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Constitutional Fidelity/Democratic Agency

Cover Page Footnote

Robert Walmsley University Professor, Harvard University

CONSTITUTIONAL FIDELITY/ DEMOCRATIC AGENCY

Frank I. Michelman*

PROFESSOR Ackerman began by declaring *the generation* to be, in his view, the “basic unit” in constitutional theory. I agree, and draw from this pro-democratic premise a lesson with which I expect he in turn would agree.

Ackerman did not expressly say in what enumeration, compiled for purposes of what inquiry, the generation stands as the basic constitutional-theoretic unit. Context, however, easily fills that gap. When a principal speaker in a conference on “Fidelity in Constitutional Theory” declares in somewhat combative voice what he thinks the “basic unit” is and is not, he is telling you what he thinks there is, constitutionally speaking, that might be worthy of his faith. Not for Professor Ackerman, then, “the clause”—for which read: some timelessly self-warranting, autonomously speaking text. Not for him either “the theory”—for which read: some apple of the beholder’s eye. Rather for him *the generation*—for which read: the historically acting creator of constitutional law.

The creator, that is, on a full and true view of who that is. To those who already agree with him that proper use of the Constitution today requires reference to past historical acts of constitutional creation, Ackerman speaks of the need to reckon with a certain true fact about acts of creation of our Constitution, to wit: They were done by a succession of somewhat spiritually separated generations. The Constitution we have is a product of a chronologically ordered but non-linear (“discontinuous”¹) series of creative political events, each one of which rejected some but not all of its predecessors’ basic normative premises. As such, then, must the Constitution be construed.

Excellent. But when Ackerman posits *the generation* as the basic object of fidelity—*not* the clause, *not* the theory—he certainly intends a message also to those who still need convincing that proper use of the Constitution today requires reference to past historical acts and events. The message is: “It does.” Constitutional law is constituted, he declares, by a “conversation between generations.”² Each generation of Americans is “obligated to honor” the creativities of every predecessor generation (barren generations such as our own to date perforce omitted from the rolls).³ Thus *our* task today is to say what

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1. Bruce Ackerman, *A Generation of Betrayal?*, 65 Fordham L. Rev. 1519, 1520 (1997).

2. *Id.* at 1524.

3. *Id.* at 1522.

"their sound and fury" means.⁴ Thus never for the rest of time will Americans—short of reconstituting themselves as some new and other People—be free to leave off debating "the meaning of *Lochner*."⁵

The message seemingly could not be clearer: The most compelling what-there-is-to-be-faithful-to, constitutionally speaking, is human political action, the political works and acts of generations. Fidelity does not run to an impersonal prescriptive text that just happens, Heaven only knows how, to be shining there before us *in loco constitutionis*. Whatever merits our acceptance—our "reception"⁶—as law does so precisely by virtue of being the works and acts of the generations whose works and acts it is.

Observe, now, that the Constitution's meriting our reception for that kind of reason is quite different from its meriting our reception by reason of being deemed by us, the current generation, to be probably a right or good law for us, or at any rate to be probably pointing in the general direction of that. It may be that the two kinds of reasons for constitutional reception are related. I think they are, both because I think that a current generation seeking a probably good or right law for it has reason to give heed to certain similarly directed actions of predecessor generations, and because I think that integrity counts in deciding what would be a right or good law for us.⁷ But of course it's not for me alone to decide such matters on my generation's behalf. That is why my own perception of a connection between two kinds of reasons for constitutional reception—that prior generations so acted, and that my generation so decides for itself—in no way dissolves the radical conceptual difference between the two.

One could wonder whether some inclination to past-oriented reasons for constitutional reception is already implicit in our agreement here, on this occasion, to probe the matter of "fidelity" in constitutional theory. Had we started from the supposition that what putatively grounds a constitution's claim on our reception is not that some historical actor uttered it but rather that we as current generation find it to be instinct with some attractive normative ideal, then it seems that our focal issue here might have been not "fidelity" but rather *criticism* in constitutional theory. Criticism, I mean in the discursive and disciplinary sense: The sense, that is, of bringing one's evaluation of a performance into consonance with one's interpretation of a standard for evaluation of performances of that kind, while reciprocally bringing one's interpretation of the standard into consonance with one's evaluation of the performance. (Compare "reflective equilib-

4. *Id.* at 1523 (emphasis added).

5. *Id.* at 1527.

6. *Id.* at 1524.

7. See Ronald Dworkin, *Law's Empire* ch. VI (1986).

rium.”)⁸ We might, I am saying, have taken the central problem of constitutional law to be not that of diachronically tracking between what was written in at time one and what is read out at time two, but rather that of a current generation’s synchronically tracking between a received or occurrent practice and an imperfectly comprehended idealization of it, between an instance and a contestable standard.

