

8. The British constitution in Ackerman's worldview: a critique

Martin Loughlin

1. INTRODUCTION

Why have some states been able to construct robust and responsive governmental arrangements over often diverse territories while others, struggling to establish governmental authority, have felt obliged to adopt authoritarian practices? This question has excited the interest of many scholars concerned with the character of the modern state and how it builds its authority. The topic has generated a rich literature, which extends from the classic works of Alexis de Tocqueville, Max Weber and Otto Hintze to the more recent studies of such historical sociologists as Charles Tilly, Michael Mann and Thomas Ertman.¹

These studies have not produced a singular or simple theory of state-building. The determinative influence of warfare in the process of state-making com-

¹ Alexis de Tocqueville, *Democracy in America*, H. Reeve trans., D. J. Boorstin intro. (New York: Vintage Books, 1990); Max Weber, *Economy and Society*, G. Roth and C. Wittich ed. (Berkeley: University of California Press, 1978), 2 vols; Otto Hintze, *The Historical Essays of Otto Hintze*, F. Gilbert ed. (New York: Oxford University Press, 1975); Charles Tilly, 'Reflections on the History of European State-Making' in Tilly ed., *The Formation of Nation States in Western Europe* (Princeton: Princeton University Press, 1975), 3-83; Tilly, 'War Making and State Making as Organized Crime' in P.B. Evans, D. Rueschemeyer and T. Skocpol ed. *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985), 169-91; Tilly, *Coercion, Capital and European States, AD 990-1990* (Oxford: Blackwell, 1990); Michael Mann, *The Sources of Social Power, Volume 1: A History from the Beginning to 1760 AD* (Cambridge: Cambridge University Press, 1986); *The Sources of Social Power, Volume 2: The Rise of Classes and Nation-States* (Cambridge: Cambridge University Press, 1993); Thomas Ertman, *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe* (Cambridge: Cambridge University Press, 1997); Ertman, 'Explaining Variation in Early Modern State Structure: The Cases of England and the German Territorial States' in J. Brewer and E. Hellmuth ed., *Rethinking Leviathan: The British and German States of the Eighteenth Century* (Oxford: Oxford University Press, 1999), 23-52.

monly runs through these studies, but this theme must be set alongside equally important, though diverse, geographical, cultural, historical, and religious considerations. These studies have led state theorists to conclude that deriving any general laws of political development is fraught with difficulty. The form assumed by modern nation-states exhibits considerable variation, a variation that reflects the unique circumstances of the state's specific formative conditions.

This inquiry into state-building practice has been largely the preserve of political sociology. Recently, however, an analogous theme has engaged the interest of constitutional lawyers. The reason, it would appear, is that over the last thirty or so years, most of the world's nation states have either adopted or radically amended their constitutions. This recent spate of constitution-making has, not surprisingly, given fresh impetus to the field of comparative constitutional studies and raised questions about the methodological basis for its advancement. Situated in the vanguard of this work we find Bruce Ackerman's project, whose ambitious objective is nothing less than to explain 'the rise of world constitutionalism'.² Ackerman aims to devise a comparative method by which the evolution of constitutional government across the world can be explained. He recognises the difficulties of organising the insights of historical studies of constitutional development into 'a compelling comparative framework'. Noting that we could 'make life easy for ourselves by supposing that constitutionalism is a one-size-fits-all ideal that animates a common project throughout the world', he immediately dismisses it as 'unlikely to be true'. But although rejecting a singular model of development, Ackerman nevertheless suggests that by distinguishing 'the accidental from the truly fundamental' a clear pattern of development can be identified.³

Advancing this inquiry, Ackerman argues that three main pathways by which 'constitutions have won legitimacy over the past century' can be discerned. His objective is to 'understand the different historical and cultural dynamics that have transformed each of them into powerful engines of legitimation over the course of the twentieth century'.⁴ Presenting these as ideal types, his intention is to devote a book to the study of each of these three pathways. The first is laid down when 'a revolutionary movement makes a sustained effort to mobilize the masses against the existing regime'.⁵ This path, the subject of the first of the three volumes, is examined by taking as illustrations India, South Africa,

² Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Rev* 771-797.

³ Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Cambridge, MA: Belknap Press, 2019), p.1.

⁴ *Ibid.*

⁵ *Ibid.*, p.3.

France, Italy, Poland, Israel and Iran. The second path is paved when ‘political order is built by pragmatic insiders’ and Britain is taken as the paradigmatic example. The third path is laid out when the old regime loses its authority and a new constitutional order is established, but it is created by existing (though excluded) social and political elites rather than by revolutionary movements. Post-Franco Spain is offered as an illustration of this third type. He labels these three pathways revolutionary constitutionalism, establishmentarianism, and elite construction respectively.

So far, only the first volume on revolutionary constitutions has been published. Its early reception suggests that it is nothing short of a triumph. A book devoted to critical appraisal of his project is replete with praise.⁶ Its contributors suggest that it is a ‘magnificent accomplishment’,⁷ is ‘a great book full of brilliant ideas and insights’,⁸ is ‘magisterial ... an immensely ambitious and impressive work’,⁹ and is ‘a real tour de force’.¹⁰ His theory, Yasuo Hasebe writes, ‘is gripping and overwhelming’,¹¹ with Tom Ginsburg reckoning that ‘it will become a must-read classic alongside the *We the People* trilogy’.¹² In the book’s editorial introduction, Richard Albert claims that all contributors were agreed ‘that the ideas in the book will reset the terms of debate on the most important questions in constitutionalism today’.¹³

High praise indeed, but one immediate problem is that this type of comparative constitutional analysis seems to have been undertaken without reference to the state-building studies published by historical sociologists. Comparative constitutional scholars seem to have assumed that they might begin with a clean slate. And once their exercises are set in that broader state-building context, we are impelled to adopt a more cautionary approach. My main task is to consider whether British constitutional development can be adequately explained once it is assumed to be exemplary of Ackerman’s second path.

