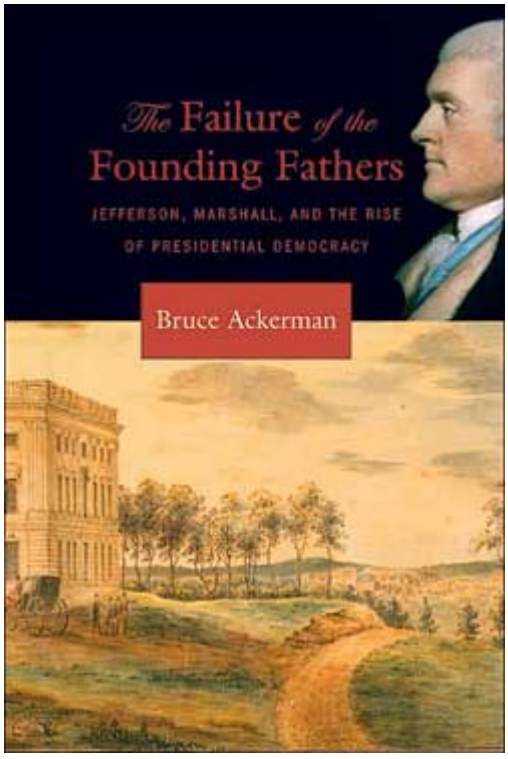
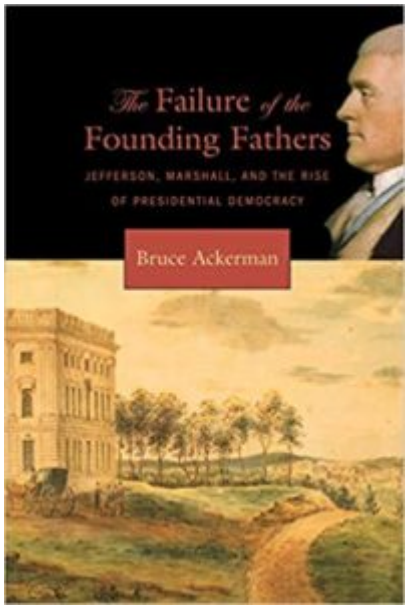
Whose Failure?





Bruce Ackerman, The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy.

Bruce Ackerman takes seriously a phenomenon Americans often seem to overlook: the rapid evolution of a political system radically different from the one anticipated by the framers of the Constitution. Ackerman argues, in *The Failure of the Founding Fathers,* that the Constitution's procedures for electing a

president were particularly ill suited to the realities of American politics and that the election of 1800 exposed these inadequacies. The constitutional mechanism failed because the framers failed to foresee the rise of political parties. The party system became a vehicle for the creation of a "plebiscitarian" presidency, a chief executive whose unexpected influence derived from his ability to claim a popular mandate. Less responsive to public opinion, the federal courts remained an obstacle to presidential government, but Ackerman sees a creative synthesis emerging from the conflict. The Supreme Court would assume the power of judicial review, but the Constitution would not be allowed to frustrate the will of a popular president. Ackerman's argument echoes his earlier work: at critical moments in the nation's history, unequivocal expressions of public sentiment at the ballot box have rewritten constitutional law.

Ackerman's story begins with the results of the election of 1800. The Republican nominee for president, incumbent vice president Thomas Jefferson, defeated the Federalist incumbent, John Adams, but Jefferson found himself tied in the electoral college with his running mate, the enigmatic New Yorker Aaron Burr. Under the terms of Article II, Section 1 of the Constitution, each elector voted for two candidates, with the vice presidency going to the second-place finisher. Showing a level of party discipline the founders did not anticipate, the Republican electors failed to waste a single vote on a third candidate. The votes were perfectly divided between two Republican candidates.

Allowing individual electors to cast separate ballots was only one of the Founding Fathers' blunders. Article II, Section 1 also authorized the vice president to count the electoral votes in the presence of both houses of Congress, which was at best an awkward business when the vice president was a candidate. To make matters worse, in 1800, Georgia's electors reported their votes for the Republican candidates on an irregular ballot. Jefferson blithely counted the early republic's equivalent of a hanging chad for himself and Burr. It is a fine story, but Ackerman makes too much of it; the Federalists knew they had lost Georgia.

