Columbia Law School
April 19, 1993

DRAFT: For web publication.

The Incompleat Burkean: Bruce Ackerman's Foundation for Constitutional History

Eben Moglen*

* Professor of Law and Legal History, Columbia University Law School.

With this book, the first in a projected series of at least three volumes, Bruce Ackerman confirms what attentive readers of his law review articles of the past ten years have already known—he is the most original and important writer on constitutional theory in the contemporary English-speaking world. *We the People: Foundations*, despite its informal, sometimes overly talky style, is not an easy book. Filled to the brim, even to overflowing, and containing many gestures in the direction of arguments to be made in future volumes rather than the substance of the arguments themselves, it presents both the casual reader and the reviewer with a complex task of assimilation, understanding, and judgment. No single critique of the book can do justice to the whole of its content, let alone its potential, particularly when appropriate reservation is made for the fact that much of this first volume is promise rather than delivery. But even with what we have, Ackerman's book attempts to establish in a single imaginative bound the agenda for both constitutional history and theory in the last decade of the twentieth century; given the scope of its ambitions, the dialogue over its significance cannot begin too soon, or be carried on too heatedly. My own interest as a legal historian is with Ackerman's attempt at a revision of the entire span of American constitutional history; others will no doubt concentrate on his political theory, or his analysis of the contemporary quandary of constitutional politics and the Supreme Court. But while this book could hardly be styled a seamless web, a summary of Ackerman's remarkably fertile theoretical conceptions must precede any attention to his historical and historiographic arguments.

I. Constitutional Dualism

The center of Ackerman's thought is a claim of uniqueness for the constitutional arrangements of the United States—a claim of "American exceptionalism," in the usual historiographic jargon. Ackerman's claim is that the theory embodied in the 1787 Constitution is a theory of "dualist democracy," in which institutional structure presupposes a distinction between periods of "normal politics" on the one hand and "constitutional moments," or periods of higher lawmaking on the other. Ackerman's dualist recognizes that the outcomes of majoritarian institutions in times of "normal" politics do not fully reflect the choices "We the People" would make for ourselves. Only on those occasions when, through mobilization of levels of public engagement impossible to sustain indefinitely, the institutions or individuals leading movements for major structural reform succeed in raising politics to the "higher lawmaking track," does our dualist tradition fully gratify the impulse of all politicians in a democratic order, by validating their claim to speak in fact for the People at large.

The consequences of this paradigm are many, and their elucidation is the substance of Ackerman's entire project. At the outset, however, the theory of constitutional dualism allows Ackerman to distinguish his own approach from those "monisms," as he calls them (pp. 7-16), that assume no distinction between "normal" and "constitutional" politics in the United States. One set of monists, unable to distinguish between Congress pursuing its ordinary business of politics as usual and the moments of higher lawmaking, perceives in the Supreme Court's power of judicial review a "counter-majoritarian difficulty." Another, committed to the monistic belief that all politics are equal within the democratic constitutional order, but equally committed to the protection of "fundamental" rights, become "rights foundationalists"—determined to entrench certain exogenously-derived norms beyond the possibility of interference by any political process. Ackerman rightly proclaims that "[t]he clash between monists and foundationalists dominates the present field of constitutional debate."[1] (p. 16) He associates both theoretical positions with non-American influences on constitutional thought—an "Anglophilia" traceable at least as far back as Woodrow Wilson, whose admiration of British

1. Ackerman's own use of the term "monists" tends to include only majoritarians who believe in legislative supremacy, as in this sentence, which distinguishes between monists and rights foundationalists. In this employment of the terminology, Ackerman's dualism is intermediate between monism and foundationalism. Conceptually, it seems to me to make more sense to emphasize that what pure majoritarians share with rights foundationalists is a belief that constitutional politics has but a single mode: either the mode of respect for "normal" politics tempered by weak judicial review, or the mode of protection—by both legislative and judicial means—of fundamental rights. Ackerman's distinctive contribution is the argument that only a dual-mode description of the American constitutional tradition makes history and theory coherent. In this broader sense, both majoritarians and rights foundationalists are monists.

Parliamentary supremacy leads to monism of the pure majoritarian school, and the influence of Kant or Locke (depending on the flavor) for foundationalist premises. Dualism, then, becomes the distinctively American theory upon which a true grasp of our development should be founded.

Monists, whether of the purely majoritarian or foundationalist sort, must defend themselves against the weight of Ackerman's criticism—in the main, I find myself in agreement with his basic premise, though with some reservations. For Ackerman also distinguishes his dualism from what he calls "the paradoxes of American 'Burkeanism'." (p. 17) Edmund Burke, Ackerman believes, is the archetype of another historicist approach to constitutional theory, also capable of recognizing the difference between normal and constitutional politics, but hampered by three intellectual failings—"conservative incrementalism," a distrust of self-conscious appeals to principle, and an elitist disdain for actual self-government by the people, as opposed to their wisely chosen (and wiser) representatives. (pp. 19-21). Here I neither agree that Ackerman has captured the essence of Burkeanism as it figures in the American constitutional tradition, nor adequately distinguished the "Burkean" approaches he criticizes from those for which he contends himself. I shall return to these points in the concluding section of this essay.

Having sounded the major theme of his labor, which is to recover the genuine dualist premises of American constitutionalism, Ackerman surveys the obstacles to acceptance of his view—why have we so easily bought the essentially "foreign" monist approaches to constitutional theory? For Ackerman, the answer lies in our failure to appreciate the real contours of our constitutional history. Monist theories have produced monist histories, as an outgrowth of which we are unable to perceive precisely those details of our constitutional development that would in turn clarify the dualist theoretical principles to which the Constitution of 1787 committed us. Historicism, and of an intensely revisionary character, is thus the centerpiece of Ackerman's argument, at least as he sketches it out in the present volume. Ackerman thus premises his entire effort on the most exceptionalist form of revisionist constitutional historiography since William Crosskey's notorious *Politics and the Constitution*[2].

But any similarity between Crosskey and Ackerman is merely superficial. Ackerman's revised constitutional history hinges on two basic concepts: the division of that history into three separate "constitutional regimes," and the work of "integrating interpretation" by which the Supreme Court undertakes (well or ill) to establish continuity across the divides separating those regimes.

