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REVIEW ESSAY

ACKERMANIA: THE QUEST FOR A COMMON LAW OF HIGHER LAWMAKING

WE THE PEOPLE: TRANSFORMATIONS. By Bruce Ackerman. The Belknap Press of Harvard University Press. Pp. 515. \$29.95.

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INTRODUCTION

Almost twenty years ago, Bruce Ackerman, Sterling Professor of Law and Political Science at Yale University, began an extraordinary journey. He set out to explain the dynamics of constitutional change. Along the way, he has authored several publications in which he has asserted the provocative thesis that the Constitution does not provide the exclusive means for its formal amendment.¹ Instead, Ackerman has maintained, our constitutional system allows the people, working in concert with their elected national leaders, to amend the Constitution in enduring ways other than through the formal procedures provided in

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1. See, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); Bruce Ackerman, *Higher Lawmaking?*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 63 (Sanford Levinson ed., 1995); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988); see also Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 478 (1995) (contending that Reconstruction Republicans and New Deal Democrats, in spite of "breaking with the established system of constitutional amendment," still won the mandate of the People).

Article V.² In 1991, Ackerman elaborated on this thesis in *We the People: Foundations*,³ the first book in a projected three-volume series. In *Foundations*, Ackerman explained the historical and theoretical bases of a peculiar American phenomenon he called dualism.⁴ In Ackerman's parlance, dualism refers to the special innovation of the American Constitution to allow two kinds of lawmaking—ordinary and higher.⁵ Ordinary lawmaking is the everyday activity of political life in Washington and states throughout the country,⁶ while higher lawmaking is the outcome of a rare occasion in which the American people have carefully considered the need for constitutional change.⁷ Higher lawmaking is not confined to concerted efforts to comply with Article V; in fact it has been achieved on three noteworthy occasions that did not conform to the formal rules for constitutional or constitutional-like amendment—the Founding of the Republic, Reconstruction, and the New Deal.⁸

Ackerman expands his arguments about the process of higher lawmaking in the recently published second volume of his projected three-volume series, *We the People: Transformations*.⁹ In *Transformations*, Ackerman explores "how American institutions have in fact operated to organize popular debate and decision

2. Article V provides, in pertinent part:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by the Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V.

3. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

4. *See id.* at 6-7.

5. *See id.*

6. *See id.* at 6, 234-35, 265.

7. *See id.* at 6, 240, 272-74.

8. *See id.* at 40.

9. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

during our most creative periods of constitutional politics. The aim is to learn what history can teach about the ways Americans have translated the heady rhetoric of constitutional politics into enduring judgments of higher law."¹⁰ The "creative periods" discussed in detail by Ackerman are Reconstruction and the New Deal.¹¹

The purpose of this Review Essay is not to rehash prior commentaries' praise¹² or criticism¹³ of Ackerman's work. Instead, its purpose is to assess the thesis of Ackerman's new book on its own terms. Repeatedly throughout the book, Ackerman claims to be establishing his provocative thesis in the manner of a good common-law lawyer¹⁴ (or "common lawyer" in Ackerman's words¹⁵). According to Ackerman, such lawyers study "precedents" to identify the appropriate "rules" and "principles" to govern legal decisionmaking in an area not governed by some positive law.¹⁶ The sources on which Ackerman relies to construct a common law of higher lawmaking are diverse, including, but not limited to, Supreme Court opinions; congressional debates, hearings, and speeches; newspaper editorials; presidential memoranda, orders, and addresses; and other public documents.¹⁷ For Ackerman, the critical task is to synthesize or coor-

10. *Id.* at 6.

11. *See id.* at 99-252, 255-382.

12. *See, e.g.,* Sanford Levinson, *Accounting for Constitutional Change (Or, How Many Times Has the United States Constitution Been Amended? (A)<26; (B)26; (C)>26; (D) All of the Above)*, 8 CONST. COMMENTARY 409, 429 (1991); James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 304 (1990); Mark Tushnet, *The Flag-Burning Episode: An Essay on the Constitution*, 61 U. COLO. L. REV. 39, 48-53 (1990); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1515 (1990).

13. *See, e.g.,* Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1992); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918 (1992) (reviewing 1 ACKERMAN, *supra* note 3); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1225 (1995).

14. *See* 2 ACKERMAN, *supra* note 9, at 17, 30, 66, 92, 205, 232, 246, 252, 269, 270, 360, 367, 370, 371, 384.

15. *See id.* at 360.

16. *See id.* at 30.

17. *See id.* at 17.

dinate these sources of constitutional meaning into a coherent body of law governing higher lawmaking.¹⁸

This Review Essay examines whether these latter sources do in fact support a common law of higher lawmaking. It demonstrates the methodological problems, including the inconsistencies and contradictions, in Ackerman's treatment of constitutional text, history, and judicial precedent. The Review Essay concludes that a principled or consistent approach to these sources indicates that they do not support a common law of higher lawmaking.¹⁹ Instead, they demonstrate that constitutional change—or higher lawmaking—is not something confined to the three moments identified by Ackerman but rather is made in a much wider and often subtler array of formal and informal practices and arrangements than Ackerman has recognized.

After reviewing the book's basic argumentation in Part I, Part II analyzes Ackerman's methodology for construing the Constitution as not expressly precluding a common law for higher lawmaking. Central to Ackerman's interpretation of the text is the assumption that it only bars exercises of governmental power, including higher lawmaking, that are not explicitly prohibited by the Constitution. This assumption is incompatible with the structure of the Constitution, constitutional tradition, and a consistent line of Supreme Court precedent.²⁰ Moreover, Ackerman's methodology in reading Article V as a nonexclusive

18. *See id.* at 30.

19. As Benjamin Cardozo explained, a judge engaged in common law adjudication has to consult or analyze a variety of sources of decision, including constitutional text and structure, history, custom or tradition, and past judicial opinions. *See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS* 10, 28, 31, 60, 65-66, 71-72, 164-65 (1921). In the field of constitutional law, the sources of authority—or those sources on which a good constitutional law argument is based—primarily consist of the text, structure, and history of the Constitution, tradition and historical practices subsequent to ratification, as well as judicial precedents. *See generally* MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES* 348, 358-61 (1993) (contending that the technique one uses to interpret a particular constitutional provision will vary according to the provision). For purposes of this Review Essay, I will confine myself to those things that Ackerman suggests a common-law lawyer should consult in constitutional adjudication, namely, the text of the Constitution, historical practices (including the public statements, decisions, and actions of national political leaders), and judicial precedents. *See* 2 ACKERMAN, *supra* note 9, at 17.

20. *See infra* notes 62-65 and accompanying text.

grant of higher lawmaking authority to the President or Congress conflicts with his very narrow reading of other constitutional provisions, such as the Republican Guarantee Clause,²¹ as severely constricting governmental power.²²

Part III examines Ackerman's use and conception of history. History is crucial to Ackerman's enterprise as the source of the most important common-law precedents of higher lawmaking. This treatment of history is problematic because it rests on an erroneous conception of certain historical practices as constituting principles of law and rules that should and do bind courts as well as federal and state lawmakers. Neither history nor constitutional law supports this conception.

Even if it were possible for history in some configurations to serve as legally-binding precedent, Ackerman's historiography, or the way in which he uses history to construct precedents, is problematic in three respects. First, Ackerman fails to construct and adhere to a principled or systematic approach to history. This ad hoc approach leads Ackerman to gloss over or ignore the implications of changes in the meanings of terms or institutions that he tracks through time. It also leaves him unrestrained in trying to fit his theory to the facts rather than the facts to his theory.

The second major problem with Ackerman's historiography is that he assumes but never proves that the American people largely understood and were integrally involved in ratifying the illegalities of the constitutional reforms associated with the Founding, Reconstruction, and the New Deal. Moreover, he does not adhere faithfully to his stated understanding of popular sovereignty in practice—intense interaction (and dialogue) between the people and their elected national leaders.²³ Ackerman repeatedly describes historical events in a manner that suggests (without proof) a much greater degree of popular involvement and understanding of critical developments than the historical record would support.

21. U.S. CONST., art. IV, § 4 (providing that "The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

22. See *infra* notes 66-68 and accompanying text.

23. See 2 ACKERMAN, *supra* note 9, at 187.

Third, Ackerman does not adhere faithfully to his preferred methodology for clarifying the significance of historical events. Ackerman suggests that to appreciate the ways in which institutions both have led and shaped popular opinion and support during the Founding, Reconstruction, and the New Deal one should focus on the public actions and statements of national leaders rather than the private or subjective motivations of those leaders.²⁴ He fails, however, to defer to the public declarations of the architects of Reconstruction and of Congress, the Supreme Court, and even President Franklin Roosevelt during the New Deal era, to the effect that the constitutional changes associated with these constitutional moments followed constitutional norms for higher lawmaking. Instead, he avoids the implications of these declarations by trying to explain why they should not be taken at face value.

Part IV examines Ackerman's claim that certain judicial precedents support his thesis. First, it demonstrates that Ackerman's argument that the Supreme Court participated in the consolidation of Reconstruction as a constitutional moment rests on an incomplete reading of some—and Ackerman's overlooking of several other—important Supreme Court decisions. Second, Part IV shows that Ackerman distorts several important judicial precedents to maintain that the Court's shift from inconsistently to consistently upholding the constitutional foundations of the New Deal was the consequence of a new, revolutionary interpretation of the Constitution.

