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Constituting We the People

Cover Page Footnote

Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. Some passages in this Response appear as well in *What Then Is the American?* 38 *Ariz. L. Rev.* 873 (1996), and *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 *Case W. Res. L. Rev.* 845 (1996)

CONSTITUTING WE THE PEOPLE

Mark Tushnet*

IT seems to me essential to distinguish between Professor Ackerman's project and the specific content he gives it.¹ Most of his critics have focused on, and found fault in, the content of *We the People*.² On the whole, I agree with them about the content, although—because I think the project the right one for constitutional law (note, *law*, not theory)—I am more willing to apply a principle of charity in interpretation than is usual for me.

Here I want to discuss the project, with one important comment on its content. After describing the project and why I believe it to be the right one, I argue that Professor Ackerman has made his project unnecessarily positivist. This disables him from making analytic—as distinct from rhetorical—points about the possibility of a considered rejection of the New Deal regime.³

Professor Ackerman's project is to characterize the project of constitutional law. That project, in turn, is to constitute the people of the United States. We do so, he argues, by constructing a narrative that creates a single people out of many—both a contemporary plurality and a plurality across time and, in his term, generations. I think that is why he describes efforts to detach ourselves from the narratives that have heretofore constituted us and to make independent legal judgments in such critical terms.⁴ Those who try are heroes, of course, but they are heroes in the sense that Sisyphus was a hero.⁵

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1. The temptation to mention Professor Dworkin's distinction between *concepts* and *conceptions* is irresistible.

2. Bruce Ackerman, *We The People: Foundations* (1991).

3. The term *considered* is important here. I take Professor Ackerman's criticisms of Professor Tribe and Justice Thomas to rest precisely on the point that their rejection of the New Deal regime is unconsidered because of their undefended devotion to formalism. I would suppose that the difficulty would be different if Tribe and Thomas offered a defense of formalism other than the definitional, "It's just not constitutional law," that is explicit in Tribe's article. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 *Harv. L. Rev.* 1221, 1247 (1995).

4. Although it seems to me that, on Professor Ackerman's premises, there really can never be a truly *independent* legal judgment—only a judgment embedded in an effort to construct an alternative narrative. Perhaps *independent* means something like, "This judgment is embedded in a narrative entirely discontinuous with our course to this point." It remains a puzzle, however, how anyone could ever make *that* kind of judgment.

5. It seems worth noting as well that Professor Ackerman is systematically ambiguous in his explicit statements about whether his project is merely descriptive, or normative as well. At the same time, his normative stance of approval of the New

A historical narrative connecting us to our past is important because it acknowledges and promotes the fundamental human good of connection between people. We are not monads simply pursuing our individually constituted projects unaffected in principle by anyone else. We are embedded in historically created supra-individual entities—families, neighborhoods, a nation—and we are constrained by them and responsible for them simultaneously. The experience of constraint and responsibility is an important human value.⁶

That alone will not buy us much, however. Having connections to historically embedded communities either may be a fundamental human good, which all social orders ought to seek to achieve, or it may be an inescapable aspect of the human condition. Still, one can be connected to many such communities: one's family or one's religious group, for example. Preserving a national identity of the sort we have in the United States is important only if being connected to a historically constructed *political* community is a fundamental human good or aspect of the human condition.

Families and neighborhoods differ from larger political communities. In a family or neighborhood you are responsible for and constrained by people who you know personally. Larger political communities differ in two ways. Only in them do you have the experience of constraint by and responsibility for people merely because they are people.⁷ Perhaps more important, larger political communities are composed of people who are *very* different from you. Your experience of constraint by and responsibility for such people deepens and enriches your own life.⁸

A people can be constituted in many ways. But any one people is historically constituted in only one way. And here is where constitutional law comes in. It is, or should be, a commonplace that the people of the United States are constituted by the Constitution. "What then is the American, this new man?" wrote Hector St. John Crèvecoeur in 1782.⁹ The American, according to Crèvecoeur, was "a new race of men," a mixture of the peoples who had settled in its territory.¹⁰ A person "becomes an American by being received in the

Deal transformation, for example, seems obvious. For reasons I discuss below, Professor Ackerman's ambiguity may arise from his failure to characterize the Constitution's project appropriately—that is, with reference to the principles of the Declaration of Independence.

6. This is the truth in modern communitarian thinking, however overstated are the conclusions that some communitarians draw from that truth.

7. Some religious communities may support similar experiences, depending on the content of the religious beliefs that constitute them.

