

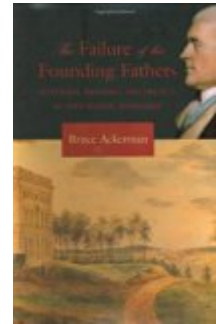
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Bruce Ackerman. *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy.* Cambridge and London: Harvard University Press, 2005. 400 pp. \$29.95 (cloth), ISBN 978-0-674-01866-2.

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Birth Pains of the Living Constitution

Bruce Ackerman is a truly creative scholar, with a wide range of interests in the law, a small sample of which include voting and democracy, the environment, NAFTA, liberalism, and, most enduringly, the nature of the American constitution. Few readers of these reviews will be unfamiliar with his theory of super-majorities and constitutional moments, which made his *We the People: Foundations* (1991) required reading in law school courses throughout the land. *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* is his latest foray into constitutional realms to reach the shelves. Unlike the sweeping accounts of American history that are the engine of his broad theory, Ackerman focuses here on the half-decade bracketing the “Revolution of 1800,” which he finds as influential for its tensions, changes, and compromises as the years of the drafting and ratification. He approaches this period, during which parties appeared and the branches of government evolved, with the preoccupations of a theorist and an historian, and he presents his story to serve both instincts. He tells the tale in two parts, the first focusing on the rise of Jeffersonian Republicanism, and the second the Republican conflict with judicial Federalism.

The five chapters in part 1 work through the presidential politics culminating in the election of Jefferson in 1800. Ackerman’s interests are initially with the unsuitability of the original constitutional vehicle to travel the political landscape after just a decade. He is fascinated by the naive hope of the constitutional framers that national elections would transcend faction by the odd structure

of the electoral college and presidential voting rules, and he is beguiled by the mishmash that resulted when both hope and rules failed. The hope, after all, was false, and faction did arise in the form of political parties. And the rules did fail, not just when it became clear that vice presidents might become presidents, so making poor judges of presidential elections, but more fully when electors committed to candidates on party slates, distorting not only the mathematics but also the purpose of the electoral college.

The opening four chapters of part 2 consider the aftermath of the 1800 elections, which resulted in the ousting of the Federalists from the presidency (and so the cabinet), as well as from most of their seats in Congress. John Adams then used the months of his lame-duck term of office, with the complicity of the lame-duck Federalist congress, to flood the bench with Federalists, the most visible being John Marshall, Adams’s secretary of state. Once Jefferson arrived, Ackerman focuses on the maneuvering between the judges and the Republicans. These maneuvers, including the dissolution of courts and denial of judgeships, with the occasional impeachment thrown in, derived not only from raw political contest, but also from a clash of philosophy between the Federalists’ adherence to the constitutional settlements of 1787 and the Republicans’ promotion of a new populism by which they had been elected to office. As Ackerman tells it, this tussle of ideas between the settled principles of law and the transient obligations of direct democracy, was both tool and product of the power plays of Jefferson, Marshall,

and their allies. Such a brief overview does little justice either to Ackerman's ability to tell a good story or to the depth and imagination of his research. Both accent the narrative, which Ackerman rightly argues should be better known.

He offers some fresh insight, raising or reviving interesting questions, such as how far Marshall promoted his own presidential candidacy, whether Jefferson fudged the counting of his own votes, why James Bayard ended a congressional impasse to allow Jefferson's election and his party's loss, and the extent *Marbury* (1803) ushered in a new constitutional balance between the Court and the Congress.

Granted, much of this ground has been covered elsewhere. Recent nice additions by political and legal historians have added to the standard histories both of the era and of these contests. The 1800 election is lately chronicled in John Ferling's *Adams vs. Jefferson: The Tumultuous Election of 1800* (2005) and its aftermath described in Susan Dunn's *Jefferson's Second Revolution: The Election Crisis of 1800 and the Triumph of Republicanism* (2004). Both add to a rich literature, enlivened by the likes of David Hackett Fischer in *The Revolution of American Conservatism: The Federalist Party in the Era of Jeffersonian Democracy* (1976).[1] The legal questions have been recently revisited by Dean James Simon in *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States* (2002) and are part and parcel of standard constitutional histories, such as the Holmes devise books.[2]