Part V analyzes the implications of Ackerman's proposals for maximizing popular sovereignty in effecting constitutional moments. The proposals include a supermajority requirement for Supreme Court appointments and the adoption of a "Popular Sovereignty Initiative" that would allow for the scheduling of two popular votes on initiatives for constitutional change proposed by reelected presidents.²⁵ At the end of his book, Ackerman acknowledges that his suggested reforms for facilitating greater popular sovereignty in higher lawmaking would

24. See *infra* notes 162-69 and accompanying text.

25. See *infra* notes 269-76 and accompanying text.

likely fail.²⁶ This admission is telling, for it reflects the obvious degree to which the American people do not govern higher lawmaking. In the final analysis, Ackerman's great mistake is that he has overstated the pull or force of popular sovereignty in American democracy. Popular sovereignty does not explain the Founding, Reconstruction, or the New Deal, nor most constitutional change in American history. Constitutional change is largely a function of institutional activity that turns on the participation or key decisionmaking of certain political elites rather than "We the People."

I. ACKERMAN'S *TRANSFORMATIONS*

Ackerman's first volume, *Foundations*, provides an important backdrop for understanding the arguments of his second volume, *Transformations*. In *Foundations*, Ackerman reinterpreted the Founding period. In his view, the Founders were revolutionaries who created a special constitutional order embodying two kinds of politics otherwise known as dualism: normal or ordinary politics and higher lawmaking or constitutional politics.²⁷ Normal politics is what goes on everyday in Washington, D.C.²⁸ The politicians who engage in this kind of politics are, for Ackerman, substitutes for the people but truly cannot speak on behalf of "We the People."²⁹ During periods of normal politics, most Americans focus on their private concerns. By contrast, higher lawmaking has occurred only three times in our history—the Founding, Reconstruction, and the New Deal.³⁰ It is a process of extended and thoughtful deliberation by a significant portion of the people, in which *private* citizens temporarily become *private citizens*.³¹ A higher lawmaking system allows an engaged citizenry to focus on the kinds of basic issues that would fundamentally change the constitutional order.

26. See 2 ACKERMAN, *supra* note 9, at 415.

27. See 1 ACKERMAN, *supra* note 3, at 6.

28. See *id.*

29. See *id.* at 6-7, 234-35.

30. See *id.* at 58.

31. See *id.* at 12-13, 261-62, 265.

In *Transformations*, Ackerman focuses on the work of two other groups of "revolutionary reformers"³²—the Reconstruction Republicans and the New Deal Democrats. In all three periods—the 1780s, the 1860s, and the 1930s—Ackerman sees a similar pattern. The pattern consists of five phases of higher lawmaking in which the institutions of the national government both led and reflected public opinion: a signaling that major constitutional change may occur,³³ the public shaping of proposals for change,³⁴ a triggering event (such as a landslide election),³⁵ the ratification of change,³⁶ and a period of consolidation.³⁷

The institutional actors seeking and proposing change during Reconstruction and the New Deal were different from those existing during the Founding, but the pattern of momentous constitutional change was the same. In Reconstruction, the elections of 1860, 1864, and especially 1866 signaled the prospect of an end to slavery.³⁸ Proposals took the form of the Fourteenth Amendment (and related legislation),³⁹ and the triggering phase consisted of several events, including Congress's enactment of the Reconstruction Act of 1867 and the initiation of impeachment proceedings against Andrew Johnson.⁴⁰ President Johnson's acceptance of congressional supremacy in fashioning Reconstruction (leading to an acquittal in his impeachment trial) furnished ratification,⁴¹ and the election of Ulysses Grant in 1868 and the Supreme Court's endorsement of the Reconstruction Amendments consolidated the constitutional changes embodied in Reconstruction.⁴²

In the New Deal scenario, the election of 1932 signaled the prospect of a more activist regulatory state.⁴³ Proposals took the

32. See 2 ACKERMAN, *supra* note 9, at 279.

33. See, e.g., *id.* at 40-49.

34. See, e.g., *id.* at 49-53.

35. See, e.g., *id.* at 53-57.

36. See, e.g., *id.* at 57-64.

37. See, e.g., *id.* at 64-65.

38. See *id.* at 126-30, 206.

39. See *id.* at 173-78.

40. See *id.* at 178-83, 187-91.

41. See *id.* at 227-30.

42. See *id.* at 237-47.

43. See *id.* at 281-85.

form of New Deal legislation,⁴⁴ and the triggering event was the election of 1936.⁴⁵ The Supreme Court's "switch in time" in 1937 furnished ratification,⁴⁶ and turnover on the Court brought, by the 1940s, consolidation of the "constitution" embodied in the New Deal.⁴⁷

In asserting his theory of dualism, Ackerman poses a direct challenge to the conventional notion (what he calls the "hypertextualist" position) that Article V provides the only mechanism for amending the Constitution.⁴⁸ Just as the Philadelphia framers went beyond the methods spelled out for revising the Articles of Confederation, Ackerman argues for the legitimacy of the unconventional means used by Reconstruction Republicans and New Deal Democrats for achieving fundamental constitutional changes.

Ackerman seeks both to describe what has happened at the great constitutional moments in American history and to prescribe a legitimate means for changing the Constitution without making recourse to Article V. Taking the Reconstruction era and the New Deal as exemplars, Ackerman's thesis highlights the value to be found in intense public debate and struggle over proposals that would affect such fundamental arrangements as the respective powers of the states and national government.⁴⁹ The institutions of the national government provide the forum for both the debate and the struggle. For example, rather than discrediting the conventional view of the pre-1937 Supreme Court as nine old men standing in the way of progress, Ackerman pays homage to the struggle between that Court and the other branches of the federal government—the President who envisioned and the Congress that fashioned the New Deal—because it forced Americans to recognize that the emerging New Deal challenged the existing constitutional commitments to free markets and a limited national government.⁵⁰

44. *See id.* at 286-90.

45. *See id.* at 306-11.

46. *See id.* at 350-59.

47. *See id.* at 359-77.

48. *See id.* at 72.

49. *See id.* at 187-88.

50. *See id.* at 346, 349-50.

In the final part of his book, Ackerman proposes two reforms for facilitating popular sovereignty in effecting constitutional moments. First, he proposes a supermajority requirement for Supreme Court appointments.⁵¹ He acknowledges that this proposal would probably

deprive the President, and the nation, of the only method [transformative Supreme Court appointments or the kinds of appointments made by Franklin Roosevelt to transform the Supreme Court's constitutional decisionmaking] that has yet evolved to permit the expression of the nationalistic aspect of modern constitutional identity. By putting an end to the practice of transformative appointment, it would leave the nation with the state-centered tools provided by Article Five—tools that have repeatedly proved inadequate at the great turning points of the past.⁵²

Adopting a supermajority requirement for confirming Supreme Court appointments would, however, help to democratize Supreme Court selections. The requirement would accomplish this objective because it would allow Supreme Court appointments to be made only by very popular presidents who would be willing to expend some of their popularity on behalf of their judicial appointments or to mobilize popular support in favor of their Supreme Court appointments.

Moreover, Ackerman maintains that requiring a supermajority for Supreme Court appointments should be done only in conjunction with other reforms designed to enhance popular sovereignty.⁵³ The most important of such proposals is Ackerman's "Popular Sovereignty Initiative,"⁵⁴ which would provide that

[u]pon successful reelection, the President should be authorized to signal a constitutional moment and propose amendments in the name of the American people. When approved by Congress, such proposals . . . 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.⁵⁵

51. *See id.* at 407.

52. *Id.*

53. *See id.* at 412-14.

54. *Id.* at 414-17.

55. *Id.* at 410.

This proposal has the virtues of excluding the states (regarded by Ackerman as barriers to rather than facilitators of popular reform) from the amendment process and treating each voter as "an equal citizen of the nation" with the opportunity to render his or her opinion on the need for constitutional reform.⁵⁶

II. ACKERMAN'S TEXTUAL ANALYSIS

To construct a common law of higher lawmaking, Ackerman initially has to demonstrate that the Constitution does not preclude amendment in a manner that deviates from the formal procedures for higher lawmaking set forth in Article V. To make the argument that Article V does not establish an exclusive means for amending the Constitution, Ackerman adopts a reading of Article V that, as I demonstrate below, conflicts with constitutional norms and undercuts his proposed methodology for construing other relevant parts of the Constitution.

Ackerman's argument on this score begins with the assertion that the Founders (and subsequent constitutional authorities during Reconstruction and the New Deal) believed that "both text and practice deserve weight in the evolving law of higher lawmaking."⁵⁷ The text is not exclusive because it "does *not* claim exclusivity."⁵⁸ For Ackerman, therefore, the text is not a dispositive source of its own meaning. In the absence of a clear textual directive, one must be prepared to look outside of the text for clues as to its meaning and scope.

The problem with this approach to the constitutional text is that it conflicts with the plain meaning of the text, constitutional tradition and structure, as well as Ackerman's methodology in reading other parts of the Constitution. First and foremost, the Constitution purports to create a number of distinct but interrelated institutions and practices and to define the rules governing those institutions and practices. The Constitution does not specify any formal role for the people in higher or lower lawmaking. Although this silence does not necessarily preclude the people

56. *Id.*

57. *Id.* at 72.

