Democratic Credentials

Donald J. Herzog

University of Michigan Law School, dherzog@umich.edu

Available at: https://repository.law.umich.edu/articles/593

Follow this and additional works at: https://repository.law.umich.edu/articles

Part of the First Amendment Commons, Jurisprudence Commons, Law and Politics Commons, and the Public Law and Legal Theory Commons

Recommended Citation

Democratic Credentials*

Don Herzog

We’ve made a mistake, urges Bruce Ackerman. We’ve failed to notice, or have forgotten, that ours is a dualist democracy: ordinary representatives passing their statutes are in fact the democratic inferiors of We the People, who at rare junctures appear on the scene and affirm new constitutional principles. (Actually, he claims in passing that we have a three-track democracy.)1 Dwelling lovingly on dualism, Ackerman doesn’t quite forget to discuss democracy, but he comes close.

I want to raise some questions about the democratic credentials of Ackerman’s view. Not, perhaps, the ones he anticipates. So I don’t mean to argue that the Constitution places illicit restraints on popularly elected assemblies: I find the so-called countermajoritarian difficulty at least as boring as does Ackerman. (More generally, any legal theory promising to relax our obsessive focus on appellate review is to be applauded, though ironically, this one turns out to be very much about that after all.) Nor do I mean to cast Publius as the fiend who subverts the democratic promise of the Revolution in the name of class interest: I find Beard and his legacy at least as mischievous as does Ackerman. (Though Arendt’s quirky misreading of Athenian democracy is a dubious remedy.)

Democracy, to say something screamingly obvious, is a complex ideal. I am historicist enough to believe that a fully adequate account of democracy must in part be a critical history not just of the concept, not just of some classic texts of democratic theory, but of high politics and social practices as well. Since I can’t provide that history here, I will instead have to rely on an appeal to the reader’s linguistic intuitions and baldly assert that the complexities I discuss here are indeed internal to democratic theory.

* My thanks to Heidi Li Feldman, Larry Kramer, Rick Pildes, and Terry Sandalow for comments on a draft.

FORM AND CONTENT, DEMOCRACY AND RIGHTS

Against "rights foundationalists," Ackerman holds that whatever rights the Supreme Court is justified in enforcing (and whatever rights we have?) are those democratically affirmed by the last incarnation of We the People. (Because they have the right to decide what our rights are? And where did that right come from?) In their quest for "the Right rights," these foundationalists turn to classic philosophical texts. Their "discourse is invariably esoteric"; they suffer an "antidemocratic disease"; they reveal "the elitism involved in removing fundamental questions from the democratic process" (p. 12).

Here Ackerman imagines (or caricatures) a rights theorist who wants to secure some right by arguing that it's so important that not even a democratic process ought to be allowed to override it. There may be good arguments for such a view, but leave that aside. Instead, consider a different strategy a rights theorist might adopt, one holding that some rights are required to make sense of the claim that whatever ensues is democratic.2

Take the right of free speech and its various concomitants: diverse news media recognizing a Weberian obligation to dig up facts embarrassing all partisan points of view, the availability of vigorous public debate, and so on. Notice that the right in turn depends on the development of a loyal opposition, now a bland label but once, given familiar views of social order as consensus, a threatening oxymoron. One might well believe that democracy is at least in part something like government by discussion, that public debate is central, voting (whether in elections or legislatures) merely a subordinate device for capturing the current sense of the debate. (So one might doubt the historiographic convention that casts liberalism and democracy as uneasy allies or cordial foes.)

