Articles

Book Review – An Extremist Monarchy in the Guise of a Republic? Some Remarks on Ackerman's Proposals for the American Presidency

By Marco Goldoni[*]

[BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (Belknap/Harvard University Press, 2010); ISBN-13: 9780674057036; 280 pp; $ 25.95 Hardcover]

A. Introduction

In *The Decline and Fall of the American Republic*[1] Bruce Ackerman focuses on the dangers associated with the rise and expansion of the imperial presidency. As known, this formula was originally introduced by Arthur Schlesinger back in 1973.[2] However, while Schlesinger was mostly worried by the impact of foreign politics on American institutional life, Ackerman intends to criticize the imperial presidency for its impact on constitutional politics. In other words, in his view, the rise of a plebiscitarian presidency at the helm of the most powerful administrative and military machine directly threatens the functioning of the separation of powers. This is the second major attack he has launched against some of the myths surrounding American constitutionalism. The first one stated that the American constitution is a text whose life spans over two centuries, touched only by some important amendments approved during the Civil War.[3] By introducing the twin ideas of constitutional regime and constitutional transformation, Ackerman has put forward a powerful demystification of the traditional interpretation of American constitutional development.[4] The second attack affirms that despite the wide consensus on the solidity of

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[1] BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010).

[2] ARTHUR SCHLESINGER, THE IMPERIAL PRESIDENCY (1973).

[3] As known, this is one of the major themes running through BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) and WE THE PEOPLE: TRANSFORMATIONS (1998).

[4] For a developmental perspective *see* the classic STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE (1993).

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the American model of the separation of powers, presidentialism (and the related separation of powers that comes with it) in the contemporary age turns out to be quite a dangerous model for a republic.

The book is a timely diagnosis of the pathologies effecting the presidency. It intends to open a debate among political scientists and constitutional lawyers on how to restrain potential and actual problems.[5] Some of the proposals presented in the book will be assessed by using two of Ackerman's own parameters: 1) restraining the politics of unreason, and 2) upholding the rule of law. Nonetheless, this review will not follow Ackerman's advice, i.e. to treat all his proposed reforms in a holistic way. "Call it the promise of holism; we should resist the temptation to search for a single magical solution to the pathologies of presidential power."[6] While this is certainly a valid point, the book treats so many themes (from the crisis of professional journalism to the ethics of the military, from the abuses of the primaries to the irrational design of the Electoral College), that it would clearly be impossible to do justice to its complexity in this space. As such this article will be structured as follows. In the next section, the main themes of the book will be briefly outlined according to the two levels that Ackerman himself stresses: the political and the legal. Then, the third and the fourth sections concentrate on two of Ackerman's proposals to counter the negative effects of executive constitutionalism: Deliberation Day and the creation of a Supreme Executive Tribunal. The final section focuses on the potential contradictions between Ackerman's much-celebrated model of constitutional transformation, and his considerations on the dangers carried by an extremist presidency.

B. Diagnosis and Prognosis: An Extremist, Irrational and Unilateralist Presidency

The first two parts of Ackerman's book are devoted to his diagnosis and prognosis on the current constitutional situation. Ackerman's diagnosis boils down to the idea that over two centuries, the most dangerous branch has turned out to be the presidency rather than Congress (as feared by the Founding Fathers). The framers could have never imagined that the president would stand at the head of a massive bureaucracy and of the greatest military power when they wrote the Constitution. The remedy for countering the ambition of every branch was to strictly separate powers.[7] Ackerman acknowledges that here lies the genius of American constitutionalism, but he also admits that the strict separation of powers has allowed the uncontrolled growth of an exorbitant power for the presidency.

[5] *Cf.* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006).

[6] ACKERMAN, *supra* note 1, at 174-75.

[7] The literature on the American separation of powers is obviously immense. *See* among many, JOHN VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967); from the perspective of the 'constitutional development' school, *see* GEORGE THOMAS, THE MADISONIAN CONSTITUTION 16-33 (2008).

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Under this aspect, the Framers' constitutional architecture operates in a way that would be unrecognizable to themselves. The transformation of the president from an eighteenth-century notable to a twenty-first-century demagogue represents solid proof of this malfunction.

According to Ackerman, three dangers come with this kind of modern presidency. The first one is extremism, which the author defines as "distance from the median voter."[8] No matter how correct the extremist view turn out to be, in a constitutional democracy, the opinions of the majority count and cannot be disregarded. The emergence of two factors has introduced the risk of extremism in a permanent way into the system. The rise of the party system brought every generation of political activists to

> [I]mpress the presidency with new plebiscitarian meanings – with the Democratic Party of Andrew Jackson, the Republican Party of Abraham Lincoln, and the Populist-Democratic Party of William Jennings Bryan each using the presidency as an engine of radical transformation.[9]