If there really is such a gap as I’m working here to open between fidelity and criticism, then does it pose some sort of practical choice for constitutional interpreters? I do have in mind such a choice. On the side of fidelity, interpreters can strain within limits (that are themselves read out of the legal practice-in-fact that stands to be faithfully rendered) to make the Constitution’s current meaning-in-application a true rendition of the sum of the prescriptive vectors of the works of the generations. On the side of criticism, interpreters can strain within limits (that are themselves contained in the idealization of the practice-in-fact by which we criticize and strive to correct it) to make the Constitution’s current meaning-in-application carry forth or steer toward some relatively more abstract and timeless yet incomplete and contested ideal of what a constitution is, what end or ends it properly serves in the view of us the living.

At stake in this tussle between faithful and critical constitutional interpretation, I believe, is democratic political agency or freedom. That is because, as far as I can see, the exercise of any generation’s political freedom cannot consist in anything other than its collective negotiation of the dialectical tension—the interpretative space—between its actually accepted (criticizable) political practices and professions and their corresponding (contestable, emergent) political ideals.⁹ Since only by and within an already constituted political society can that sort of negotiation occur, some measure of constitutional fidelity is prerequisite to democratic agency. Without an established set of norms to draw upon, there is no telling what events ought to count as an expression of “the people’s” will or “the people’s” judgment in any generation. Yet because the space of the negotiation *is* the space of democratic agency, agency stands to be constricted by whatever would constrict the negotiation space, and that has to include fidelity to ancestral prescription. This looming adversity between fidelity and agency is, I believe, a matter for which Professor Ackerman’s work has shown too little concern.

Tentatively, then: What might be the incompletely comprehended, contestable end with which, in the “critical” approach to constitutional interpretation, the Constitution-as-applied is to be brought into a reflective equilibrium? For Bruce Ackerman, author of both *Social*

8. See John Rawls, *A Theory of Justice* 48-51 (1971).

9. See Frank I. Michelman, *Always Under Law?*, 12 *Const. Commentary* 227, 239-42 (1995).

*Justice in the Liberal State*¹⁰ and *We the People*,¹¹ it would seem that the end ought to be liberal democracy, the project of a diverse population's living together as free and equal consociates, by laws that they jointly hammer out for themselves. Yet, as I've already noted, one might gather from Ackerman's rhetoric on this occasion—constitutional law is a "conversation between generations," etc.—that the end of democracy calls for a dominance of diachronic fidelity over synchronic critical agency in constitutional-legal work.

Such a teaching, if intended, would flow in the first place from insistence that democracy is, in essence, a matter of abiding by whatever law the People institutionally decide upon from time to time—meaning, in practice, by "the People," a sufficient mobilized preponderance to figure as the whole. Of course, such a nakedly procedural view of what democracy is or requires is currently under siege. Ronald Dworkin, for example, argues forcefully that it's not a procedure but rather a state of political affairs that Americans deeply mean by "democracy," posited as an end for basic political arrangements.¹² In the tussle I have set up between the call of fidelity and the call of criticism, arguments of that kind weigh on the side of criticism. I don't pause over them, because my aim here is to raise the issue between fidelity and agency within the proceduralist camp of democratic theorists.

Ackerman's pro-fidelity argument from procedural democracy comes down, I think, to this. Democracy just does mean self-rule by the People; that is what Americans have always meant by the notion. True, this root idea of the American People ruling themselves leaves us with the problem of telling when *the People* have spoken law; it gives us need for a rule of recognition of *the People* legislating. But the root idea that raises the need also points to the form of the only admissible answer to it, which is to draw the rule of recognition from the actual historical practice of the country. The country came to treat the semi-lawlessly enacted Constitution of the 1780s as highest law, as it did the semi-lawlessly enacted Reconstruction amendments and as it now does (so Ackerman contends and many adamantly deny) an undocumented constitutional-legal quasi-enactment of the New Deal era.¹³ The country thus shows to itself what it counts as an apparition of the legislating People. On this matter as on others, our task is noth-

10. Bruce A. Ackerman, *Social Justice in the Liberal State* (1980).

11. Bruce Ackerman, *We the People: Foundations* (1991) [hereinafter Ackerman, *We the People*].

12. See Ronald Dworkin, *Freedom's Law* ch. 1 (1996).

13. In other words, by Ackerman's account (roughly rendered) the People served notice of their aroused presence on the higher-lawmaking stage in the 1780s, and again in the 1860s, by approving inventive and formally extra-legal deployments by the branches of government of conventionally recognizable components of popularly-based-lawmaking—and by similar means in the 1930s accomplished an amendment-like transformation of constitutional law without anyone's professing to lay hands on the documentary text. See Bruce Ackerman, *We the People: Transformations* (forthcoming 1997).

ing more nor less than to listen to ourselves. What could be more in the spirit of democracy than popular self-rule?

The difficulty is as it has ever been (call it "counter-majoritarian,"¹⁴ call it "inter-temporal"¹⁵). They—the generations of the Founding, Reconstruction, and the New Deal—are not us the living. I would be amazed to hear Professor Ackerman proclaiming that they were. But given that they are not, for us to submit in any degree to governance by their say-so—including not least their say-so regarding rules of recognition—is for us in that same degree to be not governing ourselves.