First the regimes themselves. The first extended from 1789 through the end of the Civil War and more particularly the adoption of the Fourteenth Amendment. The second regime (the "Middle Republic") lasted until the New Deal, and more particularly the "switch-in-time" that Edward Corwin first called the revolution of 1937.[3] As the reference to Corwin makes clear, Ackerman is by no means the first student of American constitutional history to adopt such a sharp periodization, or to locate the epochal divisions in our history as he does. The conceptual novelty, and the power, of Ackerman's history is the claim that the regimes were born not merely from the adoption of new substantive principles largely incompatible with those of the constitutional past, but rather from fundamental change in the method of constitutional politics. Each of the three regimes was born, according to Ackerman, from the adoption of a new method for switching from "normal politics" to "higher lawmaking." Dualism, in short, is not only the primary theoretical commitment of our constitutional order: the search for a workable set of dualist mechanisms under changing conditions is the basic mechanism of our historical experience. Thus, the first constitutional regime, that of the Federalists, was born out of the use of the Constitutional Convention, an extralegal body whose theory called for higher lawmaking through conventions, or through cooperation between federal and state legislatures, as laid out in Article V of the 1787 Constitution. But the second regime, of the Middle Republic, was ushered in not by a series of amendments adopted under Article V, but rather by a Congressionally-led

2. **William Winslow Crosskey, Politics and the Constitution in the History of the United States** (2 vols. 1953).

3. *See* **Edward S. Corwin, Constitutional Revolution, Ltd.** (1941).

process of higher lawmaking that forced ratification of the Fourteenth Amendment without the required supermajority of the States. And the third regime, that of 1937, arose from a Presidentially-led movement which eschewed even the outward form of constitutional amendment, preferring instead the path of "transformative opinions" affirming a sweeping legislative program in the Supreme Court, which opinions were secured by renewal of the Court itself, through the power of Presidential appointment.

For Ackerman, then, the history of the United States Constitution is divided into three periods by sharp discontinuous change in our approach to the basic question of dualist democracy—how can we tell whether a particular set of actors can properly lay claim to be making "higher" or fundamental law in the name of the American People, rather than merely undertaking a particularly brash form of politics as usual? Dualism underlay all three regimes, but the "professional narrative" of our constitutional history, being to one degree or another afflicted with exogenous monisms, told a different story. The Federalist constitution, at least as explicated in the opinions of Chief Justice John Marshall, was taken as the *summum bonum* of the tradition. The due process jurisprudence of the post-Reconstruction Supreme Court was lamented as a falling-away from the true religion, salvationally rediscovered by the Court in 1937, just in time to save the Republic from a frightful confrontation that might have wrecked the Constitution altogether.

This last point focuses attention on the role of the Supreme Court in dualist constitutional regimes. Having disposed of the monism that sees all judicial review as interference in the process of majoritarian government, since for the dualist any majority in any legislature is claiming to speak for the People, not actually so speaking, Ackerman can resolve the long-ballyhooed problem of the "counter-majoritarian difficulty." During times of "normal politics," when fundamental law-making is not occurring through the great mobilization of the People, the Court serves a "preservationist" role—protecting the higher law already in existence from incursions by institutions claiming for themselves more political support than they actually possess.[4]

And what of the Court's role in "constitutional moments," those occasions on which, through popular mobilization, our dualist democracy shifts to its "higher track"? Until 1937, Ackerman believes, the Court played little or no role in the process of higher law-making itself. Instead, the Court performed a more difficult and much less well-understood role: it attempted, by "integrating interpretation" in Ackerman's phrase, to reconcile the new fundamental law resulting from higher-track politics with the surviving elements of the old constitutional regime. For Ackerman, the much-despised jurisprudence of the *Lochner* era[5] (indeed, of the "Middle Republic" from 1866 to 1937) was an attempt to integrate the nationalist, rights-oriented fundamental law of the Fourteenth Amendment with the non-nationalist, rather rights-insensitive constitution of the Federalist Founders. Though Ackerman concedes that this enterprise was conducted with far from perfect success, he insists that our traditional "professional narrative," through its need to show that the events of the New Deal era were consistent with the "original intent" of the Federalist Constitution, has always emphasized a nonexistent continuity with the Marshall Court, wrongly reducing the Justices of the Waite, White, and Taft eras to the role of imbecile or evil misinterpreters.

So Ackerman's purpose is to displace the professional narrative. History founded on proper conceptions, recognizing the distinctive dualism of American constitutionalism, would bring new and more respectable light to the constitutional jurisprudence of the *Lochner* era, as well as explaining to us both the true meaning of the *Federalist Papers* and the proper role of the Supreme Court in American government. On these, and a host of other matters, *We the People: Foundations* provides the beginning of the revision. We cannot yet form a judgment on the overall success of the project, for Ackerman has told us that the detailed argument is yet to come. But we know enough, at least of his

4. Although he never explicitly acknowledges the fact, Ackerman thus joins another line of constitutional theory that emphasizes the preservative, or "validating," function of judicial review. *See* **Charles L. Black, Jr., The People and the Court** (1962).

5. *See* Lochner v. New York, 198 U.S. 45 (1905).

present intentions, to define the contours of the argument he seeks to make, and to estimate the strength of the obstacles against which it must contend.

II. Intimations of History, Traces of Dualism

Consideration of Ackerman's new constitutional history should begin with Part Two of his book, in which he presents at length his historical interpretation of the *Federalist Papers*. Ackerman regards Hamilton, Madison, and Jay (to whom he chooses to refer collectively by the joint pseudonym "Publius," a point to which I return below), and by implication the other framers and supporters of the 1787 Constitution, as "successful revolutionaries," seeking to protect the gains of their movement. (p. 165) Their insight, Ackerman claims, was a complete awareness of the impracticability of keeping the People endlessly involved in the business of politics, joined to an acute understanding of the inevitable corruptions of normal politics, in which the self-seeking, delusion, and factionalism among the People's "representatives" act to erode the principles of virtue created by a political community fully engaged in a revolutionary situation. This insight, which Ackerman finds throughout the *Federalist*—though, perhaps not surprisingly, primarily in papers written by Madison—is the heart of constitutional dualism. Its outcome, within the literary context of the *Federalist Papers* themselves, is the famous principle of the "economy of virtue." If politics are properly structured and carefully nurtured, the *Federalist* says, the available resource of political virtue in the community, though not enough to sustain revolutionary ardor and equivalent public-mindedness at all times, will nonetheless carry society through the periods when the mass of men are unsurprisingly more interested in their own pursuits than in the commonweal.