58. *Id.* at 73.

from trying to effectuate constitutional change in any manner they please, the people's power to amend the Constitution, if it comes from anywhere, comes from this silence, not from the text of the Constitution. At least since *McCulloch v. Maryland*,⁵⁹ constitutional silence does not necessarily constitute a positive grant of authority to any part of the federal government.⁶⁰

Moreover, as Professor Laurence Tribe has shown, the process of constitutional interpretation would be paralyzed if the simple absence of the qualifier "only" meant that a clause was not "exclusive."⁶¹ Article V is one of many constitutional provisions the plain purpose of which is to define a process by which to exercise a certain power—in Article V's case, that of making higher law. These powers-granting provisions of the Constitution are crucial for determining whom the Constitution authorizes to take legal actions, and the particular significance of those actions in our system of government. If these provisions do not constrain, preclude, or preempt alternatives for achieving precisely the same ends, their constitutional significance disappears. The structure of the Constitution loses much if not all of its meaning because it becomes optional rather than binding on the institutions it purports to define and govern.

Several Supreme Court decisions from the early nineteenth century to the present confirm the importance of reading exclusively the powers-granting provisions of the Constitution. A small sampling includes *Marbury v. Madison*,⁶² the Term Limits case,⁶³ and, most recently, the Line-Item Veto Act decision.⁶⁴ In

59. 17 U.S. (4 Wheat.) 316 (1819).

60. See *id.* at 405 ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted.").

61. See Tribe, *supra* note 13, at 1241-45, 1273-76.

62. 5 U.S. (1 Cranch) 137, 174 (1803) ("Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.").

63. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 806 (1995) ("[T]he Qualifications Clauses were intended . . . to fix as exclusive the qualifications in the Constitution.").

64. *Clinton v. City of New York*, 118 S. Ct. 2091, 2103 (1998) ("There are powerful reasons for construing constitutional silence on this profoundly important issue [the authorization of the President to veto only particular items in a bill] as equiva-

his famous commentaries on American constitutional law, Justice Joseph Story agreed with the Court's position that "[t]here can be no doubt, that an affirmative grant of powers . . . will imply an exclusion of all others."⁶⁵

Assuming *arguendo* that Ackerman's methodology in approaching this clause is sound, he does not follow it consistently. For example, in discussing Reconstruction, Ackerman suggests that the Republican Guarantee Clause does not authorize Congress to condition the states' reentry into the Union on their approval of the Reconstruction Amendments, because it does not expressly grant such power to Congress.⁶⁶ He also suggests that Congress acted illegitimately in securing the ratifications of the Thirteenth and Fourteenth Amendments because it had no authority to count states (or those entities that qualified as states) differently for securing the ratifications of different amendments.⁶⁷ Neither Article V nor the Republican Guarantee Clause, however, explicitly prohibits Congress from placing conditions on states in order for them to reenter the Union subsequent to secession or the Civil War. Nor does the Constitution in Article V or the Republican Guarantee Clause explicitly bar Congress from using different strategies in securing the ratifications of different amendments. Furthermore, if the absence of any express prohibition in Article V could be read as allowing the people and the institutions of the national government to amend the Constitution outside of the formal procedures set forth in Article V, one could similarly construe the Republican Guarantee Clause, by virtue of its silence, as not expressly prohibiting Congress from imposing conditions on the reentry of states into the Union after the Civil War.⁶⁸

lent to an express prohibition.").

65. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 155 (1833).

66. See 2 ACKERMAN, *supra* note 9, at 106-10.

67. See *id.* at 101-09.

68. Ackerman's argument that Congress lacked the authority to place conditions on the reentry of states into the Union or to use different strategies in securing the ratification of different amendments is based in part on the absence of any such express authority given to Congress in Article V. Article V, however, does not grant any express authority to the people, the President, or Congress to deviate from it in amending the Constitution.

Moreover, Ackerman's argument that Congress had no authority to condition reentry of the southern states into the Union on the acceptance of the Fourteenth Amendment ignores the fact that Congress had been placing conditions on statehood well before the Civil War.⁶⁹ In only one instance did the Supreme Court strike down such conditions,⁷⁰ and it did so not because of some general principle that Congress lacked any authority to place conditions on statehood but rather because the conditions imposed in that case, in the Court's view, violated the Fifth Amendment.⁷¹ Ackerman's construction of Article V seems to depend on not just a self-serving mode of constitutional interpretation and weak historical support, but also his personal biases. For Ackerman, it is not coincidental that Article V is state-centered, i.e., it is based on the idea that an important forum for debate and action on constitutional amendments will be in the states (either in the legislatures or conventions that the legislatures have authorized).

The latter circumstances are precisely what compel Ackerman to seek reform of Article V. He explains that Article V is wrong-headed because it gives undue authority to the states in the amendment process and that states cannot be trusted in the higher lawmaking process, particularly if "We the People" want federal authority expanded at the expense of the states.⁷² One need look no further for a response to this contention than Ackerman's own arguments in support of reforming Article V. For Ackerman, states cannot be trusted because state officials invariably think only of what will benefit themselves or their

69. See David P. Currie, *The Constitution in Congress: Jefferson and the West, 1801-1809*, 39 WM. & MARY L. REV. 1441, 1452-56, 1502 (1998) (describing the bases for Congress's decision to place conditions on Ohio's statehood in 1802). Before the Civil War, Congress also required certain conditions to be met in order for Kansas and Missouri to be admitted into the Union. See 1 DEXTER PERKINS & GLYNDON G. VAN DEUSEN, *THE UNITED STATES OF AMERICA: A HISTORY* 322, 611 (2d ed. 1968).

70. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 449-52 (1856).

71. See *id.* at 425. The Fifth Amendment provides, in pertinent part, that "nor shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

72. See 2 ACKERMAN, *supra* note 9, at 407 ("[T]he state-centered tools provided by Article Five . . . have repeatedly proved inadequate at the great turning points of the past.").

authority or the authority of the governments of which they are a part.⁷³ Ackerman does not provide any empirical support for this assertion. Nor is it surprising for Ackerman to take this position in light of his greater confidence in federal officials, particularly the President, to deal appropriately with national problems.⁷⁴

If Ackerman's distrust of state officials has merit, though, it is unclear why federal officials would be immune to the same problem. It is entirely conceivable that state *and* federal officials would be prone to act to some degree on behalf of the respective interests of the governmental entities they represent. If, however, self-interest plays a significant role in higher lawmaking, it becomes much more difficult to identify the differences between ordinary and higher lawmaking. Other scholars have demonstrated that the obscurity of this line undermines Ackerman's conception of higher lawmaking.⁷⁵ Part III examines more closely other problems with Ackerman's historiography of Reconstruction and the New Deal.

73. See *id.* at 415 (noting that "state politicians" are likely to "refuse" to agree to give up any of their authority in the amendment process because they "are interested parties").

74. Ackerman contends:

If we hope to move beyond the present practice, we must come up with an alternative that also expresses the modern American understanding that We the People of the *United States* can express its constitutional will in a process in which the President plays an important role. Rather than ignoring Reconstruction or the New Deal, the challenge is to channel nationalistic, and Presidentially centered, understandings into a better lawmaking structure.

Id. at 408.

Ackerman continues:

[M]y proposal [for reform] highlights the basic problem with the status quo: the mismatch between modern constitutional identity and the classical forms of constitutional amendment. Modern Americans put their national identity at the center and expect the Presidency to take a leading role in the process of articulating the nation's future. The classical system puts federalism at the center and assumes [wrongly] assembly leadership over the process.

Id. at 413.

75. See, e.g., Klarman, *supra* note 13, at 780-85; Sherry, *supra* note 13, at 928 n.31.

III. ACKERMAN'S CONCEPTION AND USE OF HISTORY

History is crucial to Ackerman's undertaking. It consists of the practices that he regards as supplementing and thereby illuminating the meaning of the Constitution's text. When done in a pattern or manner that tracks one of the phases of higher lawmaking, Ackerman regards such practices as constituting precedents that have the binding force of law on present and future generations.⁷⁶ The existence of such precedents conflicts with simplistic "hypertextualist" readings of the Constitution that posit that the full meaning of the Constitution can and should be discerned from "the four corners" of the document.⁷⁷

This part examines the two major problems with Ackerman's conception and use of history as legally-binding precedent. The first is that neither history nor constitutional law supports the notion or existence of history as a source of legally-binding precedent. The second is that, even if such precedents were possible, Ackerman misuses history in constructing them.

A. *History as Precedent*

Ackerman's conception of certain historical practices or patterns as constituting legally-binding precedents poses several problems for his project. First, he errs in weaving all three constitutional moments (the Founding, Reconstruction, and the New Deal) into a common law of higher lawmaking because only two of the moments occurred when Article V was available as a process for amending the Constitution. The Founding obviously predated ratification of the Constitution and thus the adoption of Article V, and, therefore, *nothing* about the Founding sheds any significant light on the processes of higher lawmaking under the Constitution. This leaves Ackerman with a maximum of only

76. The argument that historical practices may constitute legally-binding precedents is Ackerman's response to the often-made criticism directed at his theory of constitutional moments that it fails to provide a compelling justification for present and future generations to abide by past generations' constitutional commitments. See, e.g., Klarman, *supra* note 13, at 765-66; Frank I. Michelman, *Constitutional Fidelity/Democratic Agency*, 65 *FORDHAM L. REV.* 1537, 1538-42 (1997); Sherry, *supra* note 13, at 933.