8. See Jeremy Waldron, *Legislation, Authority, and Voting*, 84 *Geo. L.J.* 2185 (1996).

9. J. Hector St. John Crèvecoeur, *Letters from an American Farmer* 54 (Fox, Duffield & Co. 1904) (1782).

10. *Id.* at 55.

broad lap of our great *Alma Mater*.”¹¹ This new man “acts upon new principles.”¹² For Crèvecoeur, the most important new principle was equality of station, arising in part from the material abundance of the land but in part from the principles on which the new world was organized: “From nothing to start into being; from a servant to the rank of a master; from being the slave of some despotic prince, to become a free man, invested with lands, to which every municipal blessing is annexed!”¹³ As Crèvecoeur saw it, the homogenizing influence of material abundance and principles of equality would eliminate the conflicts Europeans experienced arising from national allegiances and religious diversity: “[T]he Americans become as to religion, what they are as to country, allied to all. In them the name of Englishman, Frenchman, and European is lost, and in like manner, the strict modes of Christianity as practiced in Europe are lost also.”¹⁴

Two generations later Frances Wright, a social reform lecturer from Great Britain, asked the same question—“What is it to be an American?”—and offered the same answer: “They are Americans who have complied with the constitutional regulations of the United States . . . [and] wed the principles of America’s declaration to their hearts and render the duties of Americans practically to their lives.”¹⁵

The narrative of the people of the United States must be a constitutional narrative.¹⁶ But, I think, not just any constitutional narrative. We are self-creating, and so have the power to reconstitute ourselves at will. We can reject the New Deal regime if we choose, and in doing so—if we do indeed so choose—we would reconstitute ourselves as a people. Professor Ackerman’s positivism looks to the self-constituting acts of the people of the United States to provide the raw material for narratives that others—primarily, in his argument, judges—will later synthesize. And, although synthesis of the New Deal and its rejection might be difficult, it surely is not impossible in principle. A generation from now, I can imagine, there might be a single story line connecting 1789, 1868, 1937 and—when? 2000? 2004?

Yet Professor Ackerman’s tirade against today’s “midgets” shows that he wants to say that that story line, though a coherent narrative of the people of the United States, would not be a good one. I do not see how his positivism gives him the resources to do so.

11. *Id.*

12. *Id.* at 56.

13. *Id.* at 79.

14. *Id.* at 62.

15. Address by Frances Wright, in Cincinnati, Ohio, *printed in* The Beacon (Mar. 17, 1838), *quoted in* Werner Sollors, *Beyond Ethnicity: Consent and Descent in American Culture* 152 (1986) [hereinafter Wright, Address].

16. Seen in this way, constitutional law has no strong connections to what the courts do, although, as Professor Ackerman has argued, on some matters and at some times the courts can help construct the people’s self-understanding, particularly as times of regime change recede.

But there is a way out. Frances Wright referred not only to the Constitution but to the Declaration of Independence.¹⁷ Professor Ackerman's work is striking in the degree to which the Declaration of Independence and Abraham Lincoln, the Declaration's primary constitutional expositor, are simply not present. From this alternative point of view, the key to Reconstruction is not what happened in 1868, but the "new birth of freedom" occasioned by the Civil War.

I think it unnecessary to spell out in detail the Declaration's principles.¹⁸ In contemporary terms, we would say that they are the principles of rationally defensible universal human rights in the service of self-government—universal, because all people are created equal; rights, because all people are endowed with inalienable rights; and in the service of self-government, because governments rest on the consent of the governed. They must have reasoned justifications because of a decent respect for the opinions of mankind, and because, in the words of *The Federalist Papers*, the United States proposed to create a republic by reflection and choice.

Note that Lincoln's new birth of freedom renewed the Declaration's commitment to equality, thereby constructing the narrative connection to the Founding. In this perspective, too, the New Deal's substantive commitments matter. Freedom from fear and freedom from want continue the Declaration's project.

Here is how I would carry out the project of constructing a coherent narrative in which the Constitution constitutes the people of the United States. We are constituted by the Declaration's principles, which the written Constitution only imperfectly realizes.¹⁹ The historical project of the people of the United States has been to realize those principles increasingly extensively—in Wright's terms, to "render" them "practically to [our] lives."²⁰

That project must avoid two serious but unfortunately common missteps. We could mistakenly treat the Declaration and the Constitution as the organic seeds of a process that has been working *itself* out over history, almost without regard to what the people of the United States actually choose. That denies that we are dealing with a *project*, that is, a self-creating activity in which the people of the United States daily

17. Wright, Address, *supra* note 15.

18. I gather that the position I am describing is something like what contemporary jurisprudence refers to as *inclusive legal positivism*. I am unacquainted with the relevant literature, however, and therefore do not intend to support my position by referring to that literature.

