the difference between moral rectitude and popular deliberative authorization. Ackerman's normative preference for the latter, however, risks some self-contradiction. If the people have authorized rights foundationalism, then on a day-to-day (or even year-to-year) basis, nothing turns on the difference between dualism and rights-foundationalism except the formal power of the people to withdraw their authorization for rights foundationalism in the latter case but not in the former. But Ackerman's rejection of rights foundationalism is stronger, for he wants to claim that the people have not authorized the courts to engage in that process at all. If the people have not authorized rights foundationalism, but have engaged in the process of authorizing courts to create an interpretive synthesis out of what they have explicitly done, then Ackerman must, as both Dworkin and his critics have, take on the serious issue of the role of morality in interpretation, in light of the fact that the available interpretive field will underdetermine the result, just as any available field of data will underdetermine the interpretation or explanation of

man's denial that *Griswold* and *Brown* are much more than reinforcements of then-existing constitutional understandings is powerfully criticized in Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. Rev. 893 (1990).

22. DWORKIN, *supra* note 18, at 225-75; see also RONALD DWORKIN, A MATTER OF PRINCIPLE 119-77 (1985).

that data.²³

But if what the people have actually deliberated about is subject to interpretation so as to include what they have not explicitly deliberated about, then what role is deliberation playing? It must play a big role for Ackerman, because only deliberation separates him from the rights foundationalists who would reach the same result in *Griswold* without needing to see the result as the product of a series of deliberations. Moreover, it is what privileges the constitutional moments over normal politics. If Ackerman were, like Ely and others, to offer an account of textual exclusivity, he could rely less on the virtues of deliberation.²⁴ But because for Ackerman some but not all extra-textual political events rise to constitutional proportion, and because the distinction between those that do and those that do not turns on the presence or absence of widespread and engaged public deliberation of a certain sort, then we must turn to the second component of the underpinnings of Ackerman's normative claims and ask, in a nonquestion-begging way, what is so special about deliberation?

III

So what is so unique about deliberation and its products, making deliberation of a certain kind, but nothing else, a sufficient condition for constitutional transformation? We can approach the question in two ways. One would start with the premise that deliberation just *is* democracy, and that Ackerman is following Alexander Meiklejohn in seeing the population as a New England town meeting writ large.²⁵ Meiklejohn recognized, however, that New England town meetings take place once a year, with "normal politics" taking place between town meetings with little popular involvement. But if Ackerman is operating within the Meiklejohnian tradition, we may ask what is so good about a New England town meeting (a question more likely to be asked by those who have attended one). The New England town meeting does provide an exercise in engaged majoritarianism, but why do we think that is a good thing?

It might be good for one of four reasons. First, majoritarianism fosters an independent value of equality, for a system in which everyone participates equally serves equality values independent of the results of the participation. Second, majoritarianism serves an independent value of self-government, here seen as the political exten-

23. See Lawrence A. Alexander & Michael D. Bayles, *Hercules or Proteus? The Many Theories of Ronald Dworkin*, 5 *SOC. THEORY & PRACTICE* 267 (1980); Frederick Schauer, *An Essay on Constitutional Language*, 29 *UCLA L. REV.* 797, 814-21 (1982); A.D. Wozley, *No Right Answer*, in *RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE* 173 (Marshall Cohen ed., 1983).

24. *E.g.*, pp. 197-99.

25. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

sion of individual freedom in the sense of the ability to make decisions about one's own life. Third, majoritarianism might, for those who reject foundationalism or any other conception of prepolitical rights antecedent to political decision, be the only way to define rights. Fourth, even if majoritarianism (or consensus, which is similar but hardly identical) is not the only way to define rights, it still might be the best way to discover what rights there actually are.

Note that none of these, and especially neither of the first two, is necessarily connected with deliberation. Democracy, defined for the moment in a thin majoritarian manner, might exist in a number of ways placing less stress on deliberation. Voting is one example, and so are various other ways of registering preferences. But although serious questions can be asked about the virtues and vices of government based on citizen preferences, Ackerman's agenda is different. He privileges public-regarding rather than private-regarding preferences,²⁶ and he privileges the products of deliberative engagement over other forms of articulation of public-regarding preferences.