77. 2 ACKERMAN, *supra* note 9, at 72.

two instances of higher lawmaking outside of Article V, and the architects and proponents of one of those, Reconstruction, claimed to have been following Article V,⁷⁸ whereas the architects of the New Deal maintained that their problem was not with the Constitution but rather the Supreme Court's interpretation of the Constitution.⁷⁹ Moreover, the New Deal has neither been encapsulated nor embodied in the same form of higher law as Reconstruction. Ackerman is thus left with only one precedent, the New Deal, as an example of higher lawmaking in which, at least according to Ackerman's account, higher law was made in a form and manner that did not comply with Article V. One precedent is a rather small set to constitute an entire common law of higher lawmaking. Indeed, a single precedent might not constitute a common law at all. Nor is there common law in any other area consisting of only a single precedent.

The second major problem with Ackerman's reliance on history as precedent is that neither of the two post-ratification constitutional moments he has identified (Reconstruction and the New Deal) actually has served as a precedent for higher lawmaking. Ackerman fails to offer a scintilla of evidence to indicate that the architects of the New Deal had Reconstruction (or, for that matter, the Founding) as a model of higher lawmaking.

If a precedent has not been recognized as such by those who have the most interest in claiming it as authority, its significance as precedent seems dubious. If those responsible for Reconstruction never considered the Founding as their guiding precedent or those responsible for the New Deal never thought of the Founding or Reconstruction as a precedent to guide their higher lawmaking efforts, it is either post-hoc reasoning or wishful thinking to describe these events as "precedents" within the field of higher lawmaking.

The third major problem with Ackerman's use of nonjudicial precedents to formulate a common law of higher lawmaking is that he ignores the richest body of precedents of higher lawmaking. Although by his own definitions Ackerman identifies one or,

78. See *infra* notes 170-72 and accompanying text.

79. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 23 (1998).

at most, two instances of higher lawmaking outside of the formal procedures of Article V, there are more than twenty-five precedents of higher lawmaking that have *complied* with Article V's formalities.⁸⁰ If one truly were concerned with figuring out the law of higher lawmaking, it would be a mistake to overlook these other precedents because they comprise a more substantial body of principles and rules of higher lawmaking for a good lawyer to study than do Ackerman's one or two cases. It is odd to talk of constructing a common law of higher lawmaking without taking into account the reasons for and the process by which the overwhelming majority of higher lawmaking instances have been made.

Once one studies these other instances, one discovers the frequency with which higher law has been made—at least in the form of amendments—without significant public input, support, or interest. The public seems to have been widely interested (as opposed to being directly involved) in higher lawmaking in several instances, including the ratifications of the Reconstruction Amendments,⁸¹ the Seventeenth Amendment,⁸² the Eighteenth Amendment (legitimizing prohibition),⁸³ the Nineteenth Amendment (granting women suffrage),⁸⁴ the Twentieth Amendment (regulating presidential succession),⁸⁵ and the Twenty-sixth

80. See U.S. CONST. amends. I-XXVII.

81. See Larry Kramer, *What's a Constitution for Anyway? Of History and Theory*, Bruce Ackerman and the New Deal, 46 CASE W. RES. L. REV. 885, 914 (1996).

82. See Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 538-47 (1997).

83. See EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA 3-5 (1996).

84. Cf. Bruce Ackerman, *A Generation of Betrayal*, 65 FORDHAM L. REV. 1519, 1520 (1997). Ackerman describes the Nineteenth Amendment as a "paradigm" in which

a long campaign that mobilize[d] millions of women, and also men, finally gain[ed] a primary place on the national agenda and then [won] recognition in the enactment of the Nineteenth Amendment. This new *constitutional solution* marked an important change, but the women's movement that spearheaded it was demobilized by its own success and did not move on to challenge other inegalitarian features of the constitutional regime.

Id.

85. See John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV.

Amendment (granting the right to vote to eighteen-year-olds).⁸⁶ The fact that there are several instances of relatively significant public interest in higher lawmaking suggests that we have historically embraced Article V as the means of conducting constitutional change.

The remaining amendments have triggered modest or little public interest because the public has not been their direct beneficiary. The most dramatic example of the latter kind of amendment is the Twenty-seventh Amendment,⁸⁷ ratified in 1992. Ackerman has trouble fitting this amendment into his analysis because it became higher law in the exact opposite way in which Ackerman has suggested such lawmaking should occur—without any public support or awareness at all. When first proposed in 1792, the amendment did not receive the approval of the requisite three-fourths of state legislatures in existence at that time.⁸⁸ Congress set no deadline by which states had to vote on the proposed amendment. States entering the Union after 1792 thus had the opportunity—at least theoretically—to vote on the proposed amendment. None did until 1992.⁸⁹ In 1992, as Ackerman relates, the amendment's

partisans revived it . . . and ran a low-visibility campaign amongst the state legislatures for its ratification, which ultimately resulted in approval by three-fourths. Since the amendment purportedly restricts the power of Congress to raise its own salaries, the present incumbents found it too embarrassing to protest at this antiquarian revival and accepted its validity.⁹⁰

Ackerman regards this amendment "as a bad joke," because it violates

470, 478 (1997).

86. Cf. Jeffrey Rosen, *Overcoming Posner*, 105 YALE L.J. 581, 608 (1995) (comparing popular support for Fourteenth and Twenty-sixth Amendments).

87. The Twenty-seventh Amendment provides that "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." U.S. CONST. amend. XXVII.

88. See 2 ACKERMAN, *supra* note 9, at 490-91 n.1.

89. See *id.*

90. *Id.*

the theory of popular sovereignty underlying Article Five requir[ing] representatives of *both* the nation and the states to think a proposed amendment is a good idea . . . this [theory] is not satisfied if the assent of the nation is obtained in the eighteenth century and the assent of the states in the twentieth century. Instead, We the People must speak on both national and state levels within a reasonable amount of time of one another.⁹¹

Ackerman's arguments against the Twenty-seventh Amendment are unavailing. To begin with, it is unclear why "the theory underlying Article V" should make any difference here. It made no difference to Ackerman's analyses of Reconstruction and the New Deal. More importantly, the fact that the Twenty-seventh Amendment has received formal status as an amendment without any public or official opposition reflects greater recognition among political elites of the superiority of the Twenty-seventh Amendment as enacted higher lawmaking as compared with the New Deal.⁹² In addition, such recognition demonstrates that Ackerman's historical precedents do not fully encapsulate the ways to amend the Constitution outside of Article V's requirements, including many lacking significant public interest, support, or participation.

Another serious problem with Ackerman's reliance on historical precedents, however, is that, as a matter of tradition in constitutional adjudication, they are not recognized as legally binding on political actors or judges. In Congress, for instance, the rule is that present members of Congress do not have the authority to bind a subsequent Congress.⁹³ Nor do courts recognize historical events, practices, or patterns as legally binding. In constitutional adjudication, courts defer to historical events only if some justices have been persuaded that those events reflect

91. *Id.* at 491 n.1.

92. See generally Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677 (1993) (discussing theoretical approaches to the amendment process).

93. See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 49 (1996).

some kind of authoritative tradition⁹⁴ or illuminate the necessity for overruling a precedent.⁹⁵

To put the point slightly differently, Americans have no tradition in the realm of historical or nonjudicial precedents analogous to the judicial doctrine of *stare decisis*. The closest thing the nation has to such a doctrine outside of adjudication is tradition, but tradition hardly is the same as what Ackerman wants to count as precedent. Ackerman attaches significance to certain events precisely because they represent, in his opinion, deviations from the conventional or traditional mode of higher law-making.

Moreover, Ackerman does not seem to take very seriously the binding quality of legal principles in the realm of higher law-making. As long as people have the means to change the Constitution as they see fit, there are no rules. Ackerman notes that "[b]y breaking the law we will find higher law."⁹⁶ If the rules for making higher law do not constrain subsequent generations, those subsequent generations are free as a practical matter to change or abandon commitments as they see fit.

Yet another reason that Ackerman's conception of history as precedent fails to work is that he neglects to investigate the

94. The degree to which tradition binds depends a great deal on the level of specificity with which it is identified. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989) (plurality opinion) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."); *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (suggesting that in interpreting the Due Process Clause of the Fourteenth Amendment, the Court should remain sensitive to the "balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.").

95. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (plurality opinion). In *Casey*, the Court explained that in reexamining a prior holding, it routinely asks, *inter alia*,

whether the rule [set forth in the prior decision] is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Id. (citations omitted).

96. 2 ACKERMAN, *supra* note 9, at 14.

possible relevance of war to the formation of the precedents he has identified—the Founding, Reconstruction, and the New Deal. One plausible link between these so-called precedents is war, for armed conflict conceivably framed or closed discussion of constitutional reform in each case. War might be a necessary precondition for the kind of higher lawmaking that Ackerman urges present and future generations to use as models. It is, however, difficult to conceive how something as volatile as war could be factored into the principles or rules of higher lawmaking. For his part, Ackerman's historiography completely fails to address the extent to which the desire to maintain peace (and domestic prosperity) after a war (e.g., the Revolutionary and Civil Wars) or the desire to transcend domestic conflict in order to wage another war on a grander scale (e.g., World War II) precipitated deviations from or inhibited recourse to conventional means of higher lawmaking.