Now suppose that the people decide on massive incursions against free speech. Decades of Republican whining about the alleged biases of the liberal media pay off in spectacular political dividends: Peter Jennings is placed under house arrest; CNN is instructed to broadcast Rocky and Bullwinkle reruns twenty-four hours a day; major American newspapers are censored, or instructed to do nothing but reprint

2. For one version of the general argument, see Amy Gutmann, "How Liberal is Democracy?" in Liberalism Reconsidered, ed. Douglas MacLean and Claudia Mills (Totowa, N.J.: Rowman & Allanheld, 1983). John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (Cambridge, Mass.: Harvard University Press, 1980), offers such a view in the context of constitutional law. Ackerman indicts him as a monist but does not notice the implications of his strategy for thinking about democracy and rights. Then again, Ely thinks that by turning to "democracy" he has answered some questions; in fact, he has raised new ones, and judges and others might well disagree on what it means to reinforce democracy.
official government press releases without comment; and so on. Would this be a democratic decision?

Suppose the decision followed vigorous public debate with lots of competing views championed and heard respectfully. Then one might describe it as a democratic decision to suspend or overturn or abridge democracy itself. Imagining another kind of repellent amendment, Ackerman comments, “I do not believe that judges would be justified in asserting a general authority to protect the fundamental principles of dualist democracy against repudiation by the People” (p. 16 n.). But more is at stake than the scope of judicial authority. We want to know if “the People” can do anything they like and nonetheless remain “the People,” or if some of their actions threaten or undercut their own status.

Now consider the decisions taken after the assault on free speech is institutionalized as higher law. Elections don’t feature even the impoverished public debate they now do. Proceedings within the legislative chambers change, too: communicative links between representatives and constituents are far sketchier than before; or perhaps the majority party takes advantage of parliamentary rules by allowing minority members to take the floor only on alternate Tuesday mornings. Are elections and legislative acts democratic any more?

More important here: consider the next broad-based popular movement, say a drive to adopt various green principles and systematically downgrade whatever private law might seem to protect smokestacks, dumping, and the rest. Respecting the terms of the last constitutional settlement, this new movement takes place with little or no public debate. Does it qualify as higher lawmaking, as the waking of We the People? Ackerman lists three criteria for identifying such a movement: depth, breadth, and decisiveness. Here I want to focus on depth: “A private citizen’s support is deep when she has deliberated as much about her commitment to a national ideal as she thinks appropriate in making a considered judgment on an important decision in her private life” (pp. 273–74).

If we take this at face value, it is not clear that any incursion on free speech, however severe, could threaten the credentials of the people here. For Ackerman is describing a kind of citizenship that is private with a vengeance, one in which every citizen can do all her deliberating sitting by herself, daydreaming over a cup of coffee in the morning, just as she might in thinking about whether to take a new job or have another child. It is more charitable, though, to think that Ackerman’s prose is sloppy. For he clearly thinks that when the sleepy or absent people rise to life, they deliberate together, as a community.

I have chosen free speech only for illustrative purposes; there may be other tacit criteria governing the use of ‘the people’. Take one
of Ackerman's own claims: "Apart from the special need for tolerance, the citizenship perspective will often require you to reflect on the vast size of your country, the need to give interests of Americans on the other side of the continent equal weight to your neighbor's. As citizens, all of us are equals; no region, race, or sect can be ruthlessly sacrificed to the rest" (pp. 298–99). What kind of claim is this?

It might be taken as a request or advice or exhortation: Ackerman means only to recommend one mode of deliberation that he takes to be attractive, but we are free to spurn the recommendation. Or it might be taken as a substantive moral or political requirement: we must deliberate this way, else we do significant wrong. Or, again, it might be taken as stating criteria governing the use of 'citizenship': so people who fail to deliberate this way can't be described as citizens at all, not even as bad citizens, and can't politically act as the people. To sharpen what's at stake in these competing glosses, imagine a popular movement that, after plenty of deliberation, moves to consecrate certain facets of contemporary racism with all the lofty imprimatur of constitutional law. The Reconstruction amendments are to be overturned; blacks are to be officially recognized as second-class citizens or stripped of citizenship altogether; claims of gross economic inequality, of differential treatment in criminal proceedings, and so on are to have no weight in law or are to be taken as inherently choiceworthy, as legitimate goals of state action.