In so reading the *Federalist Papers*, and in so viewing the men who created both them and the Philadelphia Constitution, Ackerman is in good company. But he commits himself, and the success of his interpretation, entirely to one strand of a deeply contested historiography, for he must make the Founders of the Constitution true revolutionaries. Ackerman is fully conscious of this historiographic commitment, and much of this section of his book is an attack on Charles Beard and the "Thermidorean" interpretation of the Federal Convention. For Ackerman, the Progressive historians who joined Beard in approaching the Framers as a collection of counter-revolutionaries, bent on improving the value of the public debentures they held in their private and class portfolios, created a monist myth of the constitutional past. The work of Beard himself, in the landmark *Economic Interpretation of the Constitution of the United States*[6], is probably obsolete, not least through the work represented by Forrest McDonald's book *We The People*, whose title Ackerman has respectfully borrowed.[7] But this by no means eliminates the vitality of all counter-revolutionary interpretations of the Federal Convention, a point to which I return below.

Granting *arguendo* Ackerman's approach to the framers of the *Federalist Papers*, we can join his larger narrative (contained in Part One of the present volume) of the fate of constitutional dualism. Having created constitutional arrangements that economized on virtue through the establishment of a higher-track law-making system for fundamental law (enshrined in Article V of the proposed constitution), the Framers then secured its ratification through measures (direct submission to conventions of the People in the States, the vote of nine State conventions to be binding upon all) directly contravening the relevant provision of the Articles of Confederation. Surely Ackerman is correct in saying that this reliance upon an extra-legal convention to make fundamental law directly followed, in the minds of the Framers, the convention that determined constitutional arrangements in England in 1688. His further insight, that this established at least a tolerance, if not a preference, for extra-constitutional modes of constitutional law-making in the American tradition, is one of the profoundest supporting his new historiography.

Ackerman's historical account proceeds through the history of the new Federal Republic, emphasizing the localist cast of the institutions created. For Ackerman, the nationalism of the

6. **Charles Austin Beard, An Economic Interpretation of the Constitution of the United States** (1913).

7. **Forrest McDonald, We The People: the Economic Origins of the Constitution** (1958). Ackerman acknowledges McDonald, and justifies, perhaps unnecessarily, the reuse of the title, P. x.

Marshall Court has been much overstated in the professional narrative, which we might also call the received wisdom. The essence of the Federalist achievement was its economy of nationalist sentiment as well as virtue, in the sense that the new republic was as nationalist as the sentiments of the people would tolerate, despite the desires of Hamilton, among others, for a much stronger commercial union. For Ackerman, at least at this stage in the development of his argument, the reigning characteristics of the constitutional law of the first regime were federalism, in the sense of anti-nationalist localism, and a comparative disregard for individual civil rights. The one exception, on this latter point, was the concern for protection of property and economic liberty contained in the Contracts Clause, and made a basic part of the constitutional common law through Marshall's decision in the *Dartmouth College* case.[8]

What little nationalism there was in the constitutional law of the Marshall Court, Ackerman believes, was eroded in the jurisprudence of Roger Taney's Court—most notably the reduction of the nationalizing implications of Marshall's Commerce Clause in *New York v. Miln*,[9] and the reduction of the vested rights approach to property in *Charles River Bridge*.[10] While experiments with what Ackerman calls the "plebiscitary Presidency"—the use of national elections as mandates for basic constitutional change—occurred in the early republic (most notably in 1800 with the election of Thomas Jefferson and in 1824-1828 with the balked and then fulfilled populism that swept Andrew Jackson to power), Ackerman sees the first constitutional regime as one in which the higher law-making authority remained where Article V placed it—in the legislatures of the Federal Government and the States.

But a plebiscitary election in 1860 changed that pattern, precipitating constitutional crisis and Civil War. The resulting mandate for constitutional change might have been carried by the Presidency, but the assassination of Lincoln and the truculent resistance of Andrew Johnson to the adoption of the Fourteenth

8. Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819).

9. Mayor of New York v. Miln, 36 U.S. 102 (1837).

10. Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837).

Amendment brought Congressional rather than Presidential power to the fore in the next period of higher law-making. Radical Republicanism secured the ratification of the Fourteenth Amendment not by votes of three-quarters of the State Legislatures, as required by Article V, but by an extra-legal process depending upon Congressionally sponsored military reconstruction of States whose admission to the Union hinged on acceptance of the Amendment.

The forcible rewriting of fundamental law ushered in the Middle Republic, the second of our constitutional regimes. For the Supreme Court, whose effectiveness as preserver of the old order had been broken by *Dred Scott*[11] even before the war and the Congressional seizure of higher law-making power, the challenge posed by the Fourteenth Amendment was to make the first of the "integrative interpretations"—synthesizing what remained of the old order with the new, highly nationalist, rights-based conceptions implied by the language of the Reconstruction Amendments. For Ackerman, the process of judicial interpretation in the Middle Republic consisted of the intellectual attempt to make the integration. As he sees it, the essence of that interpretation, contained first in experimental form in the 1870s— despite the false start in the *Slaughter-House Cases*[12]—and then refined in the *Lochner* era, consisted of reviving the property-centered rights conceptions of the old order, and using them to control state action in a new nationalist vein.

Serious challenges were posed to this new order, particularly in a series of "failed plebiscitary elections" in which the Populist Party and the weaker populism of Bryanism confronted the reigning Republican orthodoxy. The challenges were resisted, largely through the preservationist role of the Supreme Court, until the collapse of the national economy in 1929-33. Franklin Roosevelt, proposing a broad range of national political initiatives with redistributive and anti-propertarian effects, touched off a confrontation with the preservationist Court, and chose to test his mandate for higher law-making through the Presidential plebiscite of 1936. Having prevailed, thus bringing about what Ackerman calls a "constitutional moment," FDR chose to make

11. Dred Scott v. Sandford, 60 U.S. 393 (1857).

12. The Slaughterhouse Cases, 83 U.S. 36 (1873).

new higher law through the Presidential leadership approach, never before tried in the history of the Republic. The precise mold in which that leadership cast itself was a proposal to reorganize the preservationist institution, the Supreme Court, which had denied the higher law effect of the New Deal statutes. Eschewing the approach of Amendment under Article V, FDR chose first to intimidate the Court with the packing plan, and then after the switch-in-time of 1937, to renew the Bench through "transformative" appointments, using the Presidential nomination power to revise the common law constitution. The effect, as Ackerman brilliantly observes, was to achieve fundamental law-making by judicial opinion—paradoxically strengthening the common-law element in American constitutionalism even as it created a new constitutional regime, hinged on the President's power of mass political mobilization and appointment to the chief institution of dualist preservation.