The election then went to the House of Representatives where each state had one vote. The Constitution permitted the sitting of a lame-duck Congress, which had become customary by 1800. The Federalists had lost control of the House, but they would select the new president. The one-state, one-vote rule diluted Federalist voting strength, but after thirty-five ballots, Jefferson remained one vote short of a majority. Loath to elect Jefferson, the Federalists considered making a deal with Burr or appointing an interim president and calling a new election. Ackerman implies that Delaware's one congressman, the Federalist James Bayard, single-handedly put Jefferson over the top on the thirty-sixth ballot. In reality, although Bayard was wavering, vote switches by Maryland and Vermont gave the Virginian a majority.

Ackerman then shifts his focus to the courts. As the Federalist era came to an end, the outgoing Congress passed the Judiciary Act of 1801 creating new

federal circuit courts, and Adams busied himself appointing his notorious "midnight judges," including John Marshall, the new chief justice. The Republican Congress promptly repealed the 1801 act and left the circuit judges unemployed, despite the constitutional provision guaranteeing them lifetime appointments. The repeal was part of a broader attack on the Federalist federal courts, which leads Ackerman to one of his most provocative points: Marshall's landmark decision in *Marbury v. Madison* (1803), asserting the court's power of judicial review, was less a magisterial assertion of authority than an exercise in judicial damage control. The Supreme Court justices had reluctantly resumed circuit-riding duties after the abolition of the circuit judgeships, and in *Stuart v. Laird* (1803) they grudgingly upheld the repeal of the Judiciary Act. *Marbury* supposedly allowed the court to salvage a slim measure of institutional integrity. But, according to Ackerman, Republican appointments eventually undermined Marshall's Federalist jurisprudence. As evidence, he points to the court's rejection in 1812 of federal jurisdiction over common-law crimes.

There is much to appreciate here. Ackerman rescues *Stuart v. Laird* from undeserved obscurity. He demystifies Marshall, who was in fact Adams's third choice for the court, and raises some intriguing questions. If Adams had not settled the Quasi-War with France and demobilized the army, might the Federalists have attempted a coup? Ackerman has uncovered enough political miscues for a comic opera. Adams intended to appoint Rhode Island Senator Ray Greene to a district-court judgeship but inadvertently made him a circuit judge. Greene, accordingly, resigned his Senate seat, only to have the Republican Congress abolish his court.

But problems abound with Ackerman's interpretation. His constant references to the stupidity of the founders are unconvincing. He criticizes the Constitution's provisions for electing a president and disparages the Twelfth Amendment, providing for the election of the president and vice president on a single ticket, without suggesting any alternative. By making a few electoral votes potentially decisive, the electoral college invites controversy in close elections, yet Ackerman, for all his complaints, has little to say about this. He sheds little light on the great mysteries of 1800. Why did the Republicans allow a deadlock to develop, and why did Burr allow it to continue? Trying too hard to be provocative, Ackerman stumbles on minor points, such as the details on the final House vote in 1800, and misfires badly on major ones. He does not produce the evidence to demonstrate a politically expedient constitutional synthesis emerging from the partisan conflicts of the early 1800s. He seems insensitive to the constitutional scruples of early nineteenth-century politicians, as if they shared the legal nihilism of modern officeholders. Even conceding that Jefferson embodied a "presidential democracy," perhaps Ackerman's most critical point, the concept was an aberration until the twentieth century. There may have been an Age of Jackson, but there was no Age of Fillmore, Pierce, or Hayes.

Further Reading:

Bernard A. Weisberger's *America Afire: Jefferson, Adams, and the Revolutionary Election of 1800* (New York, 2000) provides a readable introduction to the politics of the 1790s. Susan Dunn's *Jefferson's Second Revolution: The Election Crisis of 1800 and the Triumph of Republicanism* (Boston, 2004) is unabashedly pro-Jefferson. The best balance of accessibility and careful scholarship is John Ferling, *Adams v. Jefferson: The Tumultuous Election of 1800* (Oxford and New York, 2004). On the Marshall Court, see Herbert A. Johnson, *The Chief Justiceship of John Marshall, 1801-1835* (Columbia, S.C., 1997). Marshall Smelser's *The Democratic Republic, 1801-1815* (New York, 1968) remains useful on the presidencies of Jefferson and Madison. For more on Bruce Ackerman's view of the relationship between politics and legal change, see his *We the People*, 2 vols. (Cambridge, Mass., [1991] 1998).

This article originally appeared in issue 6.4 (July, 2006).

Jeff Broadwater is associate professor of history at Barton College in Wilson, North Carolina. His most recent book is *George Mason: Forgotten Founder*, forthcoming from the University of North Carolina Press.