So what are the special values of deliberation, above and beyond what might be good about government based on the public-regarding preferences of the entire citizenry? One possibility is that deliberation might serve as a check on the nature of the reasons employed in decisionmaking. If private preferences count for less than public ones, then the reasons behind preferences matter, and perhaps the only way we can evaluate preferences is to have them publicly defended. Public deliberation is thus a way to ensure that reasons are public-regarding, although in some sense this is only a play on words. Even if we said that only private-regarding reasons counted, public articulation might still be the only way of determining that the reasons were of the qualifying kind. And if we saw deliberation as performing this kind of a "testing" function, then certain concrete consequences might follow. We would want deliberation to be more adversarial, more combative, more oriented toward cross-examination, and in many other ways designed to filter the reasons offered in public debate.

For someone who, like Ackerman, distinguishes good (for these purposes) from bad (for these purposes) reasons, this testing function of public deliberation is crucially important. It is thus not surprising that others in the republican tradition, scholars like Frank

26. For an insightful critique of Ackerman's distinction among preferences, as well as a strong criticism of Ackerman's history, see Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1992) (book review).

Michelman,²⁷ Suzanna Sherry,²⁸ Cass Sunstein,²⁹ and Martha Minow,³⁰ place such a heavy emphasis on the judiciary.³¹ If your primary materials are judicial opinions, then you are prone to see a world in which the constraints of result-justifying and opinion-writing are apparent.³² Judges sometimes say "it won't write," meaning that there are some reasons that will not stand the test of public explanation. Not all of political life imposes this test. Indeed, one way of understanding the focus on deliberation is by seeing it as a way to impose a valuable feature of judicial justificatory methodology on a wider range of public acts, especially those with constitutional implications.

Deliberation might serve another purpose, albeit one somewhat less (or more contingently) related to the distinction between the private-regarding and the public-regarding reason. We might also think of deliberation as a way of identifying the best policy, where the criterion for and definition of the best policy is at least conceptually independent of the deliberative process but where the deliberative process might be the method most apt to locate and implement the best policy. Take as an example the New Deal and its rejection of laissez-faire. Now if we assume that the rejection of pre-New Deal laissez-faire was a good idea independent of the process that produced it, then one way of thinking about this constitutional moment is as the product of a more reliable process. Normal politics produces results, and public deliberation produces results, and the results of public deliberation might in the aggregate be better than the results of normal politics.

The claim that public deliberation is methodologically superior for identifying deliberation-independent social goods is an empirical claim, and like all empirical claims it is contingent, both in the sense that it might be wrong and in the sense that, even if now right, it might be wrong at other times or in different places. There is a plausible story that this empirical claim is not correct,³³ one that starts with a variant of Gresham's Law and the view that bad arguments drive out good. It then proceeds to the further premises that public deliberation

27. See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Frank I. Michelman, *The Supreme Court 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

28. See Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

29. See CASS R. SUNSTEIN, *A PARTIAL CONSTITUTION* (forthcoming 1993).

30. See Martha Minow, *The Supreme Court 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

31. Contrast Kathryn Abrams, *Law's Republicanism*, 97 YALE L.J. 1591 (1988).

32. See Frank I. Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, in JUSTIFICATION: NOMOS XXVIII 71 (J. Roland Pennock & John W. Chapman eds., 1986).

33. Cf. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990).

lowers rather than raises the quality of consideration, increases the likelihood that bad arguments will be accepted and good ones rejected, overly empowers the rhetorician and the demagogue, and exacerbates the disempowerment of those already disempowered on the basis of race, gender, class, wealth, physical attractiveness, and all of the other features that distinguish the empowered from the disempowered.

This is not the end of the story, however, for much the same could and does happen in normal politics. So if there is an argument against the deliberative ideal, it is that normal politics tempers rather than exacerbates or replicates the pathologies of public deliberation. Much that takes place out of the public eye in normal politics might, for example, involve reasonably well-meaning people's offering some resistance to the demagoguery that might play better on the public podium than it does in the offices of the Securities and Exchange Commission or the conference room of the Supreme Court. Normal politics, much of it taking place out of sight, might also, however, involve officials' putting their hands in the till, literally and figuratively, to the detriment of the public interest. And public comment might add more than it subtracts from normal politics as a decisionmaking process. But let us not forget that the New Deal itself was a product of normal politics, even if Ackerman is right in saying that its constitutional embodiment was constitutional politics. Let us also not forget that normal politics produced the Equal Rights Amendment and public deliberation rejected it (admittedly with the assistance of the three-fourths rule), all of which is only to say that *if* we have a notion of prepolitical desirability and undesirability, then it is an empirical question whether the increased deliberation that Ackerman celebrates gets us there more often than the filtered, tempered, and dampened process that Ackerman calls "normal politics." And if there is no reason to celebrate large-scale deliberation specially, then a judge would have no reason to treat the products of that process any differently from the products of the process of normal politics.