The new constitutional regime ushered in by the New Deal revolution also required the Supreme Court to make an integrative synthesis of the older and new regimes. Here Ackerman's history, as he himself acknowledges, is particularly sketchy, but he descries in both *Brown v. Board of Education*[13] and *Griswold v. Connecticut*[14] signs of that integrative process under way, as the Court struggled to synthesize the rights-based nationalism of the Middle Republic with those non-economic rights that replaced property conceptions as the center of constitutional attention after the New Deal. Though this conceptualization is only embryonic in the present volume, it bids fair, when more fully fleshed out in later work, to explain in a fashion hitherto difficult to specify the nature of the Warren Court's interest in the criminal procedure system. Unfortunately, however, Ackerman does not discuss what were probably the most important constitutional cases from the point of view of the "Modern" regime in his analysis—*Baker v. Carr*,[15] *Reynolds v. Sims*,[16] and *Katzenbach v. South Carolina*,[17] in which the Middle

13. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

14. Griswold v. Connecticut, 381 U.S. 479 (1965).

15. Baker v. Carr, 369 U.S. 186 (1962).

16. Reynolds v. Sims, 377 U.S. 533 (1964).

17. Katzenbach v. South Carolina, 383 U.S. 301 (1966).

Republic's founding documents, the Reconstruction amendments, were integrated with new approaches to the higher-law management of normal politics.[18]

III. Theory and History—Reservations

Even the very brief outline of Ackerman's approach to constitutional history provided in the volume under review, and summarized even more cursorily here, suggests the importance that Ackerman's conceptions might have in altering at least the emphasis, if not the basic outlook, of constitutional history in the years to come. Displacing the received wisdom in favor of a self-consciously dualist account of the constitutional development of the United States would be, for those of us who agree with Ackerman's basic premise, a good thing. But the present volume, for all its conceptual breadth and apparently boundless intellectual enthusiasm, seems to me significantly to understate the difficulties involved in recasting the the sweep of our history as Ackerman proposes. Ackerman's historiographic criticism seems to me too easily to dispose of alternative approaches to the writing of constitutional history on other premises, and his reconstructions of the critical turning points in the history as he sees it,[19] while enormously provocative, have not yet been described in ways which meet what seem to me the most important probable exceptions, reservations, or counter-arguments. This leads me to wonder whether Ackerman's theoretical positions on a number of subsidiary points, bating entirely the issue of dualism, on which he is absolutely convincing, might not be overstated. This, in turn, brings us to the question of Burkeanism.

---

18. Some helpful guides to the relevant conceptualizations in this area may perhaps be found in Pamela S. Karlan, *The Rights to Vote: Some Pessimism about Formalism*, **Tex. L. Rev.** (forthcoming, 1993).

19. Apparently to be the subject of his forthcoming second volume, significantly entitled, at least from my point of view, *We the People: Transformations*.

A. *Theory as History*

As the footnotes to the present volume show, Ackerman has mastered the contemporary historiography with the same erudition and imaginative grasp he shows with respect to all other elements of the scholarly literature with which he deals. Yet he is not, again by admission, a committed practitioner of the "no-nonsense, original-source style" of academic history in the United States, preferring the "historico-philosophical idiom" represented for him by Hannah Arendt.[20] This is a matter of skill and taste, and it might well be said that a closer attention to the ebb and flow of historical detail would have strangled Ackerman's profound conceptual project; perhaps the substance of the volumes to come will show. But whatever the truth on this point, Ackerman's account already shows, at least to one reader whose methodological premises are opposite to his own, the inevitable drawbacks resulting from the primacy of theory over history, or of conceptions over experience.

For it is the messiness of our constitutional history that Ackerman is compelled to simplify—not only for purposes of expressing complex ideas in a brief space, but because his dualism, for all that he wishes to avoid reductionism,[21] is reductive. At several—indeed, at the most crucial—points in his historical account, Ackerman indulges in foreshortening of historical detail in order to finesse inconvenient factual objections. The objections themselves are probably not insurmountable, and those of us in sympathy with the project can certainly hope to see them surmounted, either by Ackerman's later work or by the other constitutional history it is sure to inspire, but we should know at the outset that there are problems to overcome.

---

20. P. 219. It is ironic, but not in any derogatory sense, that the strong American exceptionalism of Ackerman's substance is joined to a rather Germanic taste in forms of historical investigation and expression.

21. And he does. Ackerman is clearly and forcefully critical of the reductionisms abroad in the political and social sciences, not least the contemporary madness for treating all social interactions as the work of that imaginary species, *homunculus economicus*. *See, e.g.*, P. 228 n.*.

1. *The Federalists*

The first, and perhaps the most important, of Ackerman's reductions is his visualization of the Federalists as successful revolutionaries, free of all the counter-revolutionary impulses attributed to them by the Progressive historiography of Charles Beard and his epigones. In this regard, Ackerman proposes to treat as entirely resolved the long-running polarized debate between historians over the revolutionary character of the Federal Convention. To be sure, there are profound attractions in Ackerman's resolution. On the historiographic side, as I have already mentioned, the strongest form of the counter-revolutionary hypothesis, originally presented by Beard, has not worn well. In addition, the work of Gordon Wood—which continued the association between radical Whiggery in England and revolutionary ideology in eighteenth-century America originally observed in Bernard Bailyn's classic work, *The Ideological Origins of the American Revolution*[22]—provides a powerful support to Ackerman's approach, by setting an intellectual and social background for the Philadelphia Convention as an association of revolutionaries.[23]

Nor is Ackerman's preference for Federalists unquestionably revolutionary in sympathy solely a result of historiographic fashion. The substantive interpretation of the Federalist project as an exercise in counter-revolutionary repression, or even just swag-accumulation through inflation of the value of public securities, has always suffered from implausibility, in view of the palpable intellectual seriousness with which the debate over the ratification of the Federal Constitution embraced questions of undoubtedly revolutionary character. Yet a constitutional history predicated on the entire absence of counter-revolutionary elements from Federalist thought would be as misleading as the Progressive historiography to which Ackerman objects. Surely

---

22. **Bernard Bailyn, The Ideological Origins of the American Revolution** (1967).

