WE THE PEOPLE

TRANSFORMATIONS

BRUCE ACKERMAN

WE THE PEOPLE

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TRANSFORMATIONS

Also by Bruce Ackerman

The Uncertain Search for Environmental Quality (1974)
with Susan Rose-Ackerman, James Sawyer, and Dale Henderson

Private Property and the Constitution (1977)

Social Justice in the Liberal State (1980)

Clean Coal/Dirty Air (1981)
with William T. Hassler

Reconstructing American Law (1984)

We the People: Foundations (1991)

The Future of Liberal Revolution (1992)

Is NAFTA Constitutional? (1995)
with David Golove

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Bruce Ackerman

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For Susan

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PART THREE
Modernity

Acknowledgments

I generally write books in the way they are read—beginning with the beginning, and slogging on to the end. But this one is an exception. After struggling with the first chapter of *We the People* for months with little to show other than increasing gloom, I took my wife's advice and began in the middle. I threw myself into the history of Reconstruction, and then the New Deal. Four years later, I emerged with a long manuscript that explored many forgotten questions but had lost sight of the big picture. With something resembling despair, I put my draft away and tried to write in my accustomed manner—from the beginning.

The result was *Foundations,* the first volume in this series. The years spent with the sources had not been wasted. I could now describe the forest as well as the trees, and develop my main themes without too many distractions.

But the day of reckoning could not be indefinitely postponed: *Foundations* made many controversial historical claims, and I was obliged to substantiate them if I hoped to be taken seriously. I returned to my historical manuscripts with trepidation. Rereading them, I was impressed with the number of relevant investigations that I had not even attempted. Was I cut out for this job?

The last five years have been intellectually demanding, and I am very conscious of the crucial role played by my conversation-partners. Neal Katyal and David Golove were wonderfully resourceful collaborators. The full extent of their contribution is revealed in two publications: Ackerman and Katyal, "Our Unconventional Founding,"

62 *University of Chicago Law Review* 475 (1995), and Ackerman and Golove, *Is NAFTA Constitutional?* (1995). Other students made outstanding contributions as research assistants, including Michael Aprahamian, Lynda Dodd, Rachel Harmon, Stephen Keogh, Mahmood Mabood, Cynthia Powell, Jon Shepard, Greg Silverman, Michael Splete, and Jan Trafimow. As always, Gene Coakley provided priceless assistance in unlocking the resources of the Yale libraries. Over the years, my friends among historians provided guidance. Bob Cover and Bill Nelson gave much-needed assistance in the early years. Richard Friedman reviewed an early draft of chapters on the New Deal; as did Michael Les Benedict and Eric Foner on Reconstruction; and Jack Rakove and Henry Monaghan on the Founding. I find it impossible to enumerate my debt to all the other friends who have suffered through a project that has bulked so large for fifteen years. They know how much they have helped.

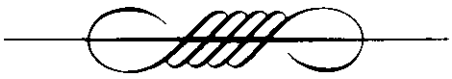
Turning to institutions, the law schools at Columbia and Yale gave me a tremendous amount of freedom to teach courses that allowed for in-depth exploration of the themes explored here. Deans Benno Schmidt and Barbara Black at Columbia, and Guido Calabresi and Tony Kronman at Yale, were unstinting in their support. In addition to research leaves provided by my universities, I gained extra assistance from two research institutes: the Wissenschaftskolleg in Berlin and the Woodrow Wilson Center in Washington. My year in Berlin was almost too seductive, encouraging me to write a book, *The Future of Liberal Revolution,* that delayed publication of the present volume. Nonetheless, I spent a lot of time in Germany rethinking *Transformations,* and this helped in the long run. My academic year at the Wilson Center in 1995–96 gave me the chance to reduce my sprawling historical manuscripts into readable size and shape. Last but not least, my secretaries Joan Pacquette-Sass and Jill Tobey helped with countless tasks that otherwise would have made sustained writing impossible.