But at the same time, parties used to constrain the presidency's plebiscitary thrust because candidates "were remote figures, who relied on local party newspapers [….] and local party."[10] Woodrow Wilson's presidency is usually said to represent the decisive breakthrough, but for Ackerman, the real turning point that took the role of gate keeping away from the parties is seen in the rise of the primary system. Since 1968, primaries have forced candidates to create their own electoral machine, and in so doing they have inverted the relationship between the party and the candidate. If one adds to this picture the non-marginal detail that citizens who turn out at the primary are statistically the most motivated and enthusiastic among the population, the end result is a candidate whose profile is capable of mobilizing supporters, but is still someone remote from the passions and interests of the median voter. This makes it possible that the candidate will not be the expression of centrist views, but rather, will be quite extremist in his position most of the time.[11] Of course, the two winning candidates may swing to the centre to compete more effectively during the election. But after having won, the president returns to his or her original position, governing further away from the electorate for four years.

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[8] ACKERMAN, *supra* note 1, at 38.

[9] *Id.* at 16.

[10] *Id.* at 17.

[11] On the effects of the primary system on the selection of presidential candidates *see* ALAN ABRAMOWITZ, THE DISAPPEARING CENTER (2010).

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According to the author, the second danger is constituted by a politics of unreason. Once elected, presidents tend to use contemporary media power as a tool to manipulate public opinion. The adoption of polls as a modern form of daily plebiscite enhances this manipulative aspect. The point is that decades of polling have had a profound impact on the public mind, and no president could do without them. Moreover, one of the potential checks on presidential manipulative strategies can be found in newspapers, which provide for facts and stories, often in a relatively impartial fashion. By creating moments where citizens can get information in order to form their judgments, professional journalism fostered a politics of discussion and reflection. In this way, and also by dictating the agenda to other media, they restrain the presidency "from indulging in particularly egregious media manipulations and distortions."[12] But their decline[13] seems to open new possibilities for the presidency to bend mass media to its own agenda.[14] Furthermore, these risks (extremism and irrationality) are tempered by other bonds that tie the President to congressional and party leadership. The President needs to gain their support for re-nomination, and he also needs their control over local party organization. However, these ties are now greatly attenuated. Parties are still at the core of American constitutional life,[15] but they are not organized along the same lines they used to be. At this point, charismatic leadership plays a growing and almost essential role in shaping party policies.

The third danger is unilateralism. This is also made possible by the peculiarity of the US separation of powers. From the inception of the republic, the Constitution has given the president the right to make the first move when interacting with the other branches. In a time where decisions are taken at a much faster pace, this is not a negligible advantage. Presidents can act unilaterally and place the burden of undoing the damage on Congress or the Supreme Court. Moreover, at the dawn of the republic, the State bureaucracy was rather minimal and presidents did not have any staff at their disposal. Beginning with the New Deal however, the bureaucratic State began a constant expansion, and required the presidency to resolve the issue of the effective manipulation of its vast administrative apparatus, as per its will. The White House has always functioned as a centripetal force, but according to Ackerman, it was the Reagan administration that made a decisive breakthrough in this regard. President Regan was the first one to secure the compliance of the regulatory agencies with his favored philosophy (*i.e.* cost-benefit analysis). From the time of the Reagan administration, all agencies in the executive branch had to submit to

[12] ACKERMAN, *supra* note 1, at 26-27.

[13] ROBERT MCCHESNEY & JOHN NICHOLS, THE DEATH AND LIFE OF AMERICAN JOURNALISM (2010).

[14] According to Ackerman, the Internet cannot become a substitute for the gate-keeping role of professional journalism, unless some new measures are introduced (such as internet vouchers) to support investigative reporting that generates broad public interest. On the limited impact of the Internet on democratic life, *see* MATTHEW HINDMAN, THE MYTH OF DIGITAL DEMOCRACY (2009).

[15] Daryl Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

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the analysis of the White House before every major regulatory initiative.[16] The Clinton administration not only consolidated this practice, but brought it to a higher level, by supporting the view that by virtue of being elected by the people, the president has the right to overcome any obstacles that prevent the fulfillment of his electoral mandate. So, "[h]is (Clinton's) White House staff began to issue what came to be known as 'presidential directives,' to kick-start the regulatory process in the agencies."[17] When President Clinton lost Congress to the Republicans in 1994, this unilateral approach became even more prominent. Administration and regulatory agencies, through the powerful and partisan tool of the White House staff, came to be seen as the main engine for promoting and realizing public policy. Elena Kagan, who played an important role in the White House staff during those years, acknowledged the danger that this kind of unilateralism carried with it: lawlessness. However, in a highly influential Harvard Law Review essay, she defended this approach against regulation, by noting that the costs of lawlessness are outweighed by the president's claim to democratic legitimacy.[18] In this way, a bipartisan elite consensus around the relationship between the presidency and the administrative branch was built.[19]