B. The Problems with Ackerman's Use of History in Constructing Precedents

Ackerman's use of history in constructing legally-binding precedents is problematic in three respects. First, he fails to adopt a consistent or coherent approach to history. Second, he does not adhere consistently to his methodology of deferring to the public statements and actions of national leaders as reflective of institutional commitments. Third, Ackerman assumes but does not establish that the American people played a significant role in shaping or ratifying Reconstruction and the New Deal.

1. Ackerman's Failure to Adopt a Consistent Approach to History

Instead of adopting a consistent approach to historical materials, Ackerman treats history as a kind of grab-bag from which he picks and chooses the particular items that reinforce his claims.⁹⁷ This approach to history leads Ackerman to commit two

97. This mode of historiography has been referred to disparagingly as engaging in "law-office history." Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 & n.13.

further errors in his historiography. The first is that he does not address changes in the terms and institutions he is studying. The second is that he tends to fit facts to his theory rather than fit his theory to the facts.

a. The Relevance of the Evolution of Constitutional Terms and Institutions for the Study of Constitutional Moments

The absence of a coherent theory of historiography in Ackerman's book leaves Ackerman unrestrained in his use of historical materials. For example, one of Ackerman's common practices is to sift through presidential and congressional debates, presidential and mid-term elections, and newspaper articles and editorials from different historical periods to demonstrate that many national leaders used some similar language or terms. The problem with this methodology is that ideas and concepts change over time. It is fundamental to sound intellectual history to clarify the evolution of ideas over time, i.e., how the meanings of terms change over time. Ackerman simply fails to provide such clarification. A prime example of this failure is Ackerman's treatment of the phrase "We the People." Ackerman takes great pains to explain that his conception of "We the People" is "the name of [a special] process of interaction between political elites and ordinary citizens."⁹⁸ For Ackerman, this phrase seems to have had the same meaning during the Founding, Reconstruction, and the New Deal era, yet neither the phrase "We the People" nor the fundamental concept Ackerman regards as underlying or embodied within it—a special dialogue—has been constant over time.⁹⁹

Similarly, Ackerman fails to explore the significance or implications of the evolution of the national political institutions primarily involved in shaping the constitutional moments of Reconstruction and the New Deal. He acknowledges that in the New Deal era, Franklin Roosevelt achieved something as presi-

98. 2 ACKERMAN, *supra* note 9, at 187.

99. See generally Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 165-73 (1996) (examining the evolution of the phrase "We the People" and the concept of popular sovereignty throughout the eighteenth and nineteenth centuries).

dent that Andrew Johnson did not, i.e., placing the presidency at the helm of the national debate over the need for constitutional amendment.¹⁰⁰ This, however, is an incomplete reading of historical events because it ignores the evolution of the presidency between the years of the Johnson administration and the 1930s. For instance, the distinctive features of Johnson's presidency are not confined, as Ackerman would seem to have it, to his obstinacy in refusing to accede to congressional leadership in the formulation and implementation of Reconstruction.¹⁰¹ One should not lose sight of the fact that in its struggle with Johnson for supremacy in fashioning domestic policy relating to Reconstruction, Congress was trying to force Johnson back into the mode of all nineteenth-century presidents who, with the exceptions of Andrew Jackson and James K. Polk, regularly deferred to congressional leadership in formulating domestic policy initiatives.¹⁰² Even Abraham Lincoln tended to defer to Congress when it came to domestic policy matters (as opposed to when dealing with emergencies or war).¹⁰³ Viewed from this perspective, there was nothing momentous about Johnson's failure to win this struggle; the extraordinary thing would have been for Johnson to have won the contest for supremacy with Congress.

When one shifts attention from the 1860s to the 1930s, it is readily apparent that the presidency itself transformed in the interim. For instance, as Stephen Skowronek suggests in his paradigm-shifting study of presidential powers, "Franklin Roosevelt, like Lincoln, made extraordinary changes in the [national] government's basic commitments of interest and ideology, but he did so by elaborating principles of governmental organization that had been standard since the Progressive era."¹⁰⁴ The movement toward greater regulation of the economy to promote social justice and fairness had begun much earlier in the century, and

100. See 2 ACKERMAN, *supra* note 9, at 265-66.

101. See *id.* at 113-14, 169-80.

102. See generally Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1816-19 (1996) (discussing the shift toward executive dominance).

103. See DAVID DONALD, *LINCOLN RECONSIDERED: ESSAYS ON THE CIVIL WAR ERA* 187-208 (2d ed. 1969).

104. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* 10 (1993).

it had begun in the states. Building on the lessons derived from state innovations, President Theodore Roosevelt took great strides in the late nineteenth and early twentieth centuries in using the presidency as a "bully pulpit" to fix the United States's place as a preeminent world power, particularly in the Western hemisphere, and to advocate and defend national regulation of large private corporations.¹⁰⁵ He also tried to appoint justices who would be disposed to uphold progressive antitrust and securities laws passed by Congress.¹⁰⁶ Subsequently, in the Bull Moose era and particularly during Woodrow Wilson's presidency, the movement toward increasingly expanding federal or national regulation of economic and social issues became more common.¹⁰⁷ The next important step in support of a relatively active federal government was made by Herbert Hoover, who, according to Ackerman, "was anything but a stand-patter. . . . Hoover was a social engineer who believed in the affirmative uses of government power. His response to the Great Crash of 1929 was quite activist."¹⁰⁸ Hoover became "the first American president to meet a downturn in the business cycle with massive governmental interventions."¹⁰⁹ Subsequently, as Garry Wills suggests, the movement in favor of greater control of social policy and the economy from Washington rather than from the states "became a stampede. From [the beginning of the Roosevelt administration] on, an overlapping series of crises (Depression, world war, cold war) led to central mobilization and control of resources."¹¹⁰ In other words, the New Deal represented a dramatic shift not so much in the kind but rather the degree of national regulation of the economy. The conception of what qualified as the national economy for purposes of defining or clarifying the appropriate realm of national regulation had shifted and expanded up to and including Franklin Roosevelt's presidency, but this conception

105. See *id.* at 244-47.

106. Cf. HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF SUPREME COURT APPOINTMENTS* 156-65 (3d ed. 1992).

107. See SKOWRONEK, *supra* note 104, at 258.

108. 2 ACKERMAN, *supra* note 9, at 281.

109. SKOWRONEK, *supra* note 104, at 261.

110. Garry Wills, *The War Between the States—and Washington*, N.Y. TIMES, July 5, 1998, at 26 (Magazine).

did not begin nor, for that matter, end with Roosevelt's administration.

Of course, none of the changes in the scope of presidential power or the size and responsibility of the national government that occurred in the first half of the twentieth century happened without significant congressional input and support. As the presidency was changing (because of the interaction of a wide variety of internal and external pressures), so too was Congress. As members of Congress were responding to presidential assertions of power, they were experiencing (as well as trying to exert their own influence over) various changes in their internal operations.¹¹¹ This dynamic is sure to have had a profound impact on presidential-congressional interactions between the 1860s and the 1930s. Perhaps most importantly, the mode of senatorial election changed in the interim. The Constitution provided for the indirect election of senators until the adoption of the Seventeenth Amendment, which provides for the popular or direct election of senators, in 1917.¹¹² Prior to the Seventeenth Amendment, senators were much more beholden to the state legislatures that had elected them than to the public-at-large. State legislatures made sure of the allegiance of the senators they had chosen by issuing formal instructions on how senators should vote on especially important matters and removing those senators who refused to follow such instructions.¹¹³

In his discussion of Reconstruction, Ackerman never explores the relevance of the Founders' decision to provide for indirect election of senators in the original Constitution or the practice of instruction. In the nineteenth century, the Senate largely conducted its business as a whole rather than through committees, whereas in the twentieth century much more of the Senate's business is decided by smaller units or powerful individuals by means of parliamentary or procedural manipulation.¹¹⁴ Political

111. See generally MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* (forthcoming, Duke University Press 2000) (discussing changes in internal congressional operations and congressional efforts to influence presidential operations).

112. See U.S. CONST. amend. XVII.

113. See generally Bybee, *supra* note 82, at 517-30 (describing the means of controlling senators available to pre-Seventeenth Amendment state legislatures).

114. See generally BARBARA SINCLAIR, *THE TRANSFORMATION OF THE U.S. SENATE*

parties exerted much more influence over Senate activity during Reconstruction than they did during the era of the New Deal; Senate staffs exercised much more authority during the New Deal period than they did during Reconstruction.¹¹⁵ The reasons for and the fact of this evolution do not figure in Ackerman's analysis, but both say a great deal about congressional-presidential dynamics in Reconstruction and the New Deal.

Nor, as I have suggested, does Ackerman address the positive contributions made by another institution—the states—to constitutional change.¹¹⁶ Each state comprises, in Justice Brandeis's grand phrasing, a significant "laboratory" of democracy.¹¹⁷ In many critical moments of American history, the states have been the great innovators in shaping economic and social policy. In dealing with health, welfare, economic, gun-control, education, and social policies, the states have proven to be much more responsive to the popular mood or will than the national government.¹¹⁸ It is a mistake to think that the innovation that one finds urged in critical periods of American history was first crafted on Capitol Hill or in the White House. More often than not, innovations have begun in the states. This was certainly true on the eve of Franklin Roosevelt's election to the presidency in 1932.

b. Ackerman's Defective Historiography

The second major consequence of Ackerman's failure to propose or adhere to a consistent approach to historiography is that he is left unrestrained to fit historical facts to his theory rather than fitting his theory to the historical records.¹¹⁹ Five examples

155-73 (1989) (assessing the relative importance of committees and the Senate floor as arenas for legislative activism).