19. From this perspective Professor Ackerman's innovation in constitutional theory—the idea of constitutional amendments outside the framework of Article V—may be less important than it appears. The "amendments" he identifies can be understood, alternatively, as realizations of the Declaration's principles and therefore not amendments at all even though they are not formally embedded in the written Constitution. From this perspective, after all, the written Constitution always has been an imperfect realization of the Declaration's principles.

20. Wright, Address, *supra* note 15.

decide whether to continue to pursue the course we have been pursuing. This expresses the Declaration's commitment to self-government.

The second mistake is to offer a highly celebratory account of the choices we have made. This account offers a story of essentially uninterrupted progress in eliminating practices inconsistent with the Declaration's principles. "Sure," a superficial account might go, "the United States has an unfortunate history of racism, exemplified by slavery and the apartheid system that replaced it, sexism, and nativism. But all those were mere aberrations. Deep down we knew that they were inconsistent with the Declaration's principles, sometimes forced on us by considerations of political expediency. But when political circumstances were favorable, the people of the United States moved to vindicate the Declaration's principles and eliminate these excrescences."

This celebration is both risky and erroneous. As Professor Balkin argues, the risk is self-satisfaction, in two forms.²¹ We may think that we have gone quite a way towards realizing the Declaration's principles, and need not work hard to "complete" the American project. Or we may think that whatever injustices we see around us somehow fall outside the scope of the Declaration's project, and so that we need not address them as we continue to honor that project.

Our economy's failure to satisfy the basic needs of many people shows that we have not come close to fulfilling the Declaration's project. We must keep that failure, and others, clearly in view. We may blur our ability to see continuing injustice if we describe contemporary constitutional law too forcefully as carrying out the Declaration's project.

A celebratory account is wrong, as well, because it does not take our history seriously enough. A real constitutional narrative must treat racism, sexism, nativism, and all those other "aberrations" as deep commitments of the people of the United States. When Thomas Jefferson wrote that "all men are created equal," he excluded women from large domains of social life even as he acknowledged the equal *moral* standing of women and men. The Constitution compromised with slavery, failing to mention it but protecting it by allowing slaveholders to count three-fifths of the slave population toward representation in the House of Representatives. Our foreign policy in the twentieth century has been imperialistic, and not always defensible even as a flawed effort to guarantee fundamental human rights elsewhere in the world.

Perhaps our national self-understanding should not treat racism, sexism, and nativism as commitments running as deep as our commitment to the Declaration's principles, but it must not treat them as

21. J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *Fordham L. Rev.* 1703, 1703 (1997).

aberrations that everyone knew all along were inconsistent with who we were. Everyone did not know that. Many people were—and remain—entirely comfortable with the privileges that racism, sexism, and nativism confer on them. It demeans our national experience to read those people out of the narrative. Building the underside of United States constitutional history into our narrative gives it a richness and complexity that in the end makes the story more attractive than the purely celebratory account. Acknowledging that Thomas Jefferson owned slaves, and that Martin Luther King, Jr. had numerous personal flaws, deepens our appreciation for what they accomplished. As we realize that those who did so much probably did not see their own flaws as we do, we may become appropriately humble as we pursue our projects with a new awareness of the possibility that we too are flawed and have a limited understanding of our circumstances.

An analogy on the personal level is helpful. Consider the stories people tell about their families, when they regard the family as a pretty good one on the whole. One superficial narrative might include some stories about the family's black sheep, no longer considered by the family as part of itself. Another superficial narrative might treat such people as lovable rogues, fundamentally good people who had an unfortunate flaw or two. But the best, the deepest, and most satisfying family narrative understands these people as deeply flawed, sometimes even evil, whose flaws are and remain the family's responsibility.

We can turn away from the narrative we have constructed to this point, as we would were we to reject the New Deal.²² But we would then be a different people—equally self-constituted, but different. And we would be a worse people, for two reasons. First, we embark on a project of reconstruction that threatens our national integrity in rejecting the narrative that has heretofore constituted us as a people. The analogy on the individual level is obvious: As a matter of brute fact, anyone can throw aside the deepest commitments he or she made a decade ago, but doing so raises questions about that person's psychological and moral integrity.

In addition, the synthetic historical narrative by which a people is constituted is valuable, but it is not the only thing of value in political life. It is a good thing that the people of the United States are constituted by the Declaration's principles, because those principles are good ones.