The other new powerful tool in the hands of the President is represented by the presidential signing of statements. A great deal of legislation takes the form of fairly complex packages, some of which a President may think is urgently required for the public interest. Vetoing an entire bill because some narrow feature of a package is arguably unconstitutional may be asking too high a price, in terms of sacrificing the common good. So, the argument goes, the President can sign the bill, but also issue a statement that declares some of the provisions unconstitutional. After all, as noted by Peter Shane, "each President sears to protect and defend the constitution. If he thinks part of some bill is unconstitutional, should he not feel duty-bound to veto what Congress has enacted?"[20] Since Presidents and their staffs have only ten days to sign or veto a bill, they are left with little time to reflect on the constitutionality of the bill. However, the shabby legalistic form of the statements— usually written by the Office of Legal Counsel (OLC) in the Justice Department, or by the Legal Counsel to the President in the White House (WHC)— covers

[16] PETER SHANE, MADISON'S NIGHTMARE 146-156 (2009).

[17] ACKERMAN, *supra* note 1, at 36.

[18] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2231-2246 (2001).

[19] To the point that theories of the so-called unitary executive are now thriving; supporters of this view believe that the Constitution grants the president plenary control over the bureaucracy; *see* STEVEN CALABRESI & CHRISTOPHER YOO, THE UNITARY EXECUTIVE (2008). According to this perspective, Congress has no power at all over regulatory agencies. For a critique of this theory, *see* JOHN MACKENZIE, ABSOLUTE POWER: HOW THE UNITARY EXECUTIVE THEORY IS UNDERMINING THE CONSTITUTION (2008). For an explanation of the emergence of this theory, *see* Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070 (2009).

[20] Peter Shane, *Presidential Signing Statement and the Rule of Law as an "Unstructured Institution,"* 16 WM. & MARY BILL RTS. J. 231, 240 (2007).

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their partisan nature by presenting them as legal acts. The practice of the presidential signing of statements is highly dangerous for the separation of powers. It allows the President to circumvent Congress by stealth, because it allows a President to avoid compliance with certain legislative provisions. By giving to the statement a legal form that is taken to be increasingly authoritative,[21] the influence of the president's *pronunciamentos* on the constitutionality of statutes questions the centrality accorded by the broader legal community to the Supreme Court, when it comes to constitutional interpretation.[22] In the long term, the rise of this kind of executive constitutionalism will put the Justices of the Supreme Court on the defensive, in case of a conflict with the presidency.[23]

This grim diagnosis,[24] it is important to stress, does not depend on personalities, but on structures. In Ackerman's view, the election of Barack Obama has not changed anything substantially. Indeed, the risk of irrationality and lawlessness is always looming, and cases like the Watergate, Iran-Contra, Guantanamo and the "torture memos" confirm this.

Ackerman's prognosis is devastating. He draws several crises scenarios where the role of the President would be to offer quasi-authoritarian solutions to possible (and maybe probable) constitutional impasses. Constitutional crises may be brought about by different sources, from an election gone wrong because of the electoral college system, to a real crisis caused by a sweeping terrorist attack or a devastating financial crisis. In these hypothetical, but not impossible cases, a runaway presidency may bring about (un)constitutional transformations by challenging and defeating other powers. In this case, republican values of American constitutionalism would be put under stress and eventually abandoned. Ackerman admits that given the electoral calendar underlying American political life, there could still be some kind of democratic politics, but republican values would be more and more threatened.

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[21] Ackerman rightly point to the fact that in 1986, the Justice department convinced law-book publishers to include presidential signing statements as part of each statute's legislative history. A point has been reached where opinions from the Office of Legal Counsel has been collected in a casebook: *see* H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEY GENERAL (1999).

[22] Ackerman attributes the primacy in the interpretation of the Constitution to the Supreme Court, and this is what distinguishes his dualist understanding of American constitutionalism from popular constitutionalism: *cf*. LARRY KRAMER, THE PEOPLE THEMSELVES (2004).

[23] A movement may appropriate a text or a fragment of a presidential signing statement and make it the central narrative of its claim for constitutional transformation. After all, as Robert Cover once remarked, "[E]ach constitutional generation organizes itself around paradigmatic events and texts." *See The Origins of Judicial Activism in the Protection of Minorities*, *in* NARRATIVE, VIOLENCE AND THE LAW 13, 49 (Martha Minow, Michael Ryan & Austin Sarat eds., 1993).

[24] For a critique of the accuracy of Ackerman's diagnosis *see* Trevor Morrison, *Constitutional Alarmism*, 114 HARV L. REV. 1688 (2011).

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In the third part of the book, Ackerman deals with possible political and legal remedies, which may reduce the risk of the decline and fall of American constitutionalism. In particular, he puts forward a series of reforms that would at least constrain the executive branch in the short and medium term. His remedies are intended to be the cure, on the one hand, for the politics of unreason that primaries, information manipulation and the abuse of opinion polls have fostered and, on the other, for the "culture of lawlessness" that the concept of 'government by emergency,' along with an extremely faithful legal staff of the White House has promoted in the last decades. Some of these proposals were already known to Ackerman's readers (the emergency constitution, Deliberation Day and Internet vouchers).[25] The next section will concentrate on what seems to be the most interesting proposal for limiting the politics of unreason: the idea of a Deliberation Day. From the legal angle, the most original reform presented in the whole book is the creation of a tribunal with jurisdiction on the acts of the entire executive branch. After having outlined the strengths and weaknesses of these two ideas, I will try to assess the internal coherence of Ackerman's proposal, keeping his previous works on constitutional transformations in mind.