⁶ Richard Albert (ed), *Revolutionary Constitutionalism: Law, Legitimacy, Power* (Oxford: Hart, 2020).

⁷ Denis Baranger, ‘Constitutionalism and Society: Ackerman on Worldwide Constitution-Making and the Role of Social Forces’, in Albert (n 6), 35-54, 53.

⁸ Roberto Gargarella, ‘Bruce Ackerman’s Theory of History’, in Albert (n 6), 55-70, 55.

⁹ Stephen Gardbaum, ‘Uncharismatic Revolutionary Constitutionalism’, in Albert (n 6), 133-53, 133, 152.

¹⁰ Menaka Guruswamy, ‘Sustaining Revolutionary Constitutions: From Movement Party to Movement Court’, in Albert (n 6), 291-311, 291.

¹¹ Yasuo Hasebe, ‘Constitutional Revolution, Legal Positivism and Constituent Power’, in Albert (n 6), 179-194, 179.

¹² Tom Ginsburg, ‘Charismatic Fictions and Constitutional Politics’, in Albert (n 6), 115-132, 118.

¹³ Albert, ‘Introduction: A Global Tour of Constitutionalism’ in Albert (n 6), 1-6, 2.

Since only the first volume of Ackerman's trilogy has so far been published, this appraisal must rely on the overview of the establishmentarian model presented in the Introduction to that volume. But before considering Britain as an example of this pathway, the general significance that Ackerman accords to these models of constitutional development must first be examined.

2. ACKERMAN'S PATHWAY MODEL

That Ackerman's pathways are not simply fluid themes but are intended to provide a law-like model of constitutional development is suggested not just by the decision to devote a book to each; it is also clear in the way that he presents the timeline of revolutionary constitutionalism.

Revolutionary constitutions are supposedly revolutions 'on a human scale', by which is meant that revolutionaries 'do not attempt a total makeover of society'; these are political revolutions which focus on '*particular sphere(s) of social and political life ... leaving intact prevailing mores in other spheres*'. Ackerman argues that this type of revolution 'succeeds when it *fundamentally* reorganizes dominant beliefs and practices in a *relatively* short period of time'. Success is gauged through a four-stage time sequence that leads to the fourth stage in the revolutionary process (T4), when 'an increasingly self-confident legal profession engages in an ongoing process which consolidates the judiciary's claims to supremacy'.¹⁴

The time sequence runs as follows. In T1 a revolutionary movement gains power and the 'experience of common sacrifice establishes a charismatic bond between revolutionary leaders and their followers'. Once this bond is routinised, the revolutionary movement is able in T2 to consolidate its position by adopting a new constitution. In T3, however, the revolutionary generation eventually dies out, leaving the regime facing a legitimacy vacuum as revolutionary politics is 'normalized'. T3 is therefore commonly marked by 'a series of succession crises'. At this point the legal orientation of Ackerman's analysis comes to the fore. Suggesting that during T1 most lawyers will have been deeply immersed in upholding the values of the old regime, it is assumed that they will face challenges to their authority as they seek to adapt to the values of the new revolutionary order. Even after the adoption of the new constitution in T2 'there will be lots of work to do before the profession as a whole can fully assimilate the revolution's constitutional principles into its repertoire of legal argument'. But in T3 lawyers gain in self-confidence and 'an increasingly confident judiciary will confront an increasingly normalized political class in an intensive struggle to occupy the legitimacy vacuum left by the preceding

¹⁴ Ackerman, *Revolutionary Constitutions* (n 3), 28, 159 (emphases in original).

generation'. Judicial supremacy emerges from these T3 struggles and this is realised in T4.¹⁵

This time sequence helps us clarify Ackerman's underlying objective. The model is evidently intended to have a predictive value in determining both the track towards, and the timing of, the consolidation of the judiciary's constitutional supremacy. Over the last few decades, there has evidently been a major expansion of constitutional jurisdiction across the world. But does this model explain it?

There are obvious problems. The first is that Ackerman does not precisely define his key concepts. He refers throughout to 'constitutionalism' but never defines this other than to indicate that: 'Constitutionalism, as I understand it, involves the imposition of significant legal constraints on top decision-makers.' He also suggests that his objective is to explain the rise of judicial review 'over the course of the twentieth century', but this really means over the latter half of the twentieth century.¹⁶ Notwithstanding the great differences in historical experience of states that adopt the revolutionary pathway – with some, such as France, being well-established states; some, such as India and Burma, becoming post-colonial states; and some, such as Israel, being newly-founded as states – the narratives begin only in the post-Second World War period (and in the case of Poland only in the 1980s). It is here in particular that the extensive literature on state-building histories might have been used but is overlooked.

Yet, it is the last chapter that is the giveaway. Here Ackerman reviews the history of US constitutional development, not over the last century but throughout the entire period from the founding. His aim apparently is both to explain to Americans that 'while some countries have travelled down the revolutionary pathway to constitutionalism, many have not' and to 'caution Americans against an overly enthusiastic form of cosmopolitanism'. Americans, he argues, should treat the constitutional experience of nations like India or France, South Africa or Poland, with 'special respect' because 'these countries are traveling down the very same Enlightenment pathway that the United States has been following since the Founding'. Americans therefore 'have something special to learn from sister nations whose constitutions have emerged from revolutions on a human scale'.¹⁷ And what might that be? Ackerman provides the answer:

If Roosevelt had taken the country down the Article Five path [and entrenched his reforms in amendments to the Constitution], it would no longer be possible for modern Americans to look upon Madison & Company as the principal authors of

¹⁵ Ackerman, *Revolutionary Constitutions* (n 3), 8, 9, 10.