What might Ackerman say about this? Not, I trust, that it can't happen here. (I write in the immediate aftermath of the Rodney King fiasco, but we didn't need that to notice that ours is a profoundly racist society.) As Ackerman sometimes grants in passing but more often blithely ignores, the people aren't some harmoniously unified community. They—we—are profoundly divided: the currently fashionable troika is race, class, gender, but of course there are many more cleavages. So such an explicitly racist movement could emerge. And it could easily meet his three official conditions of depth (degree of deliberation), breadth (quantity of support), and decisiveness (defeating every plausible alternative in turn). But it wouldn't fit the language I've just quoted, for it would ruthlessly flaunt even minimal requirements of equality and impartiality.

If that language is just exhortation, then Ackerman might shrug: "Look, I refuse to play fancy Europhile philosopher and identify what rights people have over and against our higher democratic politics; I happen to loathe this decision, but the People have now spoken." If the language is a moral or political requirement, Ackerman might instead concede that the people have spoken, but urge that they haven't done so in any way we need to recognize as binding. So again would arise problems about what courts and other bodies ought to do in the face of such outrageous developments. If the language states
criteria governing our use of ‘the people’, Ackerman might deny that such problems arise in the first place. But then he would be insisting that some rights are integral to democratic politics in the very strong sense that one can’t even recognize a decision as democratic if it violates those rights.

Another approach to this idea: Ackerman asserts that in his view, private citizenship, not dualism, “is foundational” (p. 300). But the very possibility of private citizenship depends on a robust state/society distinction, on the existence of extrapoticital social spaces. And that means that rights less obviously connected to democracy will be constitutively required to make sense of Ackerman’s vision. Rights such as religious toleration, private property, and domestic privacy help demarcate some realms of society as being in some sense off-limits to politics. If private citizenship is “foundational” in any straightforward sense, the whole scheme presupposes some such set of rights.

I chose free speech purely for illustrative purposes; so too (the devil can quote Scripture) the language of equality and impartiality and that of private citizenship. More generally, one might put the point this way: whether it is sensible to talk about the people acting in constitutionally binding ways depends on background criteria of various kinds. Some of these criteria look like substantive moral requirements, even rights. But then the project of distinguishing the merely formal requirements of democratic action from the substance of rights will collapse; calling the Constitution “democratic first, rights-protecting second” (p. 13) will be confounding, not illuminating. And the business of deriding rights theorists as diseased bookworms will turn out to be utterly bankrupt.

One last way to drive to the same point: the distinction between normal and constitutional politics turns out to be (at least) three distinctions mapped onto each other. Normal politics is pursued by elected representatives, constitutional by the people themselves; normal politics is not particularly reflective, constitutional is; normal politics is about the pluralist pursuit of group interest, constitutional about principle and the common good. But these distinctions may diverge; indeed, any connections among them seem utterly contingent. Ackerman’s explicit criteria capture the first two, but not the last. So what shall we say about putative constitutional movements that do not adopt misguided or pernicious principles, but don’t seem principled at all? (The people deliberate and decide to affirm publicly that politics ought to benefit the middle class at the expense of rich and poor, and they refuse to offer any principled justification for doing so.)

What is at stake in asking whether any or all of these decisions is democratic? Not just the meaning of a word, surely; rather, their legitimacy, or the reasons we have for upholding a certain framework of political decision making, for thinking that ordinarily at least the
laws it issues in oblige citizens and that the framework is worth upholding. There is no magic surrounding the people, even if we solemnly capitalize them as We the People, such that their actions automatically command respect. Or, put differently, absent certain background conditions, we may want to say that broad-based popular movements don’t count as the actions of the people, or We the People.