C. A Political Cure: More Deliberation

The best cure for the dangers of extremism and irrationality is to have more deliberation for citizens. This is perfectly consistent with the ground of Ackerman's theory of constitutional moments, whose legitimacy is mainly based on its enhanced deliberative quality.[26] Ackerman (together with Fishkin) proposes to set up a new national holiday before presidential elections (in the book on Deliberation Day, not only for presidential elections, but for congressional elections as well).[27] The process of preparing for Deliberation Day begins one month before the actual date, by asking the candidates to identify one or two "important issues" confronting the nation. On Deliberation Day itself, the two candidates would debate these issues, with citizens then gathering in groups throughout the nation to watch the debate. Once it is over, the citizen-groups would divide into smaller ones, and these latter groups would debate among themselves for the whole day, having had the chance to pose questions to local representatives of the two parties. The merits of this proposal are clear. As Ackerman reminds us:

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[25] *See* BRUCE ACKERMAN, BEFORE THE NEXT ATTACK (2006); BRUCE ACKERMAN & JAMES FISHKIN, DELIBERATION DAY (2004); Bruce Ackerman & Ian Ayres, *One Click Away: The Case for the Internet News Voucher*, *in* THE FUTURE OF JOURNALISM (Richard McChesney & Victor Packard eds., forthcoming).

[26] *See* Frederick Schauer, *Deliberating About Deliberation*, 90 MICH. L. REV. 1187 (1992); Mariela Vargova, *Democratic Deficit of a Dualist Deliberative Constitutionalism: Bruce Ackerman and Jürgen Habermas*, 18 RATIO JURIS 365 (2005).

[27] ACKERMAN & FISHKIN, DELIBERATION, *supra* note 19, at 97-108.

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> [P]articipants are far better informed on the issues at the end of the day. Deliberation makes a difference in the group's final judgments– there is a statistically significant change in more than two-thirds of the cases. The process is very democratic. Voters from all classes learn and change their opinions – not just the more educated.[28]

As is known, Cass Sunstein has criticized the idea that a day spent on deliberating presidential elections can really change citizens' opinions.[29] This aspect will not be discussed here, but is very interesting from a constitutional perspective, to note how Deliberation Day impacts the institutional structure. It seems that Ackerman underestimates the value of political representation by taking for granted the framework within which American constitutionalism is based, in that there will always be the same two parties. This criticism sounds similar to the one usually made with respect to deliberative democracy— although it purports to be inclusive, deliberative democracy actually excludes some viewpoints and artificially restricts dialogue.[30] In other words, no deliberation takes place in a vacuum, and it pays to be aware of the structures that will inevitably dictate the direction, and even sometimes, the outcomes of deliberation. In taking for granted the two-party system, he sides with the Supreme Court's decisions in the area of electoral law. As Richard Pildes has noted, by introducing the idea of the "constitutionalization of democracy," the Supreme Court has constantly supported and protected the major parties and their distinctiveness.[31] In this context, therefore, representation should come before deliberation.[32] As it stands right now, Deliberation Day seems to be entrenched in a two-party system that favors the role of the President because the parties are both strong supporters of the presidency. Furthermore,

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[28] Another positive thing about Deliberation Day concerns the revitalization of local party organization, which for the first time will no longer make the presidential campaigns to operate independently of local party organizations. Finally, the organization of Deliberation Day is made in such a way that it forces the candidates to the presidency to put forward rational and articulated proposals; *see* ACKERMAN, *supra* note 1, at 129.

[29] Sunstein thinks that Deliberation Day polarizes opinions. *See e.g.* David Schkade, Cass Sunstein & Reid Hastie, *What Happened on Deliberation Day*, 95 CAL. L. REV. 915 (2007). A reply to Sunstein's criticism can be found in JAMES FISHKIN, WHEN THE PEOPLE SPEAK (2009).

[30] Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy*, *in* DEMOCRACY AND DIFFERENCE 120-35 (Seyla Benhabib ed., 1996).

[31] Richard Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 4 (2004).

[32] On this *see*, among many publications, NADIA URBINATI, REPRESENTATIVE GOVERNMENT (2006). The absence of a proposal to deal with the problem of gerrymandered districts confirms that Ackerman does not frame his deliberative proposal within the template of political representation. For an overview of the debate on partisan gerrymanders, *see* Samuel Issacharoff & Pamela Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541 (2004).