23. Ackerman primary relies on **Gordon Wood, The Creation of the American Republic** (1969). The publication of **Gordon Wood, The Radicalism of the American Revolution** (1992) came too late for incorporation into Ackerman's first volume, but one can confidently expect Wood's enormously successful expansion of his own prior views to play a critical role in Ackerman's future volumes.

Ackerman is right to see Madison's fulminations against "improper or wicked" measures such as "paper money, … abolition of debts, … [and] an equal division of property" in *Federalist* No. 10 as peripheral to the political theory that renders it relevant to our time (p. 228), but it does not follow that one can safely disregard the evident social conservatism of the Philadelphia Convention's men and measures.

Ackerman is aware of the problem. Although in general extremely admiring of Hannah Arendt's approach to Federalist political theory expressed in *On Revolution*,[24] Ackerman explicitly departs from Arendt's belief that the genius of American revolutionary thought lay in refusing to acknowledge the "social question." Instead, Ackerman suggests that the essence of Federalism was confrontation with the social question through "revolutionary reform"—dualist constitutional arrangements that confined discussions of the social question during times of normal politics, and transferred crises of social and economic import onto the higher-track of constitutional law-making. (pp. 208-12)

Conceptually, this seems highly promising, particularly since it avoids the unpleasant connotations of the Progressive historiography, which seemed to saddle us retrospectively with a reactionary constitution formed in a confrontation between the masses and the classes, which the classes won. But history would not be well served if Ackerman's easy synthesis became the received wisdom. For the hostility to measures of social and economic reform breathed in the language of *Federalist* No. 10 is not only real—it formed an important, perhaps essential, intellectual and political background to the formation of the Federalist constitutional regime. A large contribution to the difference between the failed Annapolis Convention of 1786 and the successful Philadelphia Convention of 1787 was the participation of George Washington in the latter event, and Washington's willingness to forsake his apolitical retirement was explicitly an outgrowth of the alarmist treatment of Shays' Rebellion deliberately spread by his former chief adjutants, including Alexander Hamilton and Henry Knox.[25] Their inflated

24. **Hannah Arendt, On Revolution** (1963).

25. For particularly interesting recent scholarship on the conspiratorial maneuvering that secured Washington's presence in Philadelphia in the fall

account of the Shaysite disturbances—which they were in fact concerned would be put down only too quickly—announced the beginning of a general social revolution, which all good men ought to be willing to hasten to Philadelphia to prevent. The measures proposed in the Philadelphia Convention, and the willingness to employ extra-legal measures to secure their ratification in the States, speak to the importance of counter-insurgency in the ideology of the "Framers."

On one level, to be sure, this history only confirms Ackerman's point that "the Founders held notions of property rights different from those that prevail in America today." (p. 228) But John Jay's statement that "the people who own this country ought to govern it," like Madison's anti-egalitarian political economy in *Federalist* No. 10, should not be elided in our balancing of concepts of revolution, counter-revolution, and reform in our history of the events culminating in the 1787 Constitution. Ackerman's central conclusions are worthy of the most serious respect, but the history on which he bases them, so far as he has outlined it here, is too polar—too committed to the conceptual purity of the first great constitutional moment.

The same tendency may be observed in his literary analysis of the *Federalist Papers* themselves. To accept as reality the persona of "Publius," and to discuss the papers as though "he" wrote them strikes me as a serious mistake. Three quite adroit professionals composed the papers, each an expert in the combined arts of lawyering, propagandizing, and electioneering so frequently conjoined in eighteenth-century America. Each has different attitudes and ideas to present, and each is concerned with different facets of the immediate political situation in order to affect which, after all, the papers were initially composed. Even Jay and Hamilton, two New York lawyers with similar experiences in the Byzantine ways of New York political life, have dissimilar styles and approaches to the problems presented by the ratification campaign. Refusal to treat the ideas of the *Federalist* as the outgrowth of collaboration among definite individuals suits the "philosophico-historical" method Ackerman admires, and is

---

of 1787, and the propagandist use made of Shays' minor "Regulation" by conservative Federalist officers and former officers in the Continental Army, see Rock Brynner, "Fire Beneath Our Feet": Shays's Rebellion and its Constitutional Impact (unpub. PhD. diss., Columbia Univ., 1992).

part of the idealizing genre of academic political theory, but it probably represents a poor basis for the reconstructive intellectual history of the Constitution's foundation. One hopes that as Ackerman returns to the subject in later volumes he will reconsider the decision to write of "Publius," rather than the individuals who actually thought and wrote the work we are all taught to admire.

Consideration of the individual, historically-situated, Federalists—rather than the idealized fictive persona they created—might also have led to another theoretical refinement deeply to be desired in our new constitutional history. Surprisingly, in view of his own education and concerns, Ackerman is remarkably silent on the role of the legal culture in the creation of our various constitutional regimes. Not only the authors of the *Federalist*, but the vast majority of the leading figures of the Revolutionary and Federal generations, were lawyers. The early republican culture, as Robert Ferguson has brilliantly pointed out, was dominated by the thought-ways of lawyers.[26] And, more to our immediate purpose, our constitutional tradition, including the revolutionary constitutionalism from which Ackerman traces the descent of the 1787 document, was born of the legal thought of the late British Empire. To understand the constitutional history of the Revolution and its aftermath, and thus to grasp the roots of our constitutional dualism, attention to the legal thought, particularly the constitutional thought, of late colonial America is critically important. The work of John Phillip Reid, as I have previously pointed out,[27] importantly supplements, sometimes refutes, the tradition of intellectual history represented by Bernard Bailyn and Gordon Wood, which systematically underestimates the seriousness of the legal arguments made in the pamphlet literature of the revolutionary period.[28] Attention to the legal

---

26. *See* **Robert A. Ferguson, Law and Letters in American Culture** (1984).

27. *See John Reid's Revolution* (Book Review), 9 **L. & Hist. Rev.** 389 (1991).