¹⁶ Ackerman, *Revolutionary Constitutions* (n 3), 2, 1.

¹⁷ Ackerman, *Revolutionary Constitutions* (n 3), 362.

their Constitution. Like French citizens of the Fifth Republic, they would still take pride in their eighteenth-century Bill of Rights and other enduring principles laid down at the Founding. But the New Deal amendments would also require them to recognize that the Constitution had moved decisively beyond eighteenth-century notions of liberty, and that the People of the twentieth century were insisting that all Americans be granted the social and economic rights required for the meaningful exercise of freedom. In taking this step, the United States would have taken its place among revolutionary republics in India and South Africa, France and Italy, and many other places, whose twentieth-century constitutions have explicitly committed their people to the systematic pursuit of social justice.¹⁸

The overarching message is that Americans should learn from the experience of other regimes the importance of banking liberal gains achieved at specific historical periods by formally entrenching them in their Constitution.

Do we really need an elaborate comparative framework to convey this political message? After all, this is a conviction Ackerman has held for at least thirty years.¹⁹ It remains unclear what the pathways model contributes to this argument. Ackerman invokes Max Weber's work as inspiration for the model, arguing that Weber had identified three legitimating logics – tradition, charisma, and legal rationality – but failed 'to recognize the distinctive attractions of constitutionalism'.²⁰ Whether or not correct, there is an obvious danger in overemphasising the scientific character of Weber's work. As his most insightful German analyst notes:

For Weber, history was a 'concatenation of events'. Naturally, there were at particular 'developmental stages' greater and lesser probabilities, greater proximity and removal, elective affinities and strangeness, all of which were recognizable to the trained eye of the scientist. But there was one thing that did not exist in history: 'evolution' as an inner lawfulness and teleological determination of development.²¹

In places, Ackerman's time sequence model is presented as essentially determinative. It is true that Weber maintained that, given the multiple factors in play in any social situation, ideal types might be needed to gain access to reality. But he also warned that reality cannot be derived from such ideal-typical constructions.

¹⁸ Ackerman, *Revolutionary Constitutions* (n 3), 395.

¹⁹ Bruce Ackerman, *The Future of Liberal Revolution* (New Haven: Yale University Press, 1992), 112: 'The challenge is to channel the political energies released by this movement [in 1989] and seize the moment to mobilise popular support for a liberal constitution.'

²⁰ Ackerman, *Revolutionary Constitutions* (n 3), 1.

²¹ Wilhelm Hennis, *Max Weber: Essays in Reconstruction*, K. Tribe trans. (London: Allen & Unwin, 1988), 171.

3. DOES THE PATHWAY MODEL EXPLAIN CONSTITUTIONAL DEVELOPMENT?

My task is to consider whether the British constitution can be treated as a paradigmatic case of establishmentarianism. Before doing so, however, it might first be asked whether the model Ackerman presents in detail in *Revolutionary Constitutions* is able to withstand scrutiny. This is the main issue that the essays in Albert's edited collection seek to answer. And the evidence derived from twenty of 'the world's leading scholars in public law' is, at best, equivocal and, in certain respects, quite damning.²²

One already mentioned problem is the ambiguity of its key concepts. Andrew Arato thus criticises Ackerman for failing to provide 'a clear, normative meaning of "constitutionalism" and at times conflating this term with having a constitution'.²³ Roberto Gargarella suggests that his time sequence model is too schematic: since it is accorded a determinative role but does not examine the social and political forces that shape them, it 'refers to a theory of history that he does not fully expose and explain' and presents an implicit theory that 'seems wrong'.²⁴ Another problem is the fixity of its paths. Neil Walker suggests that Ackerman's model prevents us from seeing variety: 'we may come to the revolutionary path not through a rejection of the imperial yoke or an imposed transnational ideology [but] from another type of constitutional pathway, either the "pragmatic adaptation" for the "elite construction" track [and] where the paths cross is the point where Ackerman's main explanatory framework may begin to lose traction or at least become awkwardly aligned with the facts'.²⁵

Some doubt the historical methodology employed. Gargarella argues that Ackerman's account of history is 'overlegalistic and insufficiently informed by social and economic elements'.²⁶ And Ginsburg suggests that 'Ackerman's analysis of Myanmar is oddly formalist ... we see Ackerman adopt a new emphasis on text [which is] a new argument in the light of the earlier approach of *We the People*'.²⁷ From this, Alon Harel reaches the conclusion that 'Ackerman advances a position which rests on the US parochial experience and, consequently, fails to acknowledge the multiplicity of the ways in which

²² Albert, 'Introduction' (n 6), 2.

²³ Andrew Arato, 'Revolution on a Human Scale: Liberal Values, Populist Theory' in Albert, *Revolutionary Constitutionalism* (n 6), 100.

²⁴ Gargarella, 'Bruce Ackerman's Theory of History' (n 8), 63.

²⁵ Neil Walker, 'Constitutional Crossroads: A View from Europe', in Albert, *Revolutionary Constitutionalism* (n 6) 219.

²⁶ Gargarella, 'Bruce Ackerman's Theory of History' (n 8), 63.