As these paragraphs suggest, I am a lucky man. I hope this book partially repays my enormous debt to the institutions, and the country, that made it possible.

I have included revised versions of some materials published previously. Parts of Chapter 1 appeared as "Higher Lawmaking?" in

Responding to Imperfection (Princeton: Princeton University Press, 1995), edited by Sanford Levinson; parts of Chapters 2 and 3 in Bruce Ackerman and Neal Katyal, "Our Unconventional Founding," 62 *University of Chicago Law Review* 475 (1995); and parts of Chapter 13 appeared as "Transformative Appointments," 101 *Harvard Law Review* 1164 (1988). These sections are reprinted with the kind permission of the original publishers.

PART ONE



In the Beginning

CHAPTER ONE

Higher Lawmaking

The Prophetic Voice

My fellow Americans, we are in a bad way. We are drifting. Our leaders are compromising, compromised. They have lost sight of government's basic purposes.

It is past time for us to take the future into our hands. Each of us has gained so much from life in America. Can we remain idle while this great nation drifts downward?

No: We must join together in a movement for national renewal, even if this means self-sacrifice. We will not stop until the government has heard our voice.

The People must retake control of their government. We must act decisively to bring the law in line with the promise of American life.

Since the first Englishmen colonized America, this voice has never been silent. We have never lived for long without hearing its diagnoses of decline, its calls for renewal. For good and for ill, there can be no thought of silence—no way to proclaim that our generation has reached the promised land. Americans have become too diverse, too free, to suppose that their struggle over national identity will end before the death of the Republic. If the future is like the past, the substance of our collective commitments will change, and for the better?

Yet the voice will remain—calling upon Americans to rethink and revitalize their fundamental commitments, to recapture government in the name of the People. It is this voice that will concern us here, as well as the distinctive attitude Americans have cultivated in its exercise. While we have long since learned to live with prophets in our midst, we have not learned to love them.

Talk is cheap. It is one thing for self-proclaimed saviors to call for national renewal; quite another to convince millions of ordinary Americans to work together to redefine the national purpose. Many are called, but few are chosen to speak with the authority of We the People of the United States.

The normal American's reaction to some politico's claim of a popular "mandate" is incredulity, not commitment. Authority to speak for the People cannot be lightly presumed. It must be earned through years of work in the political wilderness—arguing, mobilizing, recruiting a broadening commitment to a revitalized understanding of the public good. Even relatively successful movements have met with different fates. Sometimes Americans have responded to impassioned calls for renewal by reaffirming the status quo; sometimes, by adopting important, but interstitial, constitutional amendments; sometimes, by endorsing sweeping moral transformations in the meaning of the Union.

The twists and turns of centuries have done more than reshape the substance of political identity. They have redefined the constitutional processes through which Americans have engaged the prophetic voice. The earliest calls for spiritual renewal expressed themselves in the explicit accents of Protestant Christianity.[1] But since the Revolution and Founding, national debate has been conducted primarily in secular terms. The constitutional system has not allowed transformative movements to excommunicate nay-sayers in the name of a jealous God. It has required would-be spokesmen for the People to confront the skeptical doubts of their opponents; to give them a fair chance to mobilize their own supporters. Only after the reformers carry their initiative repeatedly in deliberative assemblies and popular elections has our Constitution finally awarded them the solemn authority to revise the foundations of our polity in the name of We the People.

I shall be asking two questions about this extraordinary process of democratic definition, debate, and decision. How has it worked in the past? How should it work in the future?

Foundations

These questions are especially significant in America. This country's Constitution focuses with special intensity on the rare moments when transformative movements earn broad and deep support for their

initiatives. Once a reform movement survives its period of trial, the Constitution tries to assure that its initiatives have an enduring place in future political life. Elected politicians will not be readily allowed to undermine the People's solemn commitments through everyday legislation. If they wish to revise preexisting principles, they must return to the People and gain the deep, broad, and decisive popular support that earlier movements won during their own periods of institutional testing.