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Deliberation Day not only structures the debate in a certain way, that is, by preserving the two-party system, but it also entrenches this system preventing any challenge to it. First of all, it gives the access to televised debates to only those candidates who can get fifteen percent approval in the polls;[33] it also erects practical barriers against a more accurate representation, by allowing parties to set the conditions that make it harder for third parties to compete in politics.[34]

Finally, given that the gist of Ackerman's proposals lies in what may be defined as deliberative constitutionalism, it remains unclear why a run between two candidates is better, from a deliberative point of view, rather than having three, four or five candidates. Ackerman emphasizes throughout the book the dangers of having candidates who might represent extreme views. One of his major worries, as we have seen, concerns the primaries, because they may provide a channel for representatives who channel extreme viewpoints, for both parties. Primaries can be the tools of extremist zealots who might take over a party, often thanks to the fact that the primary itself is closed.[35] But this auspicated move toward the centre of both candidates cannot be proved to be the best solution from a deliberative perspective. One may detect a contradiction here: on the one hand, Ackerman adopts a deliberative stance towards constitutionalism. In the book written with Fishkin, he stipulates among the conditions for good deliberation one of "normative completeness."[36] "Deliberation Day requires a sustained confrontation with a series of different views."[37] But on the other hand, he fears the extremisms of potential candidates arising from the primaries. However, discussion over an increasingly narrow set of differences does not seem to exhaust the possibilities of robust deliberation. Nothing prevents Deliberation Day from being structured, for example, around three or four candidates. But as it stands in Ackerman's book, the risk is that a remedy like Deliberation

[33] ACKERMAN & FISHKIN, DELIBERATION, *supra* note 19, at 236 n. 11: "If a third-party candidate is winning the support of 15 percent or more of the voters in leading opinion polls, he or she would qualify for Deliberation Day, and we would modify the format appropriately." Part of the circularity of the argument becomes evident at this level. In another passage of THE DECLINE AND FALL, *supra* note 1, at 131, Ackerman states that "Dday will also cut down the appeal of traditional polling as a democratic legitimator." It sounds ironic then, that opinion polls determine what are the parties to be represented during Deliberation Day.

[34] This becomes clear in the Supreme Court's case law. *See e.g.*, Arkansas Educational Television Commission v. Forbes, 523 U.S. 666, No. 2 (1998— allowing limits on third-party access to televised debates), Storer *et. al.* v. Brown, Secretary of California *et. al.*, 415 U.S. 724 (1974— upholding restrictions on independent candidates for office, and affirming that states can take measures to prevent "unrestrained factionalism"); for a general survey, *see* Jessica Furst, *There Is a Crowd: Supreme Court Protection for the Two-Party System*, 58 FLA. L. REV. 921 (2006).

[35] *See* the decision of the Supreme Court that upheld the constitutionality of closed primaries: California Democratic Party v. Jones, 530 U.S. 567 (2000).

[36] ACKERMAN & FISHKIN, DELIBERATION, *supra* note 19, at 182.

[37] *Id*.

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Day will entrench the two-party system by giving both parties a systematic advantage over other competitors.[38]

This entrenchment can somehow be modified. To be precise, nothing in Ackerman's proposal prevents a different organization of Deliberation Day. But following a common consensus among political scientists about the nexus between presidentialism and two-party system,[39] he notes that the link between two-party system and the plebiscitarian presidency by writing that "the mobilized politics of two-party competition transformed the presidency into a plebiscitarian office."[40] Moreover, in an essay on the separation of powers, Ackerman notes that it would be a disastrous error to combine presidential democracy with proportional representation for the legislature, since a fragmented legislature could invite a presidential coup and proportional representation tends to lead to fragmentation.[41] Nonetheless, if the aim of Deliberation Day is to constrain the politics of unreason carried by this kind of presidency, one is left with the impression that the author might have introduced more diversity in representation in order to put the presidency in a condition where it is necessary to find compromises with several political forces in order to win the election.[42]

D. A Legal Remedy: The Supreme Executive Tribunal

The major innovation proposed by Ackerman in this book is the Supreme Executive Tribunal, a new institution shaped as a court.

> Its nine members will think of themselves as judges for the executive branch, not lawyers for the sitting president. Members of the tribunal will serve (staggered) twelve-year terms, giving each president

[38] *Cf.* Chad Flanders, *Deliberative Dilemmas: A Critique of* Deliberation Day *from the Perspective of Election Law*, 23 J.L. & POL. 147 (2007).

[39] Juan Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference? in* THE FAILURE OF PRESIDENTIAL DEMOCRACY 3, 34 (Arturo Valenzuela & Juan Linz eds., 1994), where Linz writes that "several authors have noted that most stable presidential democracies approach the two-party system according to the Laakso-Taagepera index, while many stable parliamentary systems are multiparty systems." However, it is not an established truth that the presidential system does have a two-party system. In particular, it is uncertain what the causes and the effects are. Presidential systems often find themselves in the situation of a divided government, where the branches are controlled by different parties.