²⁷ Ginsburg, 'Charismatic Fictions' (n 12), 124.

legitimation can be achieved'.²⁸ Similarly, Gargarella concludes that 'in spite of himself, [Ackerman] tends to take the example of the US ... as a model and thus as the parameter from which to examine, understand, and evaluate the workings of foreign constitutional systems'.²⁹

A further doubt is whether Ackerman's choice of case studies actually vindicates the validity of his model. He himself recognises that South Africa 'provides an important variation on the ideal-typical form of development' and that the French Fourth Republic 'is the exception' because 'the judiciary made no similar claims to supremacy during the regime's brief existence'.³⁰ But the reviewers go much further. Baranger disagrees with Ackerman's characterisation of the French system as presidential: 'The Fifth Republic is very much a parliamentary government in its own right'.³¹ Ginsburg argues that Myanmar does not belong in the revolutionary category: 'The actual Constitution, adopted unilaterally by the military in 2008, was a top-down affair, not even an elite pact'.³² Arato doubts that Israel's founding and Iran's Islamic Revolution are 'rightly included under the category of "revolutions on a human scale"', suggesting that the claim can be justified only once we agree with Tocqueville that no revolutions are genuinely total and he concludes that: 'As in India, Poland and South Africa, here too in France and Italy, it was not the logic of revolution that produced constitutionalism'.³³

The most fundamental disagreement is over the case of South Africa. Arato states that 'Ackerman rather desperately tries to have us accept the idea that South Africa was not a culmination of negotiated transitions ... but a revolutionary one', arguing that this interpretation 'is contrary to all the experts on the subject as well as the most important participants'.³⁴ Arato's scepticism is bolstered by James Fowkes who maintains that Ackerman's 'other paradigm, elite construction, also offers a promising fit', that most accounts indicate that the Constitution was 'a negotiated bargain', and concludes that 'despite the presence of mass mobilisation in its history, South Africa's constitutionalism is not revolutionary ... [but] an exercise in insider reform'.³⁵

²⁸ Alon Harel, 'A Defence of Non-representational Constitutionalism: Why Constitutions Need not be Representational', in Albert, *Revolutionary Constitutionalism* (n 6), 19-34, 19.

²⁹ Gargarella, 'Bruce Ackerman's Theory of History' (n 8), 67.

³⁰ Ackerman, *Revolutionary Constitutions* (n 3), 159-60.

³¹ Baranger, 'Constitutionalism' (n 7), 49.

³² Ginsburg, 'Charismatic Fictions' (n 12), 126.

³³ Arato, 'Revolution on a Human Scale' (n 23), 94, 111.

³⁴ *Ibid.*, 104.

³⁵ James Fowkes, 'Choosing to Have Had a Revolution: Lessons from South Africa's Undecided Constitutionalism' in Albert, *Revolutionary Constitutionalism* (n 6), 358, 366, 367.

Daniel Halberstam highlights the limitations of the model's focus on revolutionary struggles within the state.³⁶ By focusing on such revolutionary struggles, he shows that Ackerman neglects the fact that T4 status of judicial review 'gained its force in France not so much from revolutionary charisma as from engagement with Europe'. In a similar vein, Stephen Gardbaum argues that Ackerman fails to consider 'the spontaneous, leaderless, or movementless constitutionalist revolution' such as those in Mexico, the Philippines, Romania, and Tunisia, resulting in the book providing 'a partial account of the phenomenon of revolutionary constitutionalism not the whole'.³⁷ This type of critique leads Ginsburg to express concern as to whether the distinction between elite pact and establishmentarianism to be analysed in the following two volumes will be sufficiently robust.³⁸ Gargarella is less equivocal. Arguing that his classification scheme is 'descriptively implausible', he suggests that, despite Ackerman's claim that the book is descriptive, 'his work looks fundamentally normative'.³⁹ 'At almost every point of the book', Gargarella concludes, 'he is ready to make critical judgements about the legal evolution of constitutionalism' and to show 'what a proper constitutional evolution should look like'.⁴⁰ This claim is bolstered by Ginsburg's point that 'Ackerman commits the rather common sin of selecting the founding values that he likes'.⁴¹

Although expressed in a more nuanced way, Mitchel Lasser reaches similar conclusions.⁴² Ackerman's constitutional traditions, he explains, cannot be taken 'as objective descriptions of the ontological nature of particular constitutional borders' since such traditions are 'contested constructions that are used to justify procedural and institutional projects'. Lasser concludes that this 'both amplifies and confounds Ackerman's insight that different countries possess different constitutional traditions', not least because there is 'no necessary connection between any of these traditions and specific procedure and/or institutional regimes'.

Finally, Gardbaum highlights the general point that Ackerman's three-pathway model 'may be overlooking the extent to which judicial empowerment and supremacy is a *general* tendency within contemporary

³⁶ Daniel Halberstam, 'How Europe Brought Judicial Review to Europe: A Response to Bruce Ackerman', in Albert, *Revolutionary Constitutionalism* (n 6), 262-3.

³⁷ Stephen Gardbaum, 'Uncharismatic Revolutionary Constitutionalism' in Albert, *Revolutionary Constitutionalism* (n 6), 133-54, 133, 152.

³⁸ Ginsburg, 'Charismatic Fictions' (n 12), 118.

³⁹ Gargarella, 'Bruce Ackerman's Theory of History' (n 8), 58.

⁴⁰ *Ibid.*, 59.

⁴¹ Ginsburg, 'Charismatic Fictions' (n 12), 126n.

⁴² Mitchel Lasser, 'Constituting the Judiciary, Constituting Europe', in Albert, *Revolutionary Constitutionalism* (n 6), 285-6.

constitutionalism'.⁴³ After all, Germany, which Ackerman identifies as an illustration of the elite management model, has also developed a powerful case of the Constitutional Court establishing its constitutional supremacy and even the United Kingdom, the epitome of the establishment model, is showing signs of its Supreme Court seeking to move in that direction.⁴⁴

I present these assessments in some detail because in the light of the preponderance of such criticisms it is difficult to see what is left of the rigour of the pathways model. The reviews suggest that its key concepts are employed too loosely, that its pathways are too fixed, that the evidence that constitutional development follows a particular pathway is contestable, that other explanations for the trajectory of constitutional development are overlooked, and that far from it being descriptive or analytical it has a thoroughly normative orientation.