I suppose one could always take the short way with dissenters, here as elsewhere, and say that the three official criteria are exhaustive. Depth doesn’t even presuppose free speech, one might argue, because it is deliberately cast in terms of a solitary citizen pondering the alternatives. Nothing surrounding the evocative if vague contrast of “private citizenship” with “private citizenship” should be taken to suggest anything like impartiality, equality, or the common good being taken as a necessary condition of the actions of citizens. And so on.

But this won’t do. As a methodological matter, I suspect that in this sort of terrain one never finds anything as crisply architectonic as necessary and sufficient criteria, anyway. One roughly identifies the outlines of a concept and then agrees on some version of an indefeasibility thesis, that in often surprising and indefinitely many ways the scope of the concept will depend on factors we haven’t yet noticed. As a substantive matter, paring down the criteria to the three stated ones threatens to turn the higher lawmaking moments of dualist democracy into nothing but crass majoritarianism. And that, surely, doesn’t inspire gushy epiphanies. It plays into the hands of centuries of distinguished antidemocratic theory caustically mocking the thought that the mob or multitude or many-headed monster have any claim to rule. That 51 percent (or 73 percent or 99 percent) of the people want to do something is not yet enough to engage the attention of democratic theorists, let alone anyone else. Casting democracy as a matter of counting heads or aggregating preferences is an impoverished approach; the prevalence of such views is lamentable.

Perhaps I should emphasize that the strategy of casting rights as presuppositions of democracy isn’t a sneaky way of denying the people any significant discretion, so that one and only one program—call it the politically correct one—is really democratic after all. There’s still plenty of room for tenacious political disagreements; indeed, for a democratic society to adopt bad policies. I happen to think of our fabled budget deficits as terribly imprudent and unjust, but I have no problem describing them as democratic.

**JUDICIAL REVIEW, CONSENT, PARTNERSHIP, IDENTITY**

One sometimes hears that Marshall single-handedly invented judicial review in *Marbury v. Madison*. But this seems contrived: Hamilton, anyway, casts judicial review as an integral part of the constitutional scheme. And his presentation in *Federalist* 78 lends itself to a dualist
A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents. Here's the solution to the countermajoritarian difficulty: downgrade the democratic credentials of legislation, upgrade those of constitutional law, and the Supreme Court can protect the people against those only problematically representing them.

Addressed to (some of) Publius's contemporaries, and given a certain understanding of what those popular ratifying conventions were about, it makes sense. Those particular contemporaries, after all, had taken part in debates over ratifying the convention. Some of them, say a majority of them, had voted for ratification. Now the skeptical objections arise: not women, not blacks, and so on; and some of those formally eligible, after all, opposed ratification.

Here I want to press a different objection. The argument looks like it comes with a ticking stopwatch: its cogency seems to recede over time. As the years go by, fewer and fewer even of those who voted for ratification survive. (And some of them may have changed their minds.) Grant for the moment that the New Deal was a successful constitutional moment—and the last one. Then it is one thing to defend the democratic legitimacy of judicial review in 1937, another in 1947, and so on. And in 1992? How many living citizens took part in the New Deal? Can we tell today's citizens that we respect their democratic action by overturning the acts of their elected representatives in the name of what “they” did decades ago? (“What I did before I was born, eh?”)

The objection depends on a certain conception of how to identify the people, or We the People: line up the living and count. Some of Ackerman's own language suggests such a view, in particular when he plays the game of suggesting percentage thresholds for identifying potential action by the people (pp. 274–75). But this conception could easily be contested. In part, the history of social and political theory is a series of debates over how to identify the people.

3. The Federalist, ed. Jacob E. Cooke (Middletown, Conn.: Wesleyan University Press, 1961), no. 78, p. 525. Though referring to elected representatives as “agents” suggests a much less tenuous tie than Ackerman has in mind.