115. See *id.*

116. See *supra* notes 73-74 and accompanying text.

117. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

118. See Wills, *supra* note 110, at 28-29.

119. Other scholars have exposed various shortcomings in Ackerman's accounts of the Founding, Reconstruction, and the New Deal. See, e.g., Klarman, *supra* note 13,

illustrate this problem. First, in discussing the New Deal, Ackerman neglects to mention a critical perspective of the Roosevelt administration. As Professor Barry Cushman has observed:

[President] Roosevelt and his advisers had contemplated many alternative proposals when framing the [Court-packing plan] and had rejected almost all of them. Thoughts of amending the Constitution were abandoned early. In the first place, it was Roosevelt's view that the Court, not the Constitution, was the problem. Amending the Constitution would appear to be conceding that the Court's decisions against the New Deal had been correct.¹²⁰

If neither Roosevelt nor his advisers conceived that they were trying to amend the Constitution rather than using mechanisms for correcting what they perceived to be a mistaken constitutional interpretation adopted by some Supreme Court justices, Ackerman's account is not just incomplete; it is also misleading.

Second, Ackerman's reliance on Justice Robert Jackson's account of the New Deal as consistent with his understanding of it as a constitutional moment is mistaken. Ackerman notes that Justice Jackson took pride in the fact that his generation stamped

"its own impression on the Court's constitutional doctrine. It has done it by marshalling the force of public opinion against the old Court through the court fight, by trying to influence the choice of forward-looking personnel, and, most of all, by persuasion of the Court itself. It must not be forgotten that many of the most important changes in legal theory were announced before there was any change in Justices."¹²¹

at 769-71, 776-85; Sherry, *supra* note 13, at 924-25 (arguing that Ackerman's account of the Founding is flawed because "it ignores a tremendous amount of both favorable and unfavorable evidence and thus can hardly be considered history at all"); see also Martin S. Flaherty, *The Practice of Faith*, 65 *FORDHAM L. REV.* 1565, 1568 (1997) (arguing that Ackerman's methodology is "hard[] . . . to distinguish [from the approach claimed, if not practiced, by Antonin Scalia] and thus prone to the same criticisms and problems as Justice Scalia's commitment to originalist interpretation of the Constitution has been).

120. CUSHMAN, *supra* note 79, at 23 (footnotes omitted).

121. 2 ACKERMAN, *supra* note 9, at 347 (quoting ROBERT JACKSON, *THE STRUGGLE*

Ackerman finds this quotation significant because of the sound of the "note of satisfaction in Jackson's discovery that the Old Court turned out to be pragmatic in the end."¹²² The last two lines of Justice Jackson's comments undercut, however, the notion that there was a revolution or some kind of concerted effort to amend the Constitution that succeeded; Justice Jackson emphasizes that the most important factor in the period was "persuasion of the Court itself. It must not be forgotten that many of the most important changes in legal theory were announced before there was any change in Justices."¹²³ This sounds much more like the conventional account than Ackerman's rendition of the New Deal. It also reinforces Professor Cushman's point that the Roosevelt administration's problem was not with the Constitution but rather with the Court's interpretation of the Constitution.

Third, Ackerman regards the impeachment of Andrew Johnson as important to his conception of Reconstruction as a constitutional moment in two ways. He considers the threat of impeachment of Andrew Johnson as a triggering event in the constitutional moment of Reconstruction,¹²⁴ and he treats Johnson's signaling of his acquiescence to congressional leadership of Reconstruction to secure an acquittal in his impeachment trial as a ratifying event in the constitutional moment of Reconstruction.¹²⁵

Ackerman's treatment of Johnson's impeachment trial is distorted in two respects. First, as I have suggested, the struggle between Johnson and Congress for supremacy in the higher lawmaking of Reconstruction needs to be understood at least in part as an effort on Congress's part to maintain the old constitutional order in which it, rather than the President, was supreme in domestic policymaking.¹²⁶ Second, a closer reading of the historical record of Johnson's impeachment trial suggests

FOR JUDICIAL SUPREMACY at xiv (1941)).

122. *Id.*

123. *Id.* (quoting JACKSON, *supra* note 121, at xiv).

124. *See id.* at 211.

125. *See id.* at 227-30.

126. *See supra* note 102 and accompanying text.

that Johnson's switch was not the determinative factor but rather one of many factors in his acquittal. Thirty of the fifty-four senators who participated in the Johnson impeachment trial filed written opinions in which they explained their views and reasons for voting the way they did.¹²⁷ These statements indicate that the outcome of the trial turned on several factors, including genuine doubts, even among some who voted guilty, that impeachable acts had been charged or proved,¹²⁸ some uncertainty that the Tenure in Office Act covered Secretary of War Edwin Stanton (and hence Johnson's firing of Stanton did not violate the act);¹²⁹ signals from Johnson that he would be easier to deal with during the remainder of his term of office;¹³⁰ and the fear harbored by many Republicans that Benjamin Wade, a radical Republican, would become President if Johnson were ousted, and would be even less receptive to congressional leadership than Johnson had been.¹³¹

Another example of Ackerman's manipulation of the historical record is his treatment of the election of 1874.¹³² In that mid-

127. See PROCEEDINGS IN THE TRIAL OF ANDREW JOHNSON 863-1090 (F. & J. Rives & Geo. A. Bailey eds., 1868).

128. See, e.g., *id.* at 866 (opinion of Sen. Trumbull), 877 (opinion of Sen. Grimes), 888-92 (opinions of Sen. Johnson), 1071 (opinion of Sen. Henderson).

129. See, e.g., *id.* at 864-66 (opinion of Sen. Trumbull).

130. See WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENT TRIALS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 247 (1993).

131. See *id.* at 243-46. In his book on the impeachment trials of Justice Samuel Chase and President Johnson, Chief Justice Rehnquist suggests that another reason for Johnson's acquittal may have been that the "tactics of the managers from beginning to end undoubtedly antagonized not only senators who were doubtful to begin with but some who leaned toward conviction at the beginning." *Id.* at 247. He notes another distinguished commentator's observation that the House Managers "exhausted every device, appealed to every prejudice and passion, and rode roughshod, when they could, over legal obstacles in their ruthless attempt to punish the President for his opposition to their plans." *Id.* (quoting SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 721 (1965)).

132. Ackerman's misreading of the significance of the election of 1874 is similar to his misreadings of other elections. He often reads the elections at or around the periods of Reconstruction and the New Deal as providing affirmative mandates rather than repudiating certain political agendas. For instance, the 1866 congressional election is more plausibly portrayed as a popular repudiation of President Johnson's effort to readmit the southern states to the Union without requiring any significant showing of repentance or restructuring of their political and social systems than as a mandate for racial egalitarianism. See, e.g., MICHAEL LES BENEDICT, A COMPROMISE

term election, the Democrats won a landslide victory. As Ackerman describes, "[f]or the first time since the Civil War, the Democrats would control the House, and by a lopsided margin of 169-109."¹³³ Ackerman suggests that the election was not part of a constitutional moment to undo Reconstruction because, as he emphasizes, the Republicans retained control of the Senate by a margin of sixteen seats (45-29) and of the presidency.¹³⁴ Moreover, he notes that the loss should be kept in perspective, because it was a mid-term election that occurred in the midst of a period of ordinary lawmaking and such "elections almost always result in victories for the party that is out of the White House."¹³⁵ Ackerman makes these arguments to counter Professor Michael McConnell's suggestion that there was a constitutional moment to undo Reconstruction, consisting of the concerted efforts to resist Reconstruction by Presidents Grant and Hayes, Congress, the states, and segments of the population.¹³⁶

The fact that the election of 1874 might not be part of a constitutional moment actually undermines Ackerman's understanding of the significance of the 1874 mid-term elections. Ackerman's suggestion that the mid-term election of 1874 occurred in the midst of a period of ordinary lawmaking is problematic because a year later Congress was back in the mode of higher lawmaking when it passed the Civil Rights Act of 1875.¹³⁷

OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869, at 188-209 (1974); ERIC L. MCKITTRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 21-41, 442-47 (1960). Ackerman's racial egalitarianism thesis, see 2 ACKERMAN, *supra* note 9, at 178-83, is difficult to reconcile with the fact that Republicans deliberately removed black suffrage provisions from the Fourteenth Amendment because they feared a political backlash in the 1866 northern congressional races. Indeed, northern state referenda on black suffrage conducted during 1866 all yielded negative results. See, e.g., 6 CHARLES FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88*, at 1261-65 (1971); JOSEPH B. JAMES, *THE RATIFICATION OF THE FOURTEENTH AMENDMENT* 24, 43 (1984); William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirtieth Congress*, 1965 SUP. CT. REV. 33, 70.

133. 2 ACKERMAN, *supra* note 9, at 472.

134. See *id.*

135. *Id.*

136. See Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENTARY 115 (1994).

137. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-*

If Congress were engaged in higher lawmaking when it passed civil rights statutes in the 1860s and early 1870s,¹³⁸ it makes no sense to suggest that its passage of another similar statute—the Civil Rights Act of 1875—was qualitatively different. The Civil Rights Act of 1875 was passed not only in the wake of other Reconstruction civil rights statutes but also shared the same objectives of those statutes.