4. DO BRITISH DEVELOPMENTS EXEMPLIFY THE ESTABLISHMENTARIAN MODEL?

Given such criticisms of Ackerman's presentation of the revolutionary constitution pathway, a degree of circumspection about his second ideal type, that of establishmentarianism, cannot be avoided. This pathway evolves from a constitutional regime that has been constructed by 'pragmatic insiders, not revolutionary outsiders'. Ackerman here argues that, once faced with powerful movements for regime change, the political establishment makes strategic concessions that are able to divide the reformers. Co-opting a group of them, they pass reforming legislation that allows what he calls 'the sensible outsiders' to join the establishment. These concessions and co-optations enable the established order to maintain and strengthen its claim to legitimacy.⁴⁵ Ackerman takes Britain as the paradigmatic example of this model.

It is not difficult to show how constitutional development in Britain can be explained in this way. The post-1688 history can readily be interpreted as involving a series of adjustments and concessions that, in the face of social and economic change, had the effect of maintaining a sense of continuity of ruling authority. But that still leaves us having to show how these developments are exemplary of some model rather than the peculiar results of certain unique historical conditions. In the Introduction to *Revolutionary Constitutions*, Ackerman gives us an overview of his thesis about the establishmentarian

⁴³ Gardbaum, 'Uncharismatic Revolutionary Constitutionalism' (n 37), 149.

⁴⁴ See *R(Miller) v Prime Minister/Cherry v Advocate General for Scotland* [2019] UKSC 41.

⁴⁵ Ackerman, *Revolutionary Constitutions* (n 3), 4.

pathway through a synoptic reading of modern British developments.⁴⁶ And while it may not be entirely fair to judge a forthcoming book on such a truncated analysis, there is enough to cause us to doubt whether his model is capable of illuminating these developments in a satisfactory manner.

Ackerman starts with the Reform Act 1832, which he characterises as a reform in which ‘moderate insiders reached out to sensible outsiders’. He rightly notes that such reforms ‘represent fundamental elements of the British constitution but they lack ringing statements of principle’. Yet the claim that in 1832 ‘insiders’ reached out to ‘outsiders’ seems less sound. A reform that extended the franchise to little more than five percent of the adult population could hardly be said to be one that brought outsiders into the category of ‘active citizens’. It seems more accurate to say that the reform was initiated by moderate *insiders* convincing reactionary *insiders* to acquiesce in minor reforms for fear of eventually having to concede a major reform to *outsiders*.⁴⁷ Similarly with Ackerman’s ‘most salient’ twentieth century example of the Parliament Act of 1911, which he suggests ‘legitimated the politics of redistribution characteristic of the modern welfare state’.⁴⁸ This is quite a leap. It is true that the crisis was triggered by the Liberal government’s budget which proposed tax increases to provide for old age pensions, but the 1911 Act itself simply converted the aristocratic chamber’s veto power into a power to delay. It is not until after 1945 that Britain could be said to have established a welfare state.⁴⁹

These are minor quibbles, but they do highlight some of the difficulties entailed in producing a narrative account of British developments as exemplary of a model. As it is, Ackerman’s introductory overview contains many errors which reveal his limited understanding of the British system. This can be illustrated by focusing on one issue: the use of the referendum. Here Ackerman falls into the trap – admittedly common among British scholars too – of allowing his patent political conviction that it was an error for the UK to leave the European Union (EU) to distort his treatment that topic. But, more significantly, he also seems to regard the use of a referendum to determine the question of Britain’s continuing membership of the EU as a deviation from

⁴⁶ Ibid, 10-18.

⁴⁷ See J.E.K. Murkens, ‘Unintended Democracy: Parliamentary Reform in the United Kingdom’ in Kelly L. Grotke and Markus J. Prutsch ed. *Constitutionalism, Legitimacy, and Power: Nineteenth Century Experiences* (Oxford: Oxford University Press, 2014), 351-70, esp. 354.

⁴⁸ Ackerman, *Revolutionary Constitutions* (n 3), 5.

⁴⁹ Asa Briggs, ‘The Welfare State in Historical Perspective’ (1961) *European Journal of Sociology* 221-258, 221: ‘The phrase “welfare state” is of recent origin. It was first used to describe Labour Britain after 1945.’

the establishment model. Once on the establishmentarian pathway, he seems to be suggesting, it is dangerous to contemplate constitutional development other than through a process of negotiation among members of the political establishment.

Of the 2016 Brexit referendum, Ackerman writes that: 'Up to this point, the Westminster establishment had looked with disdain on the continental tendency to call national referenda when the going got tough'. He regards the referendum outcome as the product of 'rabble-rousing efforts to exploit mass prejudices' as against 'the prime minister's [David Cameron] sensible effort to renegotiate Britain's deal with Brussels', and he maintains that it demonstrates 'the depth of the legitimisation crisis that referenda can generate'.⁵⁰ These statements display not just a marked antipathy towards the use of this mechanism and a manifest political skew; they also, more significantly, indicate a limited grasp of the flexible and evolutionary character of the British constitution.

The use of the referendum had in fact been widely debated among the British political establishment long before 2016. Its first major advocate was A.V. Dicey, the Victorian high priest of orthodox constitutional law. Dicey became wedded to its use once he realised that the device could be employed to prevent the adoption of constitutional reforms contrary to what he regarded as the settled interests of the British people.⁵¹ Dicey proposed using the referendum as a device that could enable 'sensible outsiders' to prevent 'radical insiders' using their legislative majority power to bring about social reform.