Two obvious solutions depend on views that Ackerman seems inclined to renounce. One: even if those alive didn't themselves act during the New Deal, they could overturn it if they liked; so they consent to it; so it counts as their action. (This is how Hobbes reconciles the claim that law is the command of the sovereign with the existence of laws predating the sovereign.) Yet Ackerman writes, “I myself have never been enamored by the principle of consent, at least when it is used to serve as the bedrock of political life” (p. 357, n. 9). I have no such sweepingly general commitments for or against consent, but I'm happy to grant that this invocation of consent seems contrived. It underestimates the difficulties in overturning the last constitutional settlement. (Compare: “We needn't worry about even the most recklessly activist courts, because the people or their representatives can always overturn judgments they dislike.”)

Two: historical communities have far longer life spans than individuals; American society is several hundred years old; so those Americans who happen to be alive today are implicated in the actions of those coming before and after them. (This is one thrust of Burke's savage subversion of social contract theory: “Society is indeed a contract,” but a partnership “between those who are living, those who are dead, and those who are to be born.”) To be an American, then, is in part to be a member of the community that adopted the principles of the New Deal, whether or not one happened to be alive then. Notice that the argument deals in precisely the same way with problems posed by unborn Americans, living Americans who opposed the New Deal, and living Americans not enfranchised to have a view on it: by offering an account of their identity that makes them responsible. (And notice that the argument needs to distinguish American citizens, whose identity is to implicate them in this way, from, say, plumbers or violinists or tiddlywinks players, whom we may well think aren't bound at all by the actions of their predecessors.)

In disdaining “Burkeans,” Ackerman does grant that “the challenge . . . is to locate ourselves in a conversation between generations.” After all, we “enter upon a political stage already set with a complex symbolic practice charged with meaning by the thought and action of prior generations” (p. 23). Yet he falls short of affirming that in some important sense their actions are already our actions. Indeed, Ackerman's insistently American stance would make it hard for him to make any such affirmation. For he inherits from Jefferson and Paine the memorable slogan that the earth belongs to the living. That slogan,

once turned against feudal property regimes to suggest that one can’t rightly be born a serf just because one’s great-great-grandfather consented to serfdom, comes to stand for a kind of democratic exuberance in debunking the claims of history and tradition. Democrats have routinely derided appeals to the wisdom embedded in our inherited practices as contemptible lapses into necrophilia and ancestor worship. So Ackerman wants us to be able to learn from the past, but he wants us to remember that we can pursue radical change whenever we see fit.

His argument thus requires some constructive account of the identity of the American people. He has to explain how we can coherently be taken to act as a corporate entity in ways that stretch over many generations, so that “we” can in 1992 finish an Article 5 ratification procedure that was begun some two hundred years ago. He has to explain the possibility of a binding unity in the face of deep cleavages over race, class, gender, and more. (It is emphatically not enough to notice occasionally that blacks, women, and others have been badly treated despite the inspiring possibilities of American constitutionalism and then simply urge them to join in to make it even better. Or, to put it differently, sighs about the “incredible diversity of lived experience [as] one of the great glories of America” [p. 306] can be met with acerbic reminders about some of the facets of that diversity: crack, homelessness, street crime, child abuse, and on and on.) He has to tell us what to make of permanent minorities, of those so lackadaisical about politics that even high constitutional issues don’t engage their attention, especially if they are lackadaisical not because they are raptly absorbed in the pleasures of private life but because they are utterly dispirited, impotent, crushed by their prior unjust treatment in the political realm. He has to tell us if blacks, women, children, felons, the “mentally ill,” and others disenfranchised in American history are nonetheless part of the people, and if not, why they might still owe allegiance to the constitutional order. Invoking the phrase “We the People” masks substantive difficulties. At best, it counts as a promissory note for an argument forthcoming. Until that argument is on the table, the theory remains seriously incomplete.