[40] BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS. JEFFERSON, MARSHAL AND THE RISE OF PRESIDENTIAL DEMOCRACY 243 (2005).

[41] Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 656 (2000).

[42] On a different level: a major investment on education and social justice would probably bring better results in enhancing the deliberative quality of elections.

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> the chance to nominate three judges during his four years in office. Nominees must gain Senate confirmation – encouraging the president to put forward candidates with established reputation as fair-minded jurists, not political operatives.[43]

The Tribunal is supposed to put a damper on unilateral assertions of power by preventing the OLC and WHC to play a major role in the legal issues surrounding presidential actions. Presidential lawyers will have to confront the prospect of regular and timely judicial review. When they write opinions for the White House they will have to bear in mind that these might be checked by the Supreme Executive Tribunal. In Ackerman's interpretation, they should necessarily take into account the fact that extreme positions usually alienate the judges. The Supreme Executive Tribunal is also supposed to create a new dialogue between institutions. First, this is because the most important cases will be brought to the Tribunal by members of Congress. In this way, an extra channel of institutional communication is open for them, given that the Supreme Court generally denies them standing. The Tribunal provides "a new forum through which Congress and the president can resolve their constitutional standoffs through the rule of law."[44] Second, the Tribunal's opinions will serve as a reference point for the federal courts and will also help the Supreme Court (whose decisions on these issues should remain the last word) to better grasp the key issues at stake.

From the perspective of the separation of powers, the problem boils down to what this institution represents in the dynamics of constitutional transformation. What is his place in the organization of powers? As known, Ackerman recognizes the rise of the activist State and the prominent role played in it by the administration.[45] The latter must be kept separated from presidential jurisdiction. However, when assessed in comparison to the administration, the Supreme Executive Tribunal's composition shows that it shares with other powers a strong link with party political dynamics. To put it briefly, his composition is closer to the Supreme Court than to the *Conseil d'État.*

In another article, Ackerman has pointed out the shallowness and blurriness of the Senate's confirmation for Supreme Court's Justices by affirming that this politics simply does not invite the kind of public debate that would be desirable in a deliberative context, concluding that "if Article V is unusable, and Senate hearings are inadequate, perhaps we should think more creatively about new forms of higher lawmaking for the twenty-first

[43] ACKERMAN, *supra* note 1, at 143.

[44] *Id.* at 146.

[45] *See e.g.*, BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984).

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century?"[46] But then why is another judge-made tribunal introduced into the constitutional system, especially when its appointments follow more or less the same procedure as that for the appointment Supreme Court Justices? Why not experiment at this stage? The position of this new tribunal is critical, because it operates more like the French *Conseil constitutionnel* prior to its last constitutional reform, rather than a court in the standard case. It should be noted, indeed, that the judgments of the Supreme Executive Tribunal are given, not on concrete cases, but *in abstracto* and *ex ante*. These features are part and parcel of the rationale behind the Tribunal. The latter must be able to adjudicate before the bill is signed and becomes effective, producing effects (and perhaps damages) that cannot be easily undone.

Since the Tribunal is placed in a delicate position in an epoch where time is socially accelerated,[47] and where a simple victory at the poll may suffice for the President to claim to be speaking for the people, it is hard to understand why Ackerman chooses to build another Tribunal that looks like a Supreme Administrative Court. Some presidential systems have professional civil servants in charge of administration and permanent government lawyers rendering legal advice before action, with far fewer political appointees.[48] The fact that in the American constitutional system, the President will want to replace professional administrators – whose interests might lead them to try and play off congressional and White House leadership against each other – with political loyalists every time he deems this substitution or replacement of professional administrators to be appropriate, does not mean that this desire must, or should be accommodated. This is moreover strange because this Tribunal could have represented a chance to recognize the existence of another branch, which Ackerman, in another article, calls the "branch of integrity" and the "regulatory branch."[49] On another level, this would further cement the political character of American constitutionalism, by leaving it to the two-party system to determine once again, the nature of the politics of the judiciary.[50] There might be room for some autonomy of the Tribunal, in particular if, after its creation, a long period of divided government might follow. By playing one branch against the other, the Tribunal may gain some relative room for maneuvering. In the case of a unitary government, relative autonomy would be hardly achievable. Indeed, the creation of the Tribunal in times of unitary government would probably reduce this institution to simply another part of the presidential machinery.

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[46] Bruce Ackerman, *Interpreting the Women's Movement*, 94 CAL. L. REV. 1421, 1434 (2006).

[47] HARMUT ROSA & WILLIAM SCHEUERMANN EDS., HIGH-SPEED SOCIETY (2009).

[48] *See*, as noted by Stephen Gardbaum, *Empire Rises*, *in* BALKINIZATION (2010), available at: www.balkin.blogspot.com/2010/10/empire-rises.html (last accessed: 8 March 2012)

[49] Ackerman, *supra* note 34, at 693-96.

[50] MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 300 (2010).