From 1890 through to 1911, the proposed use of the referendum was the subject of extensive debate within the British political establishment. Many insiders saw it as a powerful mechanism to prevent transient political majorities from passing reforming legislation without first ensuring that such reform was in accordance with the expressed wishes of the British people. In 1910, for example, a Constitutional Conference was convened to consider adopting the referendum as part of the normal machinery of government, but the issue remained too bound up in the political crisis of the day (the status of the aristocratic chamber) for it to be adopted.⁵² There were, of course, many Victorian conservatives such as Henry Sumner Maine who argued that the appeal from

⁵⁰ Ackerman, *Revolutionary Constitutions* (n 3), 12-13, 14.

⁵¹ For Dicey the contentious issue was Irish home rule: A.V. Dicey, 'Ought the Referendum to be Introduced into England' (1890) 57 *Contemporary Review* 489-511; Dicey, 'The Referendum' (1894) 23 *National Review* 65-72; Dicey, 'The Referendum and its Critics' (1910) 33 *Fortnightly Review* 538-62.

⁵² For analysis of the issues see Vernon Bogdanor, *The People and the Party System: The Referendum and Electoral Reform in British Politics* (Cambridge: Cambridge University Press, 1981), 11-33.

Parliament to the people was an appeal from knowledge to ignorance.⁵³ This appears to be a position endorsed by Ackerman in his account of the establishmentarian pathway. It is rather strange company for an advocate of ‘deliberation day’ in the USA to be keeping.⁵⁴

The status of the referendum in British governing practice did not resurface until 1972. This was when the Conservative Government joined the European Communities simply by an exercise of its prerogative power of treaty-making, with the domestic legal consequences subsequently being ratified by ordinary legislation, the European Communities Act 1972. Ackerman suggests that joining the European Communities by ordinary legislation ‘vindicated the Westminster model of responsible government’.⁵⁵ But he makes light of the issue. This was a major constitutional change, the merits of which had caused serious divisions within the major political parties; it was also one for which the Government had no clear electoral mandate.⁵⁶ Of this, Ackerman states that Prime Minister Heath ‘did not seriously consider offering it up for approval at a special referendum’ but ‘followed the tradition of the great Reform Act [1832] and presented the basic terms of his bargain with Brussels to parliament for its approval’.⁵⁷ The ‘tradition’ he invokes, however, refers back to a precedent from a pre-democratic era in which Parliament was entirely under the control of the landed aristocracy; a referendum of 400,000 people to determine whether to extend the franchise to 650,000 of the British population of 16.5 million would have been a rather strange notion.

It was because the Conservative party lacked any clear popular mandate for taking the UK into the European Communities that Labour fought (and won) the 1974 election on a policy of renegotiating terms and presenting these to the

⁵³ H.S. Maine, *Popular Government* (London: John Murray, 1885), 110-112: ‘Another experiment is ... known as the Plébiscite. ... The delusion that Democracy ... is a progressive form of government, lies deep in the convictions of a particular political school; but there can be no delusion grosser. ... All that has made England wealthy, has been the work of minorities, sometimes very small ones.’

⁵⁴ Bruce Ackerman and James S. Fishkin, ‘Deliberation Day’, *Center for American Progress*, March 10, 2004, available at <https://www.americanprogress.org/article/deliberation-day/>.

⁵⁵ Ackerman, *Revolutionary Constitutions* (n 3), 13.

⁵⁶ In the 1970 election, the Conservative manifesto did not propose to take the UK into the European Communities. It stated: ‘If we can negotiate the right terms, we believe that it would be in the long-term interest of the British people for Britain to join the European Economic Community ... But we must also recognise the obstacles. There would be short-term disadvantages ... Our sole commitment is to negotiate; no more, no less. As the negotiations proceed, we will report regularly through Parliament to the country’: www.conservativemanifesto.com/1970/1970-conservative-manifesto.shtml.

⁵⁷ Ackerman, *Revolutionary Constitutions* (n 3), 13.

electorate for approval in either a general election or a referendum. Ackerman states that 'Wilson [the Prime Minister] paid absolutely no heed to the dangers it [the referendum] posed to fundamental principles of Westminster democracy.' He continues that it was 'only his short-term problem of coalition management that led him to break with the Westminster tradition exemplified by the Great Reform Bill of 1832 and the Parliament Act of 1911'.⁵⁸ But Wilson actually was following the precedent of the Parliament Bill. When, in the face of the House of Lords' veto on its programme, the Liberal Government proposed that the king should create a sufficient number of Liberal peers to ensure its passage through the Lords, the king had required the Government to hold a second general election before acquiescing in such a major constitutional change. Since there had already been two general elections in 1974 by the time that European membership terms had been renegotiated, it was clear that, in furtherance of Labour's manifesto commitment, the proposal could not practically be put to the people in anything other than a referendum.

The question any democrat must address is: how could any citizen opposed to the constitutional changes contemplated by the UK joining the European Communities express their preference in the 1970 election? Despite deep divisions *within* each of the major political parties, the leadership of both were in favour of joining. In such a situation, where the system of party democracy was not working in a way that enabled dissent to be pressed effectively, the referendum in fact bolstered legitimacy by 'defus[ing] what could have been deep populist resentment against politicians who were denying to the electorate the right to decide so central an issue'.⁵⁹ Further, the 1975 referendum did not, in Vernon Bogdanor's judgment, produce 'any harmful effects upon Parliament or indeed any other British institution' and, as a victory for 'moderates' and defeat for 'extremists', it was a device that divided what Ackerman would call 'sensible' from 'radical' outsiders.⁶⁰

This brings us to 2016. By 2016, the Government had authorised the use of the referendum on ten occasions, including in 1973 on whether the people of Northern Ireland wished to remain part of the UK, on proposals for schemes for devolution to Scotland and Wales in 1979 and again in 1997, on Scottish independence in 2014, and across the UK in 2011 on whether to reform the voting system. It had also been previously touted with respect to membership of the EU. In 2009, for example, David Cameron, then leader of the Conservative party in opposition, had argued that the Lisbon Treaty should not be ratified without first being approved in a referendum. Subsequently, the

⁵⁸ Ackerman, *Revolutionary Constitutions* (n 3), 13.