Professor Ackerman's positivism is important to his project, because a people can only be constituted historically, which is to say,

22. Note that I say *turn away* and *reject*, in place of Professor Ackerman's *ignore*. The considered rejection of the narrative previously constructed is, I think, much more interesting than an ignorant departure from it, and considering such a rejection produces more theoretical insight into the project Professor Ackerman and I believe important.

positively. In the end, however, I cannot avoid a criticism of the content he has given to the project. Professor Ackerman has created unnecessary difficulties for himself as we confront the possible rejection of the New Deal regime because the Declaration's principles play so little role in his narrative of how the people of the United States have constituted ourselves. It would be easier to see how the Declaration's substantive content provides a normative ground for preserving the accomplishments of the New Deal regime if the Declaration's principles played a larger role in Professor Ackerman's narrative. It would also make it easier for Professor Ackerman to integrate the two parts of his scholarship. His constitutional project would then fit together with his philosophical project of developing principles of social justice. With the Declaration in mind, Professor Ackerman could offer his principles of social justice as a continuation of the project of the people of the United States.

I conclude with an observation about the limits of Professor Ackerman's positivism. Even he acknowledges that a formal constitutional amendment can repudiate our constitutional heritage.²³ The Republican Party platform proposes to amend the Constitution to eliminate automatic citizenship for all persons born in the United States (and subject to the jurisdiction thereof).²⁴ Neither he nor his formalist adversaries have a *constitutional* ground on which to oppose that propo-

23. Ackerman, *supra* note 2, at 14-15.

24. Professor Ackerman's colleagues Peter Schuck and Rogers Smith have argued that the Fourteenth Amendment's first sentence does not require automatic citizenship, and that the courts should reinterpret the sentence to refer only to children of those lawfully admitted for permanent residence. See Peter H. Schuck & Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* 75-86, 116-17 (1985). Their catalogue of reasons why such a reinterpretation is legitimate shows liberal interpretive principles coming home to roost:

[T]heoretical ambivalence on the part of the Fourteenth Amendment's framers concerning the basis for citizenship; the inconsistencies that have always pervaded American citizenship law; the contemporary irrelevance of many of the reasons that led courts to perpetuate the medieval ascriptive principle in the past; and the existence of policy considerations today that increase the practical and theoretical attractiveness of [their alternative proposal]. It is appropriate for the judiciary to adopt this reinterpretation because it is chiefly the judiciary that created the rival common-law understanding of political membership and defended it as authoritative [A] judicial reinterpretation is possible where, as here, its original reading of ambiguous language reflected policies and principles at variance with most contemporary views of American constitutional theory and with current national policy objectives.

Id.

This sounds as close to dynamic (constitutional) interpretation as I can imagine. As far as I know they have made no progress in convincing people that the Republican platform plank is unnecessary, although the platform does refer as well to "constitutionally valid legislation" as an alternative to accomplish the party's purposes. *Dole, Kemp Accept Republican Nominations at Party Convention in California, Key Points in the 1996 Republican Party Platform*, Facts on File World News Dig., Aug. 15, 1996, at 574 A1 (available in LEXIS, NEWS Library, CURNWS File).

sal: Formalists must accept what the people do through the Article V process; Professor Ackerman must accept whatever considered self-definition the people construct.²⁵ If, as I believe, the people of the United States are constituted by our commitment to the Declaration's principles as imperfectly realized in the Constitution, we do have a *constitutional* reason for opposing the Republican proposal: It involves turning our backs not only on history, which we as a people surely can do, but on the Declaration's principles, which we as a people ought not do. In short, I can say, as I do not think Professor Ackerman can, that the Republican proposal to amend the Constitution is anti-constitutional.²⁶

25. I can imagine, just barely, an argument that some formal amendments—the Eighteenth being a prime candidate—do not reflect the people's *considered* judgment even though they result from Article V's extensive super-majoritarian processes. To show how difficult developing such an argument would be, I refer readers to a recent argument that the Seventeenth Amendment—one of the better ones, to my mind—was adopted in part because of crass political considerations. See Ronald F. King & Susan Ellis, *Partisan Advantage and Constitutional Change: The Case of the Seventeenth Amendment*, 10 Stud. Am. Pol. Dev. 69 (1996).

26. It should go without saying that I do not mean to imply that, were such an amendment adopted, the courts would not have to enforce it. In my constitutional universe, the Constitution and what the courts do, and ought to do, are two domains that only partially overlap.