This focus upon successful moments of mobilized popular renewal distinguishes the American Constitution from most others in the modern world. It motivates a distinctive system of government involving the construction of two lawmaking tracks. The normal lawmaking track is designed for countless decisions made in the absence of mobilized and politically self-conscious majority sentiment. The higher lawmaking system imposes specially rigorous tests upon political movements that hope to earn the heightened sense of democratic legitimacy awarded to spokesmen for We the People. When this two-track system is operating well, it encourages Americans to distinguish between ordinary decisions made by government and considered judgments made by the People. I have this distinctive aspiration in mind in describing America as a dualist democracy.

Foundations, the first volume in this series, located the historical origin of dualism in the Founding generation's revolutionary experience. Washington, Madison, and the rest could have played the normal political game according to the rules laid down by Imperial Britain. They refused, but were not rewarded by the life of frustration, exile, death that usually accompanies revolutionary rejection. After years of arduous effort, they lived to see most of their countrymen support their vision of a federal union—but only after a complex and demanding process of constitutional ratification. Little wonder, then, that they thought they had achieved something special. Nor were they content to allow their great achievements to be eroded by politicians who had failed to gain the mobilized and deliberate assent of the People that marked (in their eyes at least) their revolutionary triumph. As children of the Enlightenment, they used the best political science of their time to write a two-track Constitution—and thereby set the terms for the future development of dualistic democracy.

Moving from history to philosophy, *Foundations* argued that dualism still makes sense, perhaps even more sense than it did two centu-

ries ago. A dualistic process responds to a characteristic complexity in the modern American's approach to politics. On the one hand, most of us recognize a responsibility to do our part as citizens—talking about the issues of the day at home and at work, paying our taxes, coming out to vote. On the other hand, we usually spend most of our time and effort in more private spheres of life. Normal politics is a sideline, one that competes with national sports, the latest movies, and the like.

But at other times, politics can take center stage with compelling force. The events catalyzing a rise in political consciousness have been as various as the country's history—war, economic catastrophe, or urgent appeals to the national conscience. For whatever reason, political talk and action begin to take on an urgency and breadth lacking most of the time. Normally passive citizens become more active—arguing, mobilizing, and sacrificing their other interests to a degree that seems to them extraordinary.

This ebb and flow has been noted by social scientists and historians.[2] *Foundations* made it the basis of a normative argument. Dualistic government is especially appropriate for a citizenry whose engagement with politics varies substantially from decade to decade, generation to generation. During periods of constitutional politics, the higher lawmaking system encourages an engaged citizenry to focus on fundamental issues and determine whether any proposed solution deserves its considered support. During periods of normal politics, the system prevents the political elite from undermining the hard-won achievements of the People "behind the citizenry's back"—requiring leaders to return to the People and mobilize their considered support before foundational principles may be revised in a democratic way.

This conclusion returns us to the special concerns of the present volume. We shall be exploring how American institutions have in fact operated to organize popular debate and decision during our most creative periods of constitutional politics. The aim is to learn what history can teach about the ways Americans have translated the heady rhetoric of constitutional politics into enduring judgments of higher law. Only after canvasing our past two centuries of practice can we turn toward the future: Is our existing system of higher lawmaking in good repair? If not, how should it be reformed?

The Professional Narrative

Our task will require a critical reexamination of the tools we use to interpret the past. Modern Americans know their Constitution has changed fundamentally over two centuries. Only they have been taught to conceptualize these changes in ways that trivialize them.

Lawyers are most to blame for this. Day after day, the courts try to control our most powerful elected officials by discerning the meaning of decisions made in the name of the People a century or two ago. The things they allow themselves to see in the past determine, sometimes dramatically, what all of us can do in the here and now. It is their professional narrative, as I shall call it, that blocks insight into the distinctive character of our historical experience.

The problem does not involve the outright denial of change. No serious judge, lawyer, or scholar has trouble recognizing that today's Constitution is very different from the eighteenth-century version. Nor do they experience difficulty in identifying the crucial transformative periods. While particular doctrines are due to the work of different generations, two periods stand out. The first is the Republican reconstruction of the Union after the Civil War. The second is the Democrats' legitimation of activist national government during and after the Great Depression.