⁵⁹ Bogdanor, *The People and the Party System* (n 52), 41.

⁶⁰ *Ibid.*, 42, 43.

2010 Conservative Manifesto pledged not to transfer further competences to the EU without a referendum, a position endorsed by the Liberal Democrats. Both these parties supported this stance in their formal Agreement when they established a Coalition Government in 2010. This was given legislative sanction in the European Union Act 2011, which determined that no further transfers of competences to the EU could be approved without affirmation in a referendum.⁶¹

Despite having adopted these various Euro-sceptic pledges, the Conservatives had been relegated to third place in the 2014 European parliamentary elections, with UKIP (on a manifesto commitment of working to leave the EU) winning the largest number of seats. These political developments then provoked the Conservative Party to promise an in/out referendum on EU membership in their 2015 election manifesto. To say, as does Ackerman, that the referendum ‘was the product of short-term decisions by no nonsense politicians who chose to use the referendum device without regard to its long term constitutional implications’ fails to do justice to a more complicated narrative.⁶²

Following the referendum result, the Government sought to initiate proceedings to leave the EU by the same mechanism by which it had negotiated its entry in the European Communities: that is, by using its prerogative power to trigger the notification of intention to withdraw, with the precise terms of withdrawal being subsequently approved in legislation. Yet with respect to the use of prerogative power to initiate the Article 50 notification Ackerman states, rather bizarrely, that this ‘effort to short-circuit Parliament harkened back to a pre-democratic era when kings had real power’.⁶³ And he regards the subsequent legal challenge to the use of this procedure as simply founded on a ‘self-aggrandizing’ tactic of the Prime Minister that led to a ‘mind-blowing confrontation’ in the courts. Since the book went to press before Boris Johnson became Prime Minister in the summer of 2019, we are spared his analysis of the turbulence of the latter half of 2019 in which many of the conventions of normal constitutional practice were stretched to breaking point. Eventually, in December 2019, a general election was held and Johnson’s Government was returned with an 80-seat majority, leading, apparently, to the restoration of parliamentary government that Ackerman had speculated as a possibility.⁶⁴

What lessons might be drawn from this overview? Ackerman’s general theme is that ‘the establishmentarian version of Westminster democracy has

⁶¹ See Martin Loughlin and Cal Viney, ‘The Coalition and the Constitution’ in A. Selden and M. Finn ed., *The Coalition Effect* (Cambridge: Cambridge University Press, 2015), ch. 2.

⁶² Ackerman, *Revolutionary Constitutions* (n 3), 12.

⁶³ *Ibid*, 15.

⁶⁴ *Ibid*, 16, 17.

been one of the greatest success stories of the past two centuries'. Given that general assessment of the power of this distinctive pathway, he discerns major problems in the recent dealings concerning Britain's exit from the EU. The Brexit episode, it would appear, teaches that the 'great historical success' of Britain's pathway to constitutional government 'may not suffice to propel a legitimisation paradigm forward into the future'. This he attributes to a failure of 'constitutional statesmanship', which plays 'a key role in sustaining political legitimacy' under this model but which, when it fails, 'may undermine the most entrenched paradigms'.⁶⁵

I think it is both more complicated and simpler than that. Briefly, the British establishmentarian tradition is the product of unique historical circumstances that enabled the landed class to strip power from the monarch and create a parliamentary system founded on the principle of party government. It was in this pre-democratic context that the main conventions of constitutional practice were devised, and these conventions acquired authority by virtue of the fact that they were agreed between divisions within the ruling class which, despite particular political disagreements, nevertheless agreed on the fundamental policies of the state. This post-1688 aristocratic settlement then became severely strained as a result of the struggle for democratisation from the late nineteenth century. This in turn has led to a growing sense of dissatisfaction with inherited practices but, because of an underlying adherence to the idea of parliamentary government, no consensus on fundamental reform could be forged.⁶⁶ I therefore doubt Ackerman's claim that 'each of [these pathways] have been transformed into powerful engines of legitimisation over the course of the twentieth century',⁶⁷ not least because over the last fifty years it has become impossible to find any serious commentator who writes about the British constitution without proposing fundamental reforms.

5. THE QUESTION OF TIME SEQUENCING

There is one further matter concerning Ackerman's general framework to be considered. Do the British arrangements actually exemplify establishmentarianism? If we focus only on the twentieth century the answer might seem obvious, though there is a complicated story to be told about how at the beginning of the twentieth century the labour movement became wedded to

⁶⁵ Ibid, 17-18.

⁶⁶ For more detail see Martin Loughlin, 'In Search of the Constitution' in Oran Doyle, Aileen McHarg and Jo Murkens ed., *Conditions under Pressure: The Brexit Challenge for Ireland and the United Kingdom* (Cambridge: Cambridge University Press, 2021) ch. 14.

⁶⁷ Ackerman, *Revolutionary Constitutions* (n 3), 1.

the ‘parliamentary road to socialism’. But why start there? Ackerman actually starts with the Reform Act of 1832, which was an insider measure. More interesting, perhaps, is the Second Reform Act of 1867, which was a more extensive democratising reform and this ‘leap in the dark’ was conceded only once the Conservatives realised that the habitual deference of the working class would not threaten their ruling hegemony. But what if we went back to the seventeenth century?