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E. The Presidency and Constitutional Transformation

The previous sections have shown some of the weaknesses of the institutional remedies proposed by Ackerman to remedy the political and legal dangers of an extremist presidency. But, we should not forget that by admission of the same author, "the point of the book [….] is to open up a larger public debate"[51] for, rather unsurprisingly for the theorist of constitutional moments, the "revitalisation of the citizenship commitments of ordinary Americans as they engage in the larger project of self-government."[52] The problem is that in Ackerman's account of American constitutionalism, collective self-government is realized through constitutional moments. How to reconcile the warning on the dangers brought by the plebiscitarian presidency with a theory of constitutional transformation whose main institutional vector is the same kind of presidency? The author does not treat this question in the book, and perhaps, as remarked below, for a good reason. Nonetheless, the role of the President in triggering constitutional transformation should concern him (Ackerman). If the legitimacy of constitutional moments is based on their higher deliberative quality, and if these moments are triggered by the presidency *qua* the national institution *par excellence*, then it is time to start questioning the pattern of constitutional transformation led by an institution that is a vehicle for a politics of extremism and irrationality. In other works, Ackerman has shown how two-party competition transformed the race for the presidency into something that was popularly understood as a mandate for a fundamental challenge to the status quo.[53] This has been usually done through what the author defines as the core of the living constitution: the movement-party-presidency pattern.[54] Within this framework, the task of the presidency is to normalize movement politics by providing a home for social and political movements that view their mission in politics as a mandate for fundamental change. But the abuses of the primaries, of opinion polls and the possibility of a manipulative media politics may distort the position of the President in this model.[55] In the long run, this kind of executive constitutionalism could even become part of a constitutional moment, which would like to affirm the primacy of the executive branch over the other powers. In this case, a constitutional moment might be underway, but possibly one that the author might not wish. Ackerman's silence on this point might be read as a reluctance to grace this kind of mobilization with the language of constitutionalism.[56]

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[51] ACKERMAN, *supra* note 1, at 121.

[52] *Id.* at 119.

[53] ACKERMAN, *supra* note 33, at 246.

[54] Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1759 (2007).

[55] *Id.* at 1786-1787.

[56] Emilios Christodoulidis, *The Degenerative Constitutional Moment: Bruce Ackerman and The Decline and Fall of the American Republic*, 74 MOD. L. REV. 962, 968 (2011).

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Be that as it may, there are two aspects, one theoretical and one institutional, that Ackerman should take into account, because they seem to generate substantial problems within his own constitutional theory.[57] The first concerns the normative dimension of constitutional moments, and should bring about a reconsideration of the normative ground of constitutional moments. Since its first formulation, basic transformations through constitutional moments have been understood by Ackerman as valid independently from their content. The idea is that the commitment made by the people during those moments of mass mobilization becomes constitutional, not in virtue of its connection with previous constitutional history, but because it meets certain deliberative requirements and is authored by the people themselves.[58] It is the people's will, shaped by a lasting period of deliberation, which provides the basis for the legitimacy of a constitutional change. This means that constitutionalization of rights or structures produces only a relative entrenchment, and not a structural one.[59] However, as Ackerman himself seems to recognize about the extremist presidency, certain constitutional changes threaten the stability of the whole constitutional edifice. John Rawls was quite adamant in noticing the contradictions generated by a democratic theory of constitutional change based on the people's will. His example concerning the right to freedom of expression is telling of the problems engendered by an Ackermanian conception of constitutional transformation: "an amendment to repeal the First Amendment and replace it with its opposite fundamentally contradicts the constitutional tradition of the oldest democratic regime in the world. It is therefore invalid."[60] Ackerman underestimates the normative setting of a constitutional change. The latter does not happen in a vacuum, as it could be in the case of the exercise of constituent power after the collapse of a political community. A constitutional transformation, even when it impacts on essential aspects of the constitutional order, still happens in the context of a specific constitutional history and of determinate principles.[61] The question Ackerman should answer is: would the transformation of the presidency be a constitutional transformation, or would it be

[57] *See* the remarks made by Suijt Chaudhry, *Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (ICON) 193 (2008).

[58] BRUCE ACKERMAN, FOUNDATIONS, *supra* note 3, at 266-94.

[59] The debate on constitutional entrenchment is central in American constitutional scholarship, but it is certainly relevant beyond it.

[60] JOHN RAWLS, POLITICAL LIBERALISM 239 (1993).

[61] Of course, Ackerman would probably believe that his normative criteria for constitutional moments, by requiring wide participation, would function as a guarantee against pejorative transformation, under the epistemic Condorcetian assumption that the more people are involved in deliberation, the more are the probabilities that they will get the right solution.