Can these questions be laid at the doorstep of democratic politics? It’s paradoxical to assert that the people are just whoever the people say they are. We can relax the paradox, though not eliminate it, by adding a temporal dimension. It may be illuminating, not incoherent, to say that the people decided to admit women into their ranks. Still, we need at least some threshold or benchmark conception for identifying the people—not just for knowing who counts at the beginning of the historical narrative, but also to provide some critical distance from the decisions that happen to be taken along the way. So the putatively illuminating claim assumes that an exclusively male group can qualify as the people, and some may well want to deny that.
HISTORY, PUBLICITY, MYSTIFICATION

The thought that the earth belongs to the living also fueled one of Jefferson's characteristically exotic arguments, complete with careful demographic calculations: that the Constitution ought to be rewritten every nineteen years. Madison scorned the view. Ackerman follows Madison in rejecting the view that there ought to be regularly scheduled rewritings of the Constitution (pp. 176–77). But he overlooks one of Madison's reasons: "Frequent appeals would in great measure deprive the government of that veneration, which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability. . . . A nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato. And in every other nation, the most rational government will not find it a superfluous advantage, to have the prejudices of the community on its side." Ackerman assures us that "Publius refuses to learn the same lesson which Burke was to draw from the crowds of the French Revolution" (p. 177). But this is a tad too quick. The language of time, veneration, and prejudice is Burkean through and through. True, Madison doesn't identify it as his most important reason; but there it is, stuck in the middle of the Federalist. Publius's mantle aside, there are some pressing questions here about democracy, publicity, and illusion.

If democracy is something like government by discussion, we find ourselves politically engaged in demystifying, enlightening, exposing the allegedly arcane mysteries of statecraft to the view of the vulgar. So early Jacobins and democrats championed the public sphere, mass literacy, vivid newspaper coverage of politics, heated arguments in local taverns and coffeehouses; so Burke grumbled that "this new conquering empire of light and reason" would dissolve "all the pleasing illusions which made power gentle and obedience liberal."

Publicity here isn't part of some technical Kantian apparatus for thinking about social justice; it's profoundly political. It's a complex ideal: epistemologically, it calls for arguments available to all; sociologically for spaces like coffeehouses in which ordinary men and women can meet

9. Similarly, Holmes writes, "According to Jefferson, 'some men look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched.' Madison was not one of these men" (p. 218). No, but Madison did wish others to incline that way.
to debate public affairs; politically, for an egalitarian recognition of those ordinary men and women as dignified agents entitled to participate in shaping their society. So the famed transformation of subjects into citizens depends crucially on publicity. This is why Paine so ruthlessly debunks the lofty theatrical trappings of monarchy, why he insists that the business of government can and should be made simple. It is why James Mackintosh sneers, “To pronounce that men are only to be governned by delusion is to libel the human understanding, and to consecrate the frauds that have elevated Despots and Muftis, Pontiffs and Sultans, on the ruin of degraded and oppressed humanity.”

Sometimes Ackerman sounds like a radical prophet of publicity himself—or, not quite the same thing, a publicist. Take the remarkable language of imploring advertisement he sometimes succumbs to in urging the reader to purchase and read the Federalist Papers or Gordon Wood’s Creation of the American Republic: “Perhaps you will pick up a paperback copy [of the Federalist] when you are next in a bookstore? Isn’t it about time for you to encounter the Founding at first hand?” Or again, “The last chapter encouraged you to explore these dualist themes by picking up the Federalist Papers at your local bookstore and giving them a close (re-)reading. While it may be harder to get your hands on Wood’s magisterial work, try to do so” (pp. 201, 218). One presumes this advice isn’t addressed to university professors.

Then again, Ackerman can also write, “the labor movement and the peace movement, blacks and ethnics, feminists and environmentalists look upon each other with anxiety and suspicion. The very thought they might find common ground—much less common ground with more mainstream Americans—seems to many a vain illusion. But is it an illusion we can afford to live without?” (p. 318). The Jacobin impulse is that if it is an illusion, we can and must live without it: it is just another piece of mystification that stands in the way of a sober appraisal of our grim circumstances. Is Ackerman the writer who genuinely believes progress is possible? Then why does he call this thought an illusion? Or is he the one who wants us to believe it because the belief is reassuring, because it will help uphold an unjust regime by clothing it in illusion?