Yet novelty is not Ackerman's goal. As with all of Ackerman's writing, he makes no bones about a contemporary aim, a live political agenda, in his work. He challenges the hypocrisy of those in modern constitutional arguments who tout the glory of the text of 1789 while ignoring its requirements, who argue for the purity of the framing while working in a system that, at least, incorporates two hundred years of compromise and experience that cannot be undone. As he writes in "Reverberations," in essence his epilogue, "the Constitution is not a miraculous 'machine that would go of itself.' It is an ongoing dialogue between the inspiring speculations of one generation and the worldly experience of the next.... This is the Founding inheritance, and we abandon it at our peril" (p. 266).

Ackerman is keen to remind us that, since 1800, the dialogue has persisted between those who look to the text and the structure it represents, and those who look to the people and the legitimacy their plebiscites convey.

At times, he sees it as perilously close to collapse owing to the ascendancy of one side of that dialogue over the other. It is the tension that keeps the machine going—a tension not foreseen by the founders nor admitted by many of their successors. At this level of abstraction, Ackerman's book is profound and useful. It is a helpful corrective to the screeds of originalists, and it is a thoughtful balance to interpretavists. In the light of such utility, it seems almost churlish to warn the reader of a few less successful departures, but that is, after all, one function of a review.

Ackerman makes a bit more of some of his evidence than some observers might think it will hold. His speculations of anarchy and rebellion had the Federalists "stolen" the election are a bit breathless, as his comparisons of this alternate future with Latin America might suggest. His anguish at Marshall's many offices in the Adams administration is a bit overdone, given that a strict sense of separation of office was then far from the norm. His questions for Jefferson's counting of the Georgia vote seem more of a curiosity than an indictment, since it seems quite unlikely that Georgia would have voted any other way.

To me, the big question is how a law professor could so ignore the influence of the law. To read Ackerman's narrative of Marshall is to read of a skillful politician, indeed a politician so sneaky that his most political moves went undetected by his contemporaries. As seen here, William Marbury's and Hugh Stuart's cases were not really questions of law but vehicles for political maneuver and compromise. Yet, there is much room for seeing their causes as law cases, plenty of precedent for Marbury's result and a real argument for the Constitution as applied to Stuart's claim according to law. Ackerman all but ignores Marshall's consideration of such questions as the role of a federal common law, the arguments ongoing over reception, and the fundamental questions of the degree to which custom or common law could provide rules of decision in constitutional cases.

To raise these considerations does not suggest that politics played no role on the Marshall Court, but to fail to raise them suggests that the law played none, and that suggestion would be, I should hope, far more contentious. And yet, at that extreme, I think we can be confident that Ackerman would balk at such inferences. After all, he argues that Marshall recurrently looks to the text as the guide to the law and sees the Constitution as the settlement of later disputes. This is a legal analysis of a high order, and it must take some of its strength from

the surrounding legal culture. Ackerman's prose is exciting, at times compelling, although the book as a whole feels more like two stories than one. Still, if it suffers a bit from recurrent summary of arguments yet to come, these summaries do keep the reader on course through the sea of detail to the far shore of his synthesis.

His purpose is admirable, to demonstrate that the grand compact conceived in 1787 had a long and troubled labor, far more complicated and troubling than the cartoon version of the Framing. He is right to remind us that only at our peril do we ignore the medicine that has long been needed to soothe those pains: interpretation of the past and compromise with the present.

Notes

[1]. The writings on this field, both as a matter of the history of political parties and of the United States, is rich. In addition to David Hackett Fishcher, see, e.g., Stanley Elkins and Eric McKittrick, *The Age of Federalism* (New York: Oxford University Press, 1995).

[2]. Julius Goebel Jr., *History of the Supreme Court of the United States*, vol. 1, *Antecedents and Beginnings to 1801* (New York: Macmillan, 1971); and George Lee Haskins and Herbert A. Johnson, *History of the Supreme Court of the United States*, vol. 2, *Foundations of Power: John Marshall, 1801-15* (New York: Macmillan, 1981).

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