28. Reid's output in recent years has been profuse, and almost all of it bears importantly on the origins of our constitutional theory. *See* **John Phillip Reid, The Constitutional History of the American Revolution** (3 vols. 1986-1991); **John Phillip Reid, The Concept of Liberty in the Age of the American Revolution** (1988); **John Phillip Reid, The Concept of Representation in the Age of the American Revolution** (1989). Ackerman's attention has obviously not been called to Reid's work, which is nowhere

content of the Federalist project, including the extent of continuity between the legal problems of the late Empire and the early Republic, is long overdue.[29] One of the most important invitations presented by *We the People: Foundations* is to press that project forward, precisely to investigate the origins of dualist constitutional thought in the Empire before 1776.

2. *Models of Constitutional Leadership*

The other elements of Ackerman's new constitutional history are much less fully presented in the present volume than is his history of the foundation of the first regime, and perhaps comment should be withheld until the outlines have been somewhat more filled in. But a few isolated points seem worthy of mention, as they relate to the general difficulty of history written for the demonstration of clear conceptual propositions.

As an initial example, Ackerman's laudable commitment to the intellectual rehabilitation of the jurisprudence of the Middle Republic leads him to exaggerate correctively, in my view, the distance between the Marshall Court and the nationalist jurisprudence of the New Deal, precisely because he believes the received wisdom has exaggerated their similarity. For Ackerman, Marshall participated in the general anti-nationalist approach of the Founders' Constitution. But conceptualism on this point may be deceptive. Perhaps the received wisdom has been right about John Marshall, notwithstanding that it has been wrong about much else. Marshall differed from the older generation of revolutionaries convened at Philadelphia, and even from his contemporaries such as Hamilton and Burr, in that his education as a lawyer occurred almost entirely within the domain of the new Federal legal system. What little legal practice John Marshall had before ascending the Bench was almost entirely in federal fora, largely concerned with federal statutory and regulatory law,

---

cited in his volume. As Ackerman himself says—rather too patronizingly for my taste—in criticizing Gordon Wood for ignoring the work of Hannah Arendt, "nobody's perfect." P. 219.

29. *See* Eben Moglen, "The Passage of Federalisms—Reconsidering the Legal History of the Later Eighteenth Century" (unpub. paper, presented American Society for Legal History Annual Meeting, Atlanta, Ga., Feb. 1990).

mostly in litigating questions of military pensions. This aspect of Marshall's legal education has been generally under-emphasized, though Leonard Baker's biography at least presents the materials from which conclusions might be drawn.[30] As a lawyer and a judge, Marshall's basic impulse was towards a single national legal order— a "preservationist" point of view for Marshall himself, since it was the system he had known. Much of his ideological distance from other Federalists can be seen to center on this point; it is no accident that his dismissal of the *Federalist Papers* as determinative constitutional authority occurs in the strongest nationalist passage of one of the strongest of nationalist opinions in the *United States Reports*: *M'Culloch v. Maryland*.[31]

Individual persons and events are always more complex than our conceptions would allow, and the gravest problems of history-writing occur in the attempt to mediate between the necessity for generalizing conceptions and the intractable refusal of facts to fit within our categories. Both in his treatment of the events of 1866 and 1935-37, Ackerman interprets the political struggle surrounding constitution-making as a clash of institutional actors. "Congress," "the Court," even "the plebiscitary Presidency" (though more often "Johnson" or "Roosevelt") are the active agents in sentences describing the political or constitutional process. Like the reification of "Publius," this strategy of description renders conceptions clear, but the metonymy is historiographically costly. Radical Republicanism, to take the first example, was a highly complex political phenomenon, never completely in control of Congress even after the election of 1866. As William Nelson has established, the constitutional theories at play in Congress during the struggle to enact and ratify the Fourteenth Amendment were ambiguous, and their results were even more deliberately so, as Congress left much to be resolved by a Supreme Court called upon for precisely the sort of "integrative interpretation" Ackerman describes.[32] Similarly, in writing the constitutional history of the New Deal crisis, Ackerman proceeds as though

30. *See* **Leonard Baker, John Marshall: A Life in Law** (1974).

31. *See* M'Culloch v. Maryland, 17 U.S. 316, 433 (1819).

32. *See* **William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine** (1988).

Roosevelt never seriously considered a constitutional amendment under Article V as an alternative to the course eventually followed, but the record of intra-Administration discussion on this point was long, acrimonious, and controversial.[33]

Ackerman's conceptual clarity comes, in both these cases, at the expense of a more sensitive rendering of the contingencies in what he rightly sees as the critical moments in our constitutional development. In neither case, one suspects, are the fundamentals of his interpretation at stake—his conceptions will not stand or fall on the simplicity of description they make possible.

Some larger complexities in the intellectual history will have to be confronted as well, if Ackerman's account is to be rendered fully convincing. As I have already mentioned, Ackerman's attack on the received wisdom about the *Lochner* era hinges on the notion that the constitutional jurisprudence of the Middle Republic attempted—largely successfully—the "integrating interpretation" of the Fourteenth Amendment's natural rights outlook in the context of the rights-insensitive Federalist constitution of the antebellum period. But as Morton Horwitz has shown in his recent book, *The Transformation of American Law, 1870-1960*, much of the legal thought of Ackerman's Middle Republic was explicitly hostile to the natural rights dogma that had been more, rather than less, influential before the Civil War.[34] Again, the difficulties necessitate a thicker description of the historical context, rather than an abandonment of interpretive conclusions already expressed. The deep ambivalence within one strain of American legal thought over the implications of the Fourteenth Amendment must be given greater recognition in Ackerman's account, for the Middle Republic, and even its Modern successor, were far less willing to accept the postwar constitutional settlement than Ackerman so far acknowledges.[35]

---

33. For a capsule account, see **Arthur M. Schlesinger, Jr., The Age of Roosevelt: The Politics of Upheaval, 1935-1936**, at 487-96 (1966).

34. *See* **Morton J. Horwitz, The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy** (1992). These matters are further considered in Eben Moglen, *The Transformation of Morton Horwitz* (Book Review), 93 **Colum. L. Rev.** (forthcoming).