More generally, consider Ackerman’s uses of history. I wonder if poor Clio can shoulder the burdens he assigns her. Sometimes he appeals to a Dragnet theory of history, on which “just the facts, ma’am, nothing but the facts” will suffice to buttress his case: “This narrative cannot withstand an encounter with the facts of American History”;

“if we return to our sources, they tell a very different story” (p. 39, 44). But of course the facts are complex, ambiguous, open to competing interpretations. I have not mastered the historiography of American public law, but somehow I doubt that the conventional wisdom is so utterly misconceived that merely invoking “the facts” can shatter it.

Notice that we might agree to follow Ackerman’s historical turn but disagree with his account, and at different levels of abstraction. Maybe he has misread Carolene Products or misunderstands the Reconstruction amendments. Or we might deny, for instance, that he has rightly identified the three constitutional episodes of American history. Some might well argue that the tumultuous events of the 1960s constitute an independently successful constitutional revolution, not just an affirming footnote to the New Deal that helps make sense of Brown v. Board of Education; others might plump for the Reagan years. Still others will want to undercut the rigidity of the two-track (or three-track) scheme and urge instead a dimensional or continuous view along which particular acts may be more or less representative of the people themselves. Still others will read Publius as holding that representative government is a better instantiation of democracy than any direct popular movement because elections and representation promise to refine public opinion and allow the common good to prevail: this would explain the battery of constitutional provisions that deliberately make representative government less immediately responsive to popular will, like the electoral college and indirect election of the Senate. (To recur to the three distinctions between normal and constitutional politics, Publius may be betting on the combination representative, reflective, and about the common good.) So the turn to history isn’t the name of a solution to some familiar problems; it’s the name of a new set of problems.

Ackerman sometimes sounds cavalier or innocent in another way. Sometimes he cheerfully suggests that other scholars’ readings of the Federalist Papers are partial, interested, opportunistic, while his own is simply faithful to Publius: “Here disagreements abound, as each writer appropriates the Papers for his or her own programmatic purposes; despite the cacophony of voices, all fail to hear the voice of the revolutionary Publius” (p. 223)—as though Ackerman has been lucky or careful or divinely favored enough to receive the textual or historical message without static or distortion. But this version of a contrast between interested and accurate interpretation is incoherent. Surely his own account is like the others, programmatic through and through. Surely it does what all interpretations always do: it seizes on some dimensions of the text, downplays others, recontextualizes certain passages to shift their meaning, and so on. After all, why does Ackerman want to clothe himself in Publian garb? Because it legitimates his own enterprise: because many of us venerate Publius.
In this light, consider some striking features of Ackerman’s rhetoric: the earnestly preachy tone, the ludicrous use of capital letters on key words and phrases like We the People, the unabashed and occasionally cloying enthusiasm for American constitutionalism. Theorists interested in reconstructing the argument may be inclined to dismiss these features as distracting tics, but rhetoric matters. And what is the import of this rhetoric? It animates a version of patriotism I am inclined to take as debased or vulgar: nothing as relentlessly silly as “America, love it or leave it,” but not so critically searching an appraisal into the way our history has failed our best aspirations as one might like, either. That kind of patriotic rhetoric meshes all too well with his flirtation with useful illusions, his stylized invocation of history as unequivocally and authoritatively on his side, his gathering himself in Publius’s robes, to shut down debate on fundamental issues: I doubt this is Ackerman’s intention, but I do think it one unmistakable thrust of his work. Here I’d recommend learning from the antidemocrats who have jeered at democratic chatter, legislative talk shops, and the like. For the issues Ackerman glances over are central to the pursuit of democratic theory and politics. Perhaps the coming volumes of his work will address them.