Agreed, wholeheartedly, no person is an island. Agreed, persons identify, in part, with political communities. Agreed, political communities have heritages, and *Lochner* is a part of ours, and it's therefore a part of our constitutional fate as Americans to converse forever over the meaning of *Lochner*. Nevertheless I maintain that a *democratic* conversation is not inter-generational; it is intra-generational. What a prior generation said and did by the cluster of speech acts we call *Lochner* is one question. What *we* might mean by *Lochner* is another question. What they said or did, as distinguished from what we might mean, may matter for purposes of community on some (not-too-liberal) notion of what community is. It may matter for purposes of integrity, and integrity may be an entailment of democracy on a substantive, Dworkinian view of what democracy is or requires.¹⁶ The point remains that what some prior generation did as distinguished from what we might do is extraneous to *democracy* on an ultimately procedural, Ackermanian view of what democracy is or requires,¹⁷ as long as it remains agreed that they are not us.

Professor Ackerman has a way of responding to the sort of tirade I've just launched. It is this: Granted, predecessor generations are not us. Neither, on good authority, is Congress us, nor any other organ of representative government.¹⁸ If what we mean by democracy is the rule of *the People*, we must also understand that this *People* appears in action only sporadically, in moments of exceptional political mobilization which it may not be granted to every generation to know. So in this world of generational finitude and change (not to add, of

14. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16-23 (1962).

15. Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *Yale L.J.* 1013, 1045-47 (1984).

16. See Dworkin, *Freedom's Law*, *supra* note 12.

17. See Ackerman, *We the People*, *supra* note 11, at 6-16.

18. See Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 *Harv. L. Rev.* 4, 75 (1986).

The Air Force is not us. Congress is not us. The President is not us. "We" are not "in" those bodies. Their determinations are not our self-government. Judges overriding those determinations do not, therefore, necessarily subtract anything from our freedom, although the judges also, obviously, are not us.

variable stature among the generations), to ask for perfect democracy is to ask for too much. The best that any on-coming generation can do, if it means to be ruled by the People, is to receive as its law the most recent word from an adequately mobilized American citizenry, pending that on-coming generation's own arousal (if ever) of the People slumbering within it.

Ackerman's work thus regards a particular generation's slumber as a given fact for theory's mill: In fact this generation slumbers, so in theory this generation takes its constitutional law from the past. But it seems that those committed to democracy must also regard such cases as deviations from an ideal of active self-government, for theory to address reparatively.

Therefore, I want to say, there are two theoretical projects. I have already suggested reasons for thinking that neither can proceed very well or far without reference to the other, but still there are two projects. There is the project of clarifying certain categories of the concept of democratic constitutional fidelity and proposing institutional forms for them, and there is a parallel project for the concept of democratic constitutional agency. Regarding fidelity, two main categories occupy the sizable literature. The category of *inter-generational correspondence*, between what we the People willed then and what someone heeding our will from afar rules today in our name, motivates various prescriptive theories of legal interpretation over time gaps.¹⁹ The category of *a People exercising a will* motivates Professor Ackerman's strivings to arrive at institutional paradigms of formal and non-formal higher lawmaking by the People.²⁰

If, then, those are the categories of the concept of democratic constitutional fidelity for which scholars endeavor to supply substantive clarification and institutional form, what would be the corresponding categories of the concept of democratic constitutional agency for which we have comparable needs? I suggest the following pair. First, there is the category of *the contestable ideal* or standard, with revisionary reference to which a generation committed to the end of jointly and severally free self-government can, with a view to that end, collectively and critically reexamine the course of its public affairs. How do a generation's worth of people determine and express a content for this necessarily public and shared critical standard, and what can theory say about this content?

Second, there is the category of the critical reexamination as itself a process of popular self rule. What are the institutional forms and arrangements that can constitute a normatively self-governing generation out of continuing, critical exchange among (1) the claims and views of individuals, (2) an influential body of public opinion regard-

19. See Lawrence Lessig, *Fidelity and Constraint*, 65 Fordham L. Rev. 1365 (1997).

20. See Ackerman, *We the People*, *supra* note 11, *passim*.

ing the rightness of existing or proposed constitutional-legal arrangements, and (3) the collective (majoritarian or super-majoritarian) acts of legally authorized makers and interpreters of constitutional law including, as applicable, electorates, representative legislative assemblies, and constitutional courts?²¹

It seems to me a whole lot easier to identify scholarly workers on the categories of democratic constitutional fidelity than scholarly workers on the categories of democratic constitutional agency. Our pool of talents and energies is not unlimited, and I am not sure why we budget as we do.

21. See Frank I. Michelman, Book Review, 93 *J. Phil.* 307, 312-14 (1996) (reviewing Jürgen Habermas, *Between Facts and Norms* (1996)).