35. Thus Felix Frankfurter, writing to Learned Hand scarcely more than a month after the decision in *Brown*, decries the adoption of the Fourteenth Amendment, expresses his willingness to see it repealed, and ends, plaintively or nauseatingly, according to your view of the matter: "But since

We may suppose that these oversimplifications are primarily the ones necessary in what is really an introductory volume. But Ackerman's historicism must become more historical if it is ultimately to succeed. We can hope for a different, more complex, style of historical analysis in the volumes to come. It would a shame to be disappointed in this hope. Surely without intention—for his reading in the secondary historical literature is both broad and balanced—Ackerman frequently seems here to be licensing history shorn of its complexities, accidents, paradoxes, and uncertainties. What his followers (and they will doubtless be many) might make of such an invitation, we may all have cause to regret.

B. *History as Theory—Burke and Ackerman*

To this point, I have stated my belief that Ackerman's conceptual achievement in the description of American constitutional dualism, along with his call for a revised constitutional history on dualist premises, are among the most provocative events in the study of American constitutionalism in the past two decades. I have also indicated—admittedly imprecisely, given constraints of space and a disinclination to speak too definitively of the introductory volume in a long and no doubt distinguished series—my "splitter's" view that Ackerman's proposed history elevates conceptions at the expense of immanent historical complexity.[36] Perhaps this is only a matter of historiographic taste or the necessities of composition. But I think it possible that Ackerman's historiography is more directly related to his theoretical position, and in particular to the rejection of what he calls "American Burkeanism."

---

we have it, we have it, and I literally go through torture from time to time." Felix Frankfurter to Learned Hand, June 25, 1954, Hand Papers, Folder #20, Harvard Law School Library, *quoted in* **M. Horwitz**, *supra* note 34, at 259.

36. The distinction between lumpers and splitters, perhaps the most important of historiographic divisions, has been reinvented many times. As a division between hedgehogs and foxes, we owe it to Sir Isaiah Berlin. *See* **Isaiah Berlin, The Hedgehog and the Fox: An Essay on Tolstoy's View of History** (1953). In the form I use, it is traceable to **J.H. Hexter**, *The Historical Method of Christopher Hill*, in **On Historians: Reappraisals of Some of the Makers of Modern History** (1979). *See also* Eben Moglen, *Two Jewish Justices* (Book Review), 89 **Colum. L. Rev.** 959 (1989).

Ackerman recognizes significant bases of agreement between his own positions and those theorists and practitioners who treat our constitutional heritage as consisting of

> the patterns of concrete decision built up by courts over decades, generations, centuries. Slowly, often in a half-conscious and circuitous fashion, these decisions build upon one another to yield the constitutional rights that modern Americans take for granted, just as they slowly generate precedents that the President and Congress may use to claim new grants of constitutional authority. The task of the Burkean lawyer or judge is to master these precedents, thereby gaining a sense of their hidden potentials for growth and decay. (p. 17)

For Burkeans, Ackerman rightly says, the guide to understanding the constitutional order is "an emphasis on the ongoing cultivation of a concrete historical tradition. … The Constitution simply cannot be understood by speculative theorists who have failed to immerse themselves in the historical practice of concrete decision." (p. 18) Readers too will recognize that this is the very position of Ackerman himself.

Yet Ackerman feels compelled to distance himself from Burkean interpretations of constitutional history. As I observed in the beginning of this essay, Ackerman alleges three major failings of Burkean approaches: "conservative incrementalism," distrust of self-conscious appeals to principle, and a disdain for mass politics. (p. 19-22). If these were the essence of something to be called American Burkeanism, Ackerman might be right to separate himself from it. But I think these are epiphenomenal observations—criticisms of Burke rather than Burkeanism, or objections to Burke done badly. My own case, tentatively submitted to be sure, is that Bruce Ackerman is the new American Burkean, and that recognition of this fact will help him evolve his project in the most satisfying way.

Let us take first the question of conservative incrementalism. "Conservative," as a mere term of derogation in Ackerman's vocabulary, we may put aside for the nonce. Certainly, when we come to the essence of the matter, Burkean theories are evolutionary, historicist theories of political development.

Ackerman too is committed to an evolutionary approach to our constitutional tradition. This first objection to Burkeanism, then, hinges on the question of incremental as opposed to discontinuous or saltational change:

> Although gradual adaptation is an important part of the story, the Constitution cannot be understood without recognizing that Americans have, time and time again, successfully repudiated large chunks of their past and transformed their higher law to express deep changes in their political identities. ... American history has been punctuated by successful exercises in *revolutionary reform*. (p. 9, emphasis in original)

This is a remarkably interesting and fertile passage, pointing to an important truth about all evolutionary theories, whether political or biological. Evolution does not imply, in and of itself, uniformitarian principles about rates of change. Ackerman's approach to constitutional evolution is to point to short intense periods of discontinuous change, punctuating long periods of deliberately "preservationist" activity, including preservationist judicial review. Ackerman's very use of the word "punctutated" is interesting, for it resonates with recent theoretical controversy among the greatest evolutionists of all—biological scientists committed to the Darwinian view of the history of life. Since 1976, one group of Darwinian theorists have campaigned for an approach to evolutionary history clustered around the concept of "punctuated equilibrium," in which speciation and other higher-order evolutionary change occurs primarily in short periods of crisis, pretermitting the usual condition of lengthy stasis.[37] Darwin believed that *natura non facit per saltum*, but this is not the essence of Darwinism, and Stephen Jay Gould and Niles Eldredge remain Darwinists. So too with Burke, whose belief in incrementalism can be exaggerated—like every educated Englishman of his generation, Burke understood only too well the importance of revolutionary change in the formation of the English constitution. Ackerman has contributed to organicist theories of American constitutional law what Eldredge and Gould

37. *See* Niles Eldredge & Stephen Jay Gould, *Punctuated Equilibria: An Alternative to Phyletic Gradualism*, in **Models in Paleobiology** 82-115 (T.J.M. Schopf, ed. 1976).

contributed to Darwinism—the concept of punctuated equilibrium as a model of historical change. Such a conception is a useful theoretical refinement, but it is not the center of a difference between "Burkeans" and "dualists."

Ackerman's other objections to "Burkean" theory—that it is "conservative," suspicious of self-conscious appeals to principle, and disdainful of mass politics—seem even less convincing as divisions of kind. Ackerman himself observes that traditionalist historicism "can be elaborated in conservative or reformist directions." (p. 17) That Ackerman is reformist we may take on his own statement; that he is accordingly not a Burkean is on his own account *non sequitur*. Edmund Burke himself, to be sure, was a conservative intellectual politician of the eighteenth century, and his expressions of disdain for mass politics, and plain belief that people should be ruled by their intellectual and moral betters, with what Ackerman rightly calls "a broad wink" in the direction of republicanism, are quite obvious.[38] But so are the same conceptions in the minds of John Adams and John Jay—one a member of the founding revolutionary pantheon, and the other one-third of the brain of "Publius." All three we may take to be out of step with the political realities of our time, and our constitutional regime, but constitutional dualists and founders of our tradition nonetheless.