As with the original Founding, neither of these sweeping changes came about overnight. Each was preceded by a generation and more of political agitation that prepared the way for a decade of decisive change. In 1860, constitutionalists argued endlessly about secession of the states and slavery in the territories; by 1870, such questions were no longer open to fair dispute. The agonies of the Civil War had been translated into new constitutional meanings that shaped legal discourse for generations.

The same pattern—lengthy critique capped by a transformational decade—marks the constitutional legitimation of the activist welfare state. As late as 1935, the national government's power to regulate the economy was constrained by a complex set of constitutional limitations—whose precise character served as the centerpiece of ceaseless doctrinal debate. By 1941, this intricate web had disintegrated and the Constitution allowed ongoing governmental intervention in economic and social life. The agonies of the Great De-

pression had provoked a fundamental reworking of constitutional identity.

After these two transformations, American government was very different from anything the Founders had experienced or envisioned. No longer had "We the People" established a decentralized federal system enabling white men to pursue their self-interest within a market economy. Americans had constituted a powerful national government with unquestioned authority to secure the legal equality and economic welfare of all its citizens.

So much, I take it, is common ground for all students of the American constitution—citizens no less than scholars, politicians no less than judges. Whenever some new current of opinion gains political prominence, the popular mind—as if by reflex—recurs to these great achievements to measure the new movement's significance. The constitutional importance of Ronald Reagan's Presidency can be reduced to a single question: To what extent did it succeed in leading the American People to repudiate the welfare state legitimated during the New Deal? The same is true of the modern civil rights movement: Is it not past time for the American People to redeem the promise of equality made after the Civil War?

My problem arises when we turn from constitutional substance to higher lawmaking process: How did Americans of the nineteenth and twentieth centuries define, debate, and finally endorse the transformative proposals championed by their respective parties of constitutional reform?

The Existing Story Line

Today's Americans come to this question at a great disadvantage. The great struggles of Reconstruction are now beyond the recall of our grandparents. Darkness is now settling over the New Deal. The Americans who lived through the Roosevelt years are now vanishing with accelerating speed. The enduring meaning of their achievements is now in the hands of their children and their children's children.

Here is where lawyers have let their fellow citizens down. To measure their collective act of trivialization, consider the standard story lawyers tell themselves about the 1780's. If anything, modern constitutionalists are increasingly prepared to recognize, and reflect upon,

the truly revolutionary character of the Founding. The Philadelphia Convention met not in a Lockean state of nature but in a dense legal environment established by the constitutions of thirteen states joined in "perpetual Union" through the Articles of Confederation. If the Federalists had played the game defined by these authoritative documents, their constitution would have been decisively rejected.

The Federalists responded by asserting their right to redefine the rules in the name of the People. Even more remarkably, most of their opponents accepted the legitimacy of this revolutionary breach. As the next chapter shows, the Federalists won their opponents' grudging consent by using old institutions in new ways to enhance their claim to speak for the People. This fascinating process of *unconventional adaptation* will be the central object of our study. Americans owe their remarkable constitutional continuity to their repeated success in negotiating these unconventional adaptations during their gravest crises as a People.

This point is lost in standard professional discussions of Reconstruction and the New Deal. When modern lawyers turn to the Thirteenth Amendment's abolition of slavery and the Fourteenth's commitment to equal protection and due process, they do not pause to consider how these great texts became part of the Constitution. They simply assume that the Reconstruction Republicans enacted them into law in strict conformity with the provisions for constitutional amendment laid down by Article Five of the 1787 Constitution.