Here, the relevant phases do not illustrate establishmentarianism; they are indicative of the general phases of revolutionary constitution-making. During the 1640s, England was wracked by civil war, a conflict that led in 1649 to the execution of the king (T1). Under the charismatic leadership of Cromwell, a constitution of the commonwealth was drafted, the Instrument of Government 1653 (T2). Cromwell dies in 1658, creating a legitimacy vacuum (T3). In 1660, the result is ... not judicial supremacy but the restoration of the monarchy in the figure of Charles II (T4).

The time sequencing can be recalibrated to commence with the Restoration. During the 1660s, there is an attempt to rebuild charismatic authority around the figure of the king (T1). This became routinised through restored authority of the ancient constitution (T2). Charles II dies in 1685, leading to a crisis of legitimacy because his brother, James II, is a Catholic with modernising intentions along absolutist lines (T3). In 1688, we get ... not the consolidation of constitutional authority but the overthrow of James II by the Whig aristocracy, with the assistance of William of Orange (T4).

And so, we rewind the clock. In 1688-89, we have revolutionary action (T1). A constitutional settlement is devised, the terms of which are laid down in the Bill of Rights 1689 and the Triennial Act 1694 (T2). There follows a period of uncertainty, with nine general elections being held between 1695 and 1713, leading to the entrenchment of the party system (T3). But also over this period, military success, imperial expansion, union with Scotland and successful institution of the Hanoverian protestant succession opens a period of relative stability bolstered not by judicial supremacy but by the Septennial Act of 1714 which consolidates the supremacy of the Whig party in parliament over the following decades (T4).

I could go on, perhaps unhelpfully, with this type of sequencing. The general point is that where we end up depends on where we start. Ackerman might say that his exercise is purely a twentieth century pathway, though as mentioned it might be more accurate to say that it is a trajectory only of the latter-half of the twentieth century. In that case, however, the particular sequencing he identifies might not be a distinguishing feature of ‘revolutionary constitutions’. The path to T4 judicial supremacy over the last 50 years can also be seen to run from both establishment and elite narratives.

And yet, the basic problem with claiming that this is a twentieth century narrative is that, as we have seen, Ackerman concludes *Revolutionary Constitutions* with a chapter on the US. The objective is to show that the US narrative is not exceptional, that other countries examined in the book are 'traveling down the very same Enlightenment pathway that the United States has been following since the Founding', and that they 'offer us valuable lessons in our own continuing journey down the revolutionary road to constitutional legitimacy'.⁶⁸ The difficulty is that if the US is exemplary of a revolutionary constitution because of the events of the late-eighteenth century, then why is not the English story from the mid-seventeenth century also illustrative of the forging of a constitution from revolutionary origins? More pertinently, if, starting from more recent times, England/Britain follows the establishment pathway, then does not the US also do so?

Once we see that England was once revolutionary, with the formation of the British state through Union with Scotland becomes elite, and is now establishmentarian, can we not see a similar trajectory in the US development? In its origins, the US was revolutionary but, as Paul Kahn's recent study of constitutional development from 'project' to 'system' indicates, during the nineteenth century it became an elite system.⁶⁹ And if we survey the development of the US Constitution not from the Founding but from the beginning of the twentieth century, then – as Ackerman's frustrations with FDR's failure to entrench a new constitutional settlement shows – that system becomes establishmentarian. In that episode, faced with the challenges for basic regime change presented by the New Deal, we find 'pragmatic insiders' on the Supreme Court making 'strategic concessions' that enable established constitutional order to maintain its claim to legitimacy. Today, we might note that since the 1787-91 settlement the US Constitution has been amended only seventeen times, mostly in relatively unimportant ways, and is now regarded as being fixed. If we are seeking the paradigmatic example of establishmentarianism perhaps it is not Britain – it is the US.

From the perspective of twentieth century development, the 'political order [of the US] is built by pragmatic insiders' and, when faced with 'popular movements for fundamental change, the insider establishment responds with strategic concessions'.⁷⁰ This point is reinforced once we bring the judiciary into the category of the 'insider establishment'. Establishmentarianism within

⁶⁸ Ibid, 362.

⁶⁹ Paul W. Kahn, *Origins of Order: Project and System in the American Legal Imagination* (New Haven, CT: Yale University Press, 2019).

⁷⁰ Ackerman, *Revolutionary Constitutions* (n 3), 4.

the US system has been most actively policed by the dominant role of lawyers in their political system. As Yascha Mounk notes:

In the general US population, fewer than one in two hundred people hold a law degree. In the House of Representatives, it is over one in three. In the Senate, it is over one in two. Statistics on wealth are just as striking. The median net worth of an average American is just under \$45,000. The median net worth of an average member of Congress, by contrast, is over ten times as high, and that of senators higher still.⁷¹

Is it so far-fetched to suggest that the US, not the UK, is the paradigmatic illustration of establishmentarian model of modern constitutional development?

6. CONCLUSION

Once examined in detail, Ackerman's ambitious study charting the rise of world constitutionalism begins to look like a project in which the results have been determined by the framework adopted. It is illustrative of what has been called 'Maslow's hammer': if all you have is a hammer, everything looks like a nail. Once handed the instrument (the three pathways model), it becomes tempting to fit all constitutional developments into that framework. Ackerman's book on *Revolutionary Constitutions* contains a wealth of information and analysis and is valuable for its detailed country studies. But in being preoccupied with the need to make the material fit the framework, it lacks historical imagination, that is, of seeking to understand what the critical political events actually meant for the actors at that time, rather than showing how such events might be fitted into a pre-determined teleology. And without such historical sensitivity, it is difficult to see how this type of pathways model can help us appreciate the complexities of modern British constitutional development.

⁷¹ Yascha Mounk, *The People vs Democracy* (Cambridge, MA: Harvard University Press, 2018), 88.