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incompatible with other basic principles of US constitutionalism?[62] In a work that is of enormous influence on the project of *We the People*, Hannah Arendt pointed out that any constitutional change ought to be an augmentation of constitutional heritage.[63] This implies that only those transformations that increase the protection of rights and the empowerment of citizens are legitimate (and constitutional).[64] In constitutional theory there are at least two possible strategies for coping with the legitimacy of essential constitutional transformation. The first is represented by Rawls' idea that certain constitutional essentials are "entrenched in the sense of being validated by long historical practice."[65] Therefore, and this is the point of Rawls' argument, "the successful practice of its ideas and principles [of the Constitution] over two centuries places restrictions on what can now count as an amendment, whatever was true at the beginning."[66] This position, however, does leave open the question of how long it takes to establish change that would become 'historically' validated. The second strategy, which is probably more suitable for Ackerman's project, is represented by Dworkin's moral reading of the Constitution.[67] A constitutional order reflects a moral understanding of the essential aspects of the community whose constitution it is. As a consequence, constitutional changes should always 'fit' in the best moral reconstruction of the polity's constitutional order. In this way, coherence would become pertinent at the higher lawmaking level as well. Here the challenge for Ackerman would be to take into account the value of coherence without committing to the thick moral realism that undergirds the "one right answer."[68]

The second substantial problem, the need to rethink the pattern of constitutional transformation, appears even more urgent once it is recalled that Ackerman has already proposed an alternative method for constitutional change, based on two institutions constitutively exposed to the risk of demagogic manipulation like the presidency and referendums:

> Upon successful re-election, the President should be authorized to signal a constitutional moment and

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[62] Alessandro Ferrara, *Questionable Legality and Unconventional Adaptation: On Ackerman's The Decline and Fall of the American Republic* (Forthcoming).

[63] HANNAH ARENDT, ON REVOLUTION 161 (1963).

[64] For a brilliant introduction to the topic of the unconstitutionality of constitutional amendments, *see* Richard Albert, *Nonconstitutional Amendments*, 22 CANAD'N J'NL OF L. & JURI. 4 (2009); *cf*. GARY JACOBSOHN, CONSTITUTIONAL IDENTITY 34-83 (2010).

[65] JOHN RAWLS, *supra* note 49.

[66] *Id*.

[67] RONALD DWORKIN, LAW'S EMPIRE (1986); FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION (1996).

[68] To be fair, Ackerman might treat this issue in the final volume of the series of WE THE PEOPLE.

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> propose amendments in the name of the American people. When approved by Congress, such proposals would not be sent to the states for ratification. They should be placed on the ballot at the next two Presidential elections, and they should be added to the Constitution if they gain popular approval.[69]

This proposal has already been criticized because it could not ensure deliberation, but only demand a certain level of public support.[70] In light of Ackerman's diagnosis of the dangers of the plebiscitarian presidency, the time has probably come to rethink (or at least, complicate) this scheme of constitutional transformation, by downgrading the role of the president. First, the temporal link between the re-election of the President and the signaling phase that a popular mobilization is underway should be avoided. The intuition that social movements often represent the main engine of deep transformation is correct,[71] but the direct link that Ackerman establishes with the presidency bypasses the intricacies and the complexities of political representation in the House of Representatives and the Senate, which may provide a filter for the more extreme passions that animate social movements. Even though the US Congress does not function, and it does not have the structure of European parliaments, its role in constitutional change might be re-invigorated. After all, Ackerman himself now seems keen on exploring other sources of constitutional change, by recognizing the constitutional value of "super-statutes"[72] and "super-precedents."[73] Obviously, keeping in mind the diagnosis of the constitutional situation, some major obstacles remain, like the majoritarian system of representation, the staggered electoral terms, and the peculiar separation of powers of the American system. Nonetheless, as the recent literature on political constitutionalism is trying to prove, empowering parliaments is essential in order to shape executive policy, to keep governments accountable.[74] Moreover, invigorating the parliamentary style of lawmaking would ensure more representation in the political processes that are supposed to trigger, at least potentially, a constitutional transformation. Finally, Ackerman himself has seemed eager to acknowledge the virtue of a constitutional structure where the separation of powers is not organized around the presidency, but built upon a parliamentary system,[75]

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[69] BRUCE ACKERMAN, TRANSFORMATIONS, *supra* note 3, at 410.

[70] Philip Weiser, *Ackerman's Proposal for Popular Constitutional Lawmaking: Can It Realize His Aspirations for Dualist Democracy?*, 68 N.Y.U. L. REV. 907 (1993).

[71] For a similar take on the transformative role of social movements, *see* JÜRGEN HABERMAS, FACTS AND NORMS Ch. 3 (1996).

[72] On this idea, *see* WILLIAM ESKRIDGE & JOHN FEREJOHN, A REPUBLIC OF STATUTES (2010).

[73] Ackerman, *supra* note 43, at 1742; *cf*. JED RUBENFELD, REVOLUTION BY JUDICIARY (2005).

[74] RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM (2007); ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION (2005).

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and of a constitutional canon where statutes occupy a more prominent place. The problem, to close on a pessimistic note, is that it seems unlikely as a matter of constitutional practice that the presidency will lose its power in favor of other branches in the medium term.

[75] Ackerman, *supra* note 34.

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