The New Deal is treated even more dismissively. At least lawyers are willing to admit that the Civil War amendments changed the substantive law in fundamental ways. But when it comes to the New Deal, the story they tell denies that anything creative was going on. They treat the constitutional struggles of the 1930's as if they were the product of an intellectual mistake made by a handful of judicial conservatives on the Supreme Court. On the regnant view, the epic battles between the Old Court and the New Deal should never have happened. The Court should have immediately dressed the Roosevelt regime up in the clothes of the Founding Fathers. The anti-Roosevelt majority on the Supreme Court were fools or knaves to use the Constitution as a weapon against the New Deal.

Once we combine these stories about the Founding, Reconstruction, and New Deal, the overarching message is a continuing decline

in constitutional creativity. Apparently, the most sweeping transformation of the twentieth century is best understood through a myth of rediscovery—it was not Franklin Roosevelt, but James Madison, who laid the constitutional foundations for the New Deal. Even the changes that followed Civil War and Reconstruction are not understood as a second American Revolution. When viewed from the legal angle, the Fourteenth Amendment is no different from the most trivial amendment to our sacred text. The last time the American People engaged in unconventional forms of popular sovereignty was at the Founding.

Revision: A Third Way?

Every time a lawyer rises in court to tell these familiar stories about the Founding, Reconstruction, and New Deal, he is casting modern Americans as tired epigones who lack any experience of successful constitutional politics. Such an insult would be acceptable if it were based on the hard truth. But if it isn't true, why should serious lawyers continue to tell a story of decline?

Throughout this series, I point to many professional advantages that may follow from a revision of the reigning professional narrative. A new approach will clarify many modern problems of constitutional interpretation; it will give us added insights into the interpretive dilemmas of the past; it will open new frontiers of interdisciplinary collaboration with historians, political scientists, and philosophers. But all these specialist advantages pale next to the simple question of integrity:[3] Can lawyers allow themselves to abuse their special knowledge and power by systematically demeaning the constitutional creativity of their fellow citizens?

It would be naive to rely on this single question to carry the day. The received narrative has one priceless advantage. It exists as a pervasive cultural reality in the life of the law, and you can't beat something with nothing. If we hope to do better, constitutionalists must return to the sources and discover that they tell a very different story. They reveal both Reconstruction Republicans and New Deal Democrats refusing to follow the path for constitutional amendment set out by their predecessors. Like the Federalists before them, these reformers self-consciously validated their initiatives through a series of unconven-

tional institutional appeals to the People. It is we, not they, who have forgotten the truth about the revolutionary character of their higher lawmaking effort.

Our story will challenge two familiar views of constitutional change. On the first view, the distinctive feature of American democracy is the remarkable staying power of the "rules of the game." The American Constitution is the oldest in the world because we have remained remarkably faithful to established principles of democratic lawmaking for a longer period than fickle foreigners.

There is only one problem with this vision of procedural consensus: it is false. Neither Founding Federalists nor Reconstruction Republicans nor New Deal Democrats showed deep respect for established modes of constitutional revision. They changed them in the very process of changing the substance of fundamental values: from loose confederation to federal union, from slavery to freedom, from laissez-faire to the activist regulatory state.

But their revisionary activities do not comfortably fall within a second familiar framework. This position emphasizes the arbitrary character of acts of constituent power. Here is where the law ends, and pure politics (or war) begins: if revolutionaries succeed in establishing a new constitution, their rule-breaking activities are irrelevant; and if they fail, they fail.[4]

This simple account fails to capture the distinctive character of American history. The Founding, Reconstruction, and the New Deal were all acts of constituent authority. But they were not sheer acts of will. While Federalists, Republicans, and Democrats failed to follow well-established rules and principles, they experienced powerful institutional constraints on their revisionary authority. Much of this book describes the character of these constraints. Begin by considering a threshold question: if the participants weren't respectful of established legal norms, why did they feel any legal constraints at all?

My answer distinguishes between a challenge to well-established norms and a challenge to an entire constitutional tradition. As an example of this second assault, consider the Bolshevik Revolution of 1917. Before the Communists seized power in October, the previous provisional government had scheduled elections for a constituent assembly whose task was to frame a new constitution. The Bolsheviks allowed these elections to proceed, only to find themselves in the