The "Burkean" suspicion of overarching theory, and awareness of the danger presented by too complete a dedication to the pursuit of utopian visions, while undeniable, is not at odds with Ackerman's project. "Burkeans," Ackerman says, "can easily become part of the problem, rather than its solution … by taking advantage of the citizenry's weak involvement in normal politics to embrace 'statesmanly' solutions that undercut fundamental principles previously affirmed by the People." (p. 21) But a dualist "Burkean" could also diminish that tendency,

38. As Ackerman acknowledges, however, "[t]he historical Burke is a far more complex figure than the conservative incrementalist of modern fiction." P. 326 n.29. Indeed, with the pluralist elements of Burke's thought, rendered uppermost in Conor Cruise O'Brien's brilliant critical biography, Ackerman should find himself entirely at home. *See* **Conor Cruise O'Brien, The Great Melody: A Thematic Biography and Commented Anthology of Edmund Burke** (1992). A similarly nuanced view of Burke's thought, influential in shaping all but the most conservative writing on Burke in the past fifteen years, can be found in **Isaac Kramnick, The Rage of Edmund Burke: Portrait of an Ambivalent Conservative** (1977).

by emphasizing the importance of preservationist institutions, judicial review above all, that restrain it.

Putting these qualifications aside, then, what is "American Burkeanism"? Perhaps Ackerman's eponymous phrase is the problem. Burke, like Marx and Freud, has followers in quarters where the master would have feared to tread. Many, moreover, who believe—as Ackerman's "Burkean" lawyer does—that the study of the legal past means mastering the "hidden potentials for growth and decay" contained within the body of existing doctrine would, like Ackerman, hesitate to identify themselves with Burke. The line of distinction might be captured, instead, by referring to "rationalist" and "organicist" interpretations of American constitutionalism. Organicist readings of our constitutional tradition emphasize the accretive, unconscious construction of our processes of self-government. Legal development is organic, among other senses, in that it is autonomous, responding to its own inner dynamic of development, rather than the external intellectual compulsion provided by the rationalist's favorite approaches: the schematic delineation of our eternal natural rights, or the public-choice calculus of legislative supremacy, for example. In Ackerman's thought, this connection between organicism and the intellectual culture of our constitutionalism is explicit:

> I believe that American law in general, and constitutional law in particular, is a relatively autonomous part of our culture. It is *relatively* autonomous in that what counts as a plausible legal argument does indeed change, and change profoundly, over time. But it is relatively *autonomous* in that, at any moment of time, even the most powerful of our lawyers and judges are profoundly constrained by the patterns of argument built up by the legal community over the past two centuries of disputation—more powerfully than the judges themselves recognize, for they do not consciously interrogate many of the core elements of their legal culture. They simply take them for granted as they go about deciding cases. (p. 39, emphasis in original).

The result, as one British Ackermanian has written, is that

> Far from any resemblance to those propositions in geometry and metaphysics which admit no medium, but must be true or false in all their latitude, social and civil freedom … are variously mixed and modified, enjoyed in very different degrees, and shaped into a diversity of forms, according to the temper and circumstances of every community.[39]

Dualism is an organicist constitutionalism, but one which stresses—as Ackerman says—that constitutional law is only *relatively* autonomous. Social stresses provoke unusually high levels of political involvement, bringing about—in ways it is the business of constitutional history to study and describe—episodic and discontinuous change. The particular dualism of the Federalist Framers took for granted that heightened political activity intended to reduce the autonomy of constitutional law would be infrequent and costly. Ackerman himself is at pains to remind us of the costs:

> Th[e] incredible diversity of lived experience is itself one of the great glories of America; and it could not be achieved if everybody placed national citizenship first all of the time. … From this point of view, the greatest moments of constitutional creativity in American history can never be viewed as unmixed blessings. Even the successes take all of us away from too much that is too close to home. Little wonder that so many (but not all) of our great constitutional turning points have been associated with terrible wars or economic disasters. Surely it is a great and good thing for us to work productively as citizens, when the times or our consciences require it. But it is no less important to explore very different worlds of meaning—with only a few intimates, or a thousand fellow workers; worlds that invite us to move beyond geographic boundaries to seek religious or cultural association with different and distant people. These disparate values are placed in jeopardy by too great a fixation on constitutional politics, private *citizenship.* … We would lose too much of value if we were constantly debating the future of America

39. Edmund Burke, *Letter to John Farr and John Harris, Esqrs. (Sheriffs of the City of Bristol) on the Affairs of America* (1777), *in* **Edmund Burke: Selected Works** 211 (Walter Jackson Bate ed. 1960).

> with one another. … Only if a *substantial* number of citizens believe that there is something *really wrong* with the higher law tradition is it appropriate for them to force the rest of us to engage actively in the arduous enterprise of collective renewal and redefinition. (pp. 306-07, footnote omitted, emphasis in original)[40]

Essentially the same point has been put, in a more aphoristic style, as follows: "The bulk of mankind, on their part, are not excessively curious concerning any theories whilst they are really happy; and one sure symptom of an ill-conducted state is the propensity of the people to resort to them."[41]

As Ackerman says, "the dualist and the Burkean can discover common ground." (p. 21) Perhaps, at the end of the day, the ground is not only common, but congruent. Ackerman calls the organicist strand of modern constitutional thought "Burkean, since it has yet to find its modern spokesman who is Burke's equal." (p. 17) Perhaps I am wrong in my belief, and Ackerman's future writing will show me wrong, but I believe that, *malgré lui*, Ackerman has now begun the noble work of becoming that spokesman. I for one wish him well, and await with the greatest interest, along with a grain of suspicion, the fulfillment of the enterprise.

---

40. As an example of a great constitutional turning point not associated with terrible war or economic disaster, Ackerman offers the example of the civil rights movement, p. 306 n.*. The exception may not be historically justifiable. *See, e.g.*, Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 **Stan. L. Rev.** 61 (1988).

41. Edmund Burke, *supra note* 39, at 211-12.