

THIS IS NOT A CONSTITUTIONAL MOMENT

Index to posts in this series

Introduction

In this post I described three scripts that different political groups use to describe our current situation. Trump apologists say that we are in a constitutional moment, roughly defined as a period in which the American people update the Constitution by insisting on changing prior interpretations. This script is based on a theory proposed by Bruce Ackerman, Sterling Professor of Law and Political Science at Yale Law School. Ackerman's idea is laid out in his 1991 book *We The People: Foundations*, and is discussed in the second of his Oliver Wendell Holmes Lectures of 2006. It's gained prominence since the 2024 election and the wholesale assault on our governmental system by Trump. For example, the New York Times did a podcast featuring long-time SCOTUS reporter Adam Liptak (link is to transcript).

I was dismissive of this idea, partly because I'd never heard of it, and partly because it seems weird that anything about Trump would fit into a responsible theory of the Constitution. And, of course it doesn't fit: Trump apologists have to distort and prune the theory to make seem vaguely plausible.

The dualist Constitution and the Constitutional Moment

Ackerman calls his theory a dualist constitution. He describes the basic ideas. In our system of representative democracy, power flows from the people. Some decisions are made directly by the people, such as elections. Some are made by the government directly, for example rules and executive orders; and some indirectly through representatives of the people, such as

laws and appointments to certain bodies. Thus, a dualist constitution.

With respect to constitutional issues, the people can act in two ways. They can amend the Constitution following Article V. This hasn't been done in a long time, and may no longer be possible. The second way is the relevant part of Ackerman's theory.

Most of the time the people do not engage in constitutional debates, or even extended policy debates. We are consumed by the demands of our private lives, work, family, community, and that's as it should be. These are the blessings of liberty. But occasionally some event occurs that requires the people to pay attention and make a decision. I'll focus on the Civil Rights Era as in the Lectures.

In the Lectures Ackerman says:

In past work, I have shown how key constitutional transformations in American history have passed through a distinctive institutional dynamic, consisting of five phases: signaling, proposing, triggering, ratifying, and finally consolidating the new principles supported by the American people. Fn omitted.

Very briefly, signalling is the recognition by a significant institution or large group of people that change is needed and must be considered, and the issue is forced to the forefront.

Proposing is the stage at which the issue is debated and specific proposals are made.

Triggering is the adoption of new legislation or a change made by SCOTUS, or new rules adopted by the federal government. Ratification takes place as the moving group wins elections.

Consolidation occurs as the new principle is embedded in confirming cases and bureaucratic practice.

In the case of the Civil Rights Era, *Brown v. Board* was the signal, the marches,

demonstrations, citizen organizing, and agitation that followed are the proposing stage, The trigger was the Civil Rights Act of 1964. The ratification was that year's landslide victory of Lyndon Johnson over Barry Goldwater along with huge majorities in Congress. The consolidation phase took place as the Voting Rights Act and other legislation passed with substantial bipartisan support. Richard Nixon continued and reinforced enforcement of those laws, and SCOTUS upheld the new laws and allowed powerful judicial enforcement.

Ackerman calls examples like the Civil Rights Era Constitutional Moments. The Trump crowd claims that this is one.

Applying the Ackerman theory

It's difficult to diagnose the current state of a society, as Leszek Kolakowski tells us. At the time Ackerman was writing his book, the Civil Rights Era was 25 years in the past. His analysis in the Lectures was written 40 years later, which allows for at least some historical perspective, We are operating in real time, so I think it's not safe to apply historical theories blindly; caution is essential.

Even so it seems obvious that the Trump crowd has nothing like the record of the Civil Rights Era to support a claim that we are in a Constitutional Moment. Trump never won a majority in an election, let alone a landslide victory like Johnson's.

The Republicans, now firmly under Trump's control, have never won a substantial majority in the House, and their fragile majority was won through computerized racial and political gerrymandering sanctioned by the Republican SCOTUS. The Republicans have a small majority in the Senate, but the Republican Senators represent fewer people than the Democratic Senators.

Trump has no popular support for his policies. His agenda is set out in Project 2025, and it was so toxic he disavowed it during the

campaign. His favorability numbers are and have been negative. Polling consistently shows that a substantial majority of Americans loathe his policies. The brutality of his immigration enforcement, his attacks on the judiciary, his refusal to comply with the Epstein Transparency Act, his stupid tariffs, cutting research in violation of appropriation laws, and his foreign wars, none of them have even close to majority support.

I do not think the MAGA movement is a grass roots expression of the will of the American people. There are always racists and fascists, and authoritarians and anti-Semites, and religious crackpots, but the vast majority of Americans mostly ignore them. Trump's not-crazy voters are largely influenced by demagogues, liars, and grifters, funded by filthy rich right-wingers with astonishing views about the rest of humanity. Without them, he's a blow-hard flogging fraudulent universities.

The slightly bigger picture

Ackerman is a firm believer in the idea of a living Constitution. To put it very simply, the Constitution is a mix of organizational and operational rules; and a set of aspirations. The former include the establishment of the three branches, allocation of powers, and election rules. The latter are mostly contained in the Preamble and the Bill of Rights. Almost all of it is open to some degree of interpretation. The Supreme Court arrogated to itself the power to make final decisions on the meaning of both aspects of the Constitution.

But in the end, the power of government lies in the people. If SCOTUS gets it wrong, the people force change. That's one way to understand the Civil Rights Era: the absurdly limited interpretation of the Reconstruction Amendments in the *Slaughterhouse Cases* and the *Civil Rights Cases* established racial segregation as our baseline, and overturning it took decades and deaths.

Another of Ackerman's examples is the New Deal. For decades SCOTUS struck down almost all progressive legislation regulating business and empowering unions, in such cases as *Lochner v. New York*. But the Depression was such a hideous problem that SCOTUS capitulated.

That's not likely to happen given the relationship between Trump and SCOTUS Chief John Roberts. The front page pic of Trump and Roberts at the 2025 State of the Union address is the lead pic in this article at Law & Crime, titled "Chief Justice Roberts just handed Trump another win on foreign aid cuts after admin complained of judge's 'brinkmanship'". The title and the pic are a not-so-subtle sneer at Roberts' claims of independence from Trump.

Electoral victories won't fix that.

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