Moreover, the mid-term election of 1874 was quite unusual. As the noted Reconstruction historian Eric Foner explains, “the political landscape had transformed. As a result of the Democratic landslide, th[e 43rd session of Congress] would be the last time for two years (indeed, as it turned out, for over a decade) that Republicans controlled both the White House and Congress.”¹³⁹ The rise in popularity and influence of the political party that had opposed Reconstruction cannot be dismissed lightly on the ground that the electorate was moving to other issues and was no longer concerned with the fate of Reconstruction. In fact, the voters had not reached any final judgment (to the extent that one can reliably read the outcome of the direct elections of the House and the indirect elections of the Senate as signs of some considered judgment of the voting public) on Reconstruction. Ackerman has superimposed on the Reconstruction era (as he has on the New Deal era as well) an artificial framework that does not fit. Contrary to his assertions, Reconstruction was a part of the daily lives, and plainly on the minds of, many of those who voted in the 1874 election.

Ackerman’s treatment of the 1876 presidential election as one of the consolidating events of Reconstruction further illustrates his selective reading of history. Ackerman bases his claim that the 1876 presidential election consolidated Reconstruction partly on the fact that both candidates, Republican Rutherford Hayes and Democrat Samuel Tilden, accepted Reconstruction.¹⁴⁰ More-

1877, at 556 (1988) (describing the Civil Rights Act of 1875 as “represent[ing] an unprecedented exercise of national authority, and breach[ing] traditional federalist principles more fully than any previous Reconstruction legislation”).

138. See 2 ACKERMAN, *supra* note 9, at 186-87, 205-09, 212-13, 230.

139. FONER, *supra* note 137, at 553.

140. See 2 ACKERMAN, *supra* note 9, at 248-49.

over, he suggests that once Hayes became president he took several critical steps to keep the Reconstruction "spirit" alive,¹⁴¹ including repeatedly "veto[ing] the Democratic Congress's assault on the Republicans' statutory legacy in messages that emphasized the constitutional issues. . . . Hayes's vetoes revitalized the Republican Party and gained broad popularity, and the Democrats were obliged to accept defeat and pass appropriations without the riders."¹⁴² He claims further that rather than "backing away from the Republican commitment to the Reconstruction amendments, the Hayes Administration ended with their ringing reaffirmation."¹⁴³ Ackerman also makes much of the fact that Hayes's Republican party won the next presidential election of 1880, reflecting, in Ackerman's estimation, further public support for (or at least the absence of public opposition to) the ideals of Reconstruction.¹⁴⁴

The first problem with this account is that in making it Ackerman abandons his usual practice of attaching a great deal of significance to popular votes. Tilden won the popular election by almost 300,000 votes;¹⁴⁵ Ackerman tries to discount this fact by noting that, in the midst of the campaign, Tilden published a letter stressing that the debate over Reconstruction was over.¹⁴⁶ Tilden's letter, however, could hardly erase the fact that he was the standard-bearer of the Democratic party, which had defined itself during the prior decade as the party that had opposed or at least seriously questioned Reconstruction. It is hard to imagine that the Democratic party's identity as the opposition party was largely lost on the voting public, many of whom had experienced first-hand the Civil War and its immediate aftermath (including the Democratic party's involvement in all of the events of that period).

The second problem with Ackerman's account of the 1876 presidential election is that he acknowledges, but does not

141. *See id.* at 251.

142. *Id.* at 473 n.126.

143. *Id.*

144. *See id.* at 473-74 n.126.

145. *See id.* at 247.

146. *See id.* at 248-49.

attach much significance to, the post-election compromise that secured the presidency for Hayes. Ackerman correctly recounts that Hayes won the presidency as a result of an eight to seven vote by a special commission convened by Congress "to resolve disputed returns from the three Republican states remaining in the South."¹⁴⁷ The commission voted strictly along party lines. Ackerman notes further that once he became president, Hayes "stopped giving military support to the remaining Republican governments of the South, leading to their rapid collapse."¹⁴⁸

Ackerman's account is accurate to a point, but it does not go far enough. There is more to the story: In accepting the presidential nomination of the Republican party, Hayes pledged publicly to bring the South "the blessings of honest and capable local selfgovernment,"¹⁴⁹ a promise composed, in Eric Foner's judgment, of "code words, [Hayes] well understood, for an end to Reconstruction."¹⁵⁰ Nor was the message lost on Republican leaders, many of whom strongly endorsed Hayes because they expected that he would not support the continuation of Reconstruction. Moreover, once the election outcome was left for the special Commission to resolve, Hayes engaged in a series of behind-the-scenes negotiations designed to give, in Foner's words, "discreet assurances that the next administration would treat the South with 'kind consideration,' to detach enough Southern Democratic congressmen from Tilden to insure Hayes's election. But many Northern Republicans also hoped to use the crisis to jettison a Reconstruction policy they believed had failed."¹⁵¹ Hayes's decision two months after becoming president to withdraw federal troops from the only remaining states in the South with Republican-led governments—Louisiana and South Carolina—sent a clear signal (that was understood widely among the political elite of both parties) that the end of Reconstruction was imminent.¹⁵²

147. *Id.* at 247.

148. *Id.* at 248.

149. FONER, *supra* note 137, at 567 (quoting presidential nominee Rutherford B. Hayes).

150. *Id.*

151. *Id.* at 577.

152. *See id.* at 581-82.

Ackerman cannot escape the significance of Hayes's decision to withdraw federal troops from Louisiana and South Carolina, nor the implications of his other steps to signal and ensure the end of Reconstruction. To begin with, Hayes used his cabinet appointments largely to identify his administration with the Republican party's reform wing, whose agenda was to end Reconstruction.¹⁵³ Second, Hayes's withdrawal of federal troops in Louisiana and South Carolina ensured that political opponents of Reconstruction would take control in each state's government.¹⁵⁴ Third, Hayes did not hesitate to use federal troops to end the Great Strike of 1877, a series of uprisings in communities around the country to protest working conditions in the mining and railroad industries.¹⁵⁵ The federal government constructed armories not to protect black citizens in the South, but to ensure that federal troops would be on hand in subsequent labor difficulties in the major Northern cities.¹⁵⁶ Thus, the upheaval marked a fundamental shift in the nation's political agenda. Hayes's willingness to use federal troops in the latter context, but not on behalf of the enforcement of Reconstruction, sent an unambiguous signal of the administration's priorities, which plainly included abandoning Reconstruction.

The way in which Reconstruction ended does not fit with Ackerman's conception of the Hayes presidency as another consolidating event of Reconstruction. The significance of the Hayes presidency is not that it was part of a constitutional moment to embrace racial inequality. Instead, it helped, along with the last two years of the Grant administration, to consolidate the end of Reconstruction. In withdrawing federal troops and otherwise allowing the remaining Republican governments in the South to collapse, Hayes did not act alone. The Democratic House of Representatives backed all of his efforts to end Reconstruction.¹⁵⁷

153. See ARI HOOGENBOOM, *THE PRESIDENCY OF RUTHERFORD B. HAYES* 51-53, 56, 60, 134 (1988).

154. See *id.* at 56-58, 62-69, 225-26.

155. See *id.* at 79-92.

156. See FONER, *supra* note 137, at 582-83.

157. See HOOGENBOOM, *supra* note 153, at 69, 225-26 (noting, *inter alia*, the Democrats' refusal to appropriate the necessary funds to maintain the Reconstruction military presence in the South).

Moreover, Hayes was merely finishing the job of ending Reconstruction that his predecessor, Ulysses Grant, had begun. In his second term, Grant "presided over a broad retreat from the policies of Reconstruction."¹⁵⁸ The end of Reconstruction within a decade of its enactment thus was done by means of the concerted actions of all the institutions that had helped to bring it into being, including the President, Congress, the Supreme Court,¹⁵⁹ the Republican party, and the states. Moreover, many private citizens had gotten into the act, particularly in the South, by terrorizing or committing violent acts against the intended beneficiaries of Reconstruction amendments and legislation.¹⁶⁰ The institutions and the people that helped to end Reconstruction were not disconnected from the events that had led to the ratification of the Reconstruction amendments just a few years before. Instead, these were the very same institutions that had initiated Reconstruction. Moreover, many of the people who had lived through the Civil War and the early years of Reconstruction voted in state-wide and national elections in the mid to late 1870s. It hardly makes sense to imagine that these people would have been indifferent to the higher lawmaking that, at least according to Ackerman, they had had an important role in effectuating just a few years before. As one magazine observed at the time, the general approval of the concerted dismantlement of Reconstruction by national political leaders, state governors, and the press revealed "how completely the extravagant expectations [aroused by the Civil War] ha[d] died out."¹⁶¹

158. FONER, *supra* note 137, at 528. As noted by Grant's preeminent biographer William McFeely, Grant "could devise no sustained federal program of law enforcement" by the middle of his second term. WILLIAM S. MCFEELY, *GRANT: A BIOGRAPHY* 425 (1981). Grant's most egregious failures included not providing for enough federal prosecutors to prosecute violations of the new civil rights laws in the South, and not providing enough troops to curb or contain widespread private violence against blacks throughout the South, particularly in Louisiana and Mississippi. Cf. HOOGENBOOM, *supra* note 153, at 224 ("[N]orthern support for Radical Reconstruction had eroded, while southern opposition to it had grown violent. When Hayes took office, Radical Reconstruction in the South had virtually ended . . .").