But suppose that Ackerman, especially given his qualified hostility to rights foundationalism, gets nervous when people talk about pre-deliberative or prepolitical desirability or soundness or truth. He might then, in company with a range of thinkers from Holmes to Habermas, believe that what is special about deliberation is that deliberation is the process by which values, and not just *our* values, get created. But the deliberation priority of Holmes was a product of a pervasive value-skepticism that Ackerman might wish to reject,³⁴ and that of Habermas a philosophical construct presupposing an ideal speech situation that certainly Habermas himself does not suppose we are close to reaching.³⁵ Aside from these two positions, however, there may not be

34. *Abrams v. United States*, 250 U.S. 616, 624 (Holmes, J., dissenting).

35. See generally JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION*

any room left for other varieties of a view that takes deliberation as soundness-constitutive rather than merely soundness-identifying.³⁶

The problems with taking deliberation as constitutive of political truth are well known. If political truth is the product of deliberation, then what is the normative purchase for what people say when they are in the process of deliberating? Without an antecedent conception of what might make one idea better than another, participants in a deliberation are reduced to the articulation of personal preferences, without having any way of convincing others that their preferences are better.

So if the standard critique is sound, and political truth cannot be defined in terms of deliberation, then there must be a gap between political truth and constitutional truth, with the latter but not the former defined by the process of deliberation. But even apart from the fact that this will hardly satisfy the rights foundationalist, a combination of empirical and normative questions still abounds. As Habermas might be read to recognize, but Ackerman does not recognize, the normative entrenchment of the deliberative ideal when we are not in an ideal speech situation runs the risk of entrenching the nonideality and its components every bit as much as it holds open the possibility that deliberation will transcend the harms that members of the deliberative community might otherwise be inclined to impose on each other.

This is why Ackerman's historical approach is puzzling. Even apart from whether he gives us good history or not, which I have no ability to judge, he certainly does not give us an account of why *our* history and *our* traditions should be the normative starting point for how we now see our Constitution. Ackerman might think that this entrenchment of the past is desirable because it is either substantively good or because the very pastness of the past, and the very continuity that its entrenchment would represent, are desirable in their own right.³⁷ He appears to believe, however, that what is good about our past is not only its pastness, and not only that it has produced some good results, but also that it has embodied an ideal of deliberation that

(Thomas McCarthy trans., 1984); JÜRGEN HABERMAS, TOWARD A RATIONAL SOCIETY (Jeremy J. Shapiro trans., 1970); THOMAS A. MCCARTHY, THE CRITICAL THEORY OF JÜRGEN HABERMAS (1978); MARY HESSE, *Habermas' Consensus Theory of Truth*, in REVOLUTIONS AND RECONSTRUCTIONS IN THE PHILOSOPHY OF SCIENCE 206 (1980). On the application of Habermasian ideas to legal and constitutional argumentation and justification, see especially ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION (Ruth Adler & Neil MacCormick trans., 1989). In the American context, see Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990).

36. On this distinction, see also FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15-34 (1982) (book review).

37. For a powerful critique of this book along these lines, see Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918 (1992) (book review).

ought to be admired and replicated. But deliberation as an ideal seems self-evidently desirable only when all of the conditions of nonoppression in the deliberative setting are present, in which case whether we need deliberation at all might be open to question. But if those conditions are not present, as they have not been throughout American history, then there are difficult empirical questions to confront. Even if liberal dialogue and its consequent repression of selfishness is normatively desirable as ideal theory,³⁸ whether we would want to have it as constitutional prescription before the conditions for its desirability are satisfied is questionable. Do we now make ourselves better by searching for more fora for deliberation? Or do we recognize that deliberation now exists in a nonideal world where talk can oppress as well as liberate, where deliberation can produce majoritarian tyranny as well as individual liberation, and where the social identification of the leading participants in a deliberation is as likely to reinforce as to challenge the existing social structures that in this nonideal world determine who speaks and who is spoken to, who controls and who is controlled, and who has power and who is subject to it? Until we confront these questions, the jump from deliberation as ideal to deliberation as policy is far more difficult than Ackerman has yet acknowledged.

38. See Bruce Ackerman, *Why Dialogue?*, 86 J. PHIL. 5 (1989).