159. See *infra* notes 185-267 and accompanying text.

160. See Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 417-19, 427-28, 438, 441-43 (1990).

161. *The End of the Civil Rights Bill*, NATION, Oct. 18, 1883, at 326.

2. *Ackerman's Failure to Adhere to his Preferred Methodology of Institutional Analysis*

Ackerman tells his readers that in order to illuminate the significance of the interaction between institutional leaders and the American people during Reconstruction and the New Deal, he will focus on a wide range of public statements and actions of those leaders.¹⁶² Moreover, in discussing the Supreme Court's apparent turnaround in 1937 to uphold the constitutionality of not just some, but all New Deal legislation, Ackerman emphasizes that he is concerned with the justices' public statements and decisions rather than their private intentions or motivations.¹⁶³

If applied consistently, however, this methodology would lead one to conclude, contrary to Ackerman's findings, that the architects of Reconstruction and the New Deal respected constitutional norms of higher lawmaking. For example, congressional Republican leaders during Reconstruction repeatedly proclaimed fidelity to Article V.¹⁶⁴ Indeed, congressional determination to legitimate the Civil Rights Act of 1866 in the face of arguments that it was unconstitutional was the primary impetus for the Fourteenth Amendment.¹⁶⁵ The fact that Congress felt the need to legitimate its 1866 legislation by promulgating the Fourteenth Amendment reflects the extraordinary importance that compliance with Article V had for Congress. Moreover, by fashioning progressive legislation during the New Deal era, congressional leaders gave the impression that they believed such legislation was constitutional under existing norms. The congressional record is replete with their arguments that the legislation they had enacted was constitutional under current norms as they understood them.¹⁶⁶ Moreover, the Supreme Court, both

162. See 2 ACKERMAN, *supra* note 9, at 17.

163. See *id.* at 343.

164. Ackerman himself quotes from many such declarations. See, e.g., *id.* at 105, 117-18, 156-59, 170, 175-76. See also FONER, *supra* note 137, at 251-61, 276-77 (noting that the Republican leadership argued throughout Reconstruction that its actions in trying to implement various reforms adhered to or were consistent with Article V).

165. See Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1325-28 (1952).

166. Ackerman acknowledges many such statements. See, e.g., 2 ACKERMAN, *supra*

during the New Deal era¹⁶⁷ and ever since, has consistently denied that there was anything revolutionary about the Court's decisions to uphold the constitutional foundations of the New Deal.¹⁶⁸

Ackerman tries to avoid the implications of these public declarations in three ways. First, he argues that many of these statements should not be taken at face value because they lack coherence or credibility.¹⁶⁹ This is a weak point because the basic messages or signals sent by many national leaders to the public during Reconstruction and the New Deal plainly communicated a desire to maintain fidelity to the adoption of progressive reforms within existing constitutional norms. The fact that Ackerman parses the words or actions of many Reconstruction and New Deal leaders to reveal internal inconsistencies or technical flaws is meaningless, unless he can show that the people themselves deconstructed these statements, decisions, or actions to unmask the real intentions or objectives underlying them.

Second, Ackerman puts a great deal of weight on how the opponents of congressional Reconstruction and the dissenters on the Supreme Court characterized the reform movements asso-

note 9, at 256, 279, 283, 297-98, 339.

167. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

168. See, e.g., *United States v. Lopez*, 514 U.S. 549, 574-76 (1995); *Planned Parenthood v. Casey*, 505 U.S. 833, 861-64 (1992).

169. See, e.g., 2 ACKERMAN, *supra* note 9, at 153-55 (demonstrating the inadequacies or technical problems with Secretary of State Seward's proclamation on behalf of congressional Reconstruction); *id.* at 216 (noting that "[f]rom a strictly legal point of view, [President Johnson] held a winning hand"); *id.* at 233-34 (suggesting the significance of the differences between Seward's endorsements of the ratifications of the Thirteenth and Fourteenth Amendments); *id.* at 293 (noting New Deal lawyers' differences of opinion regarding the constitutionality of some New Deal legislation); *id.* at 363 (observing that in one New Deal case, "[t]he Court speaks the language of continuity while the holding bespeaks the fact of rupture. A similar disjunction is visible in another crucial decision upholding the Social Security Act."); *id.* at 365-66 (critiquing Hughes's reasoning and language in *West Coast Hotel Co. v. Parrish*); *id.* at 368-73 (demonstrating that in a line of New Deal Cases the Court used traditional language to mask its revolutionary agenda); *id.* at 373 (noting the significance of the dissents in cases upholding New Deal legislation); *id.* at 400-03 (critiquing the Rehnquist Court's explanations of the Court's break with its past decisions on the Commerce Clause).

ciated with Reconstruction and the New Deal.¹⁷⁰ Ackerman is concerned with demonstrating that real constitutional meaning emerges from the dialectic of constitutional "dialogue."¹⁷¹ Every political loser, however, is going to characterize the winner's actions as exceeding the constitutional norm. This is an old game. During Reconstruction, Congress responded to this criticism by invoking Article V and promulgating the Fourteenth Amendment.¹⁷² During the New Deal era, Congress and the President responded to this criticism by operating within the constitutional order, backing legislation and Supreme Court appointments that reflected a particular vision or understanding of the Commerce Clause.¹⁷³ Moreover, Ackerman never explains whether the disagreements between contending forces over the meanings of certain events sharpened or obfuscated those meanings for the general public. He also fails to explain why the voices of prevailing forces should not be given greater weight in assigning or determining constitutional meaning, precisely because they have prevailed or endured.

3. *The People's Participation in Higher Lawmaking*

Ackerman's major purpose in *Transformations* is to demonstrate how national political institutions interact with (or lead) the people in achieving or effecting enduring constitutional change.¹⁷⁴ He fails, however, to make the requisite showing for three reasons. First, Ackerman never demonstrates how the institutions of the national government—particularly the president and Congress—led, reflected, and incorporated public

170. See, e.g., *id.* at 151-53 (discussing the significance of President Johnson's critique of or response to congressional Reconstruction); *id.* at 177-78 (describing the significance of President Johnson's "unprecedented message" in opposition to Secretary of State Seward's Proclamation); *id.* at 306-09 (recounting the Republican leadership and conventions' critique of the New Deal in 1936); *id.* at 320-40 (discussing the congressional opposition to President Roosevelt's Court-packing plan); *id.* at 356-58 (discussing the significance of Wendell Wilkie's 1940 presidential campaign); *id.* at 363 (describing how Justice McReynolds was not "fool[ed]" by Chief Justice Hughes opinion in *NLRB v. Jones & Laughlin Steel*).

171. See *id.* at 187.

172. See *id.* at 174-77.

173. See *supra* notes 120-23 and accompanying text.

174. See, e.g., 2 ACKERMAN, *supra* note 9, at 3-8.

opinion. Although one would have expected this dimension of historical analysis to figure prominently in Ackerman's work, it appears nowhere. He does not examine the ways in which national institutions actually consulted or took public attitudes into account in their constitutional decisionmaking during any of the historical events he has claimed as constitutional moments, including the formal and informal contacts between national political leaders and their constituents or interest groups, or any informal contacts between the leaders themselves.

Second, Ackerman assumes that in periods of higher lawmaking "most ordinary Americans are spending extraordinary amounts of time and energy on the project of citizenship, paying attention to the goings-on in Washington with much greater concern than usual."¹⁷⁵ He never establishes, though, that there was any unusually high degree of citizen awareness, much less understanding and participation in the constitutional discourse that was occurring in the nation's capitol during Reconstruction or the New Deal.¹⁷⁶ He never discusses the circulation levels of newspapers during these periods; the relative numbers of non-partisan newspapers and magazines during each of these periods; how many people actually read the newspapers and magazines during Reconstruction and the New Deal, or listened to the radio during the New Deal; the relative numbers of telegrams and letters to the White House or members of Congress during Reconstruction and the New Deal; and in what other ways the people exhibited or expressed their interest in and contributions to the constitutional developments of the times.

175. *Id.* at 187.

176. The only exception is when Ackerman notes that polls indicated that most Americans did pay attention to the tussle between the President and Congress over his Court-packing plan. *See id.* at 333. Ackerman does not talk, however, about the level of attention paid by the public to this debate. He even acknowledges that the very same polls indicated a division of opinion on the President's plan. *See id.* At least at this juncture of the supposed constitutional moment of the New Deal, the public apparently was not firmly on Roosevelt's side, though the significance of this ambivalence is far from clear. It is conceivable that people did not understand the debate, or that some significant portion of the public thought it was inappropriate or unnecessary to tinker with the Court's size, or that other methods such as future appointments were more appropriate for vindicating the President's displeasure with the Court, or even that the system was not broken, i.e., the Court was performing satisfactorily.

Third, Ackerman shows disdain for the ordinary citizen side of the political equation. He derides "the last generation's fascination with social history. Rather than focusing on the rarefied heights of Capitol Hill, recent historians have preferred to explore the meaning of Reconstruction history for the ordinary men and women of the South."¹⁷⁷ This is an extraordinary statement from someone who claims to be trying to vindicate popular sovereignty in higher lawmaking. No one is better qualified nor positioned than social historians to tell us precisely what "ordinary citizens" believed or how "ordinary citizens" expressed themselves (including what they read, thought, and said) about the constitutional issues of the day during Reconstruction or the New Deal. Ackerman claims that the people are much more interested in politics at moments of higher lawmaking; he makes various assertions about what people must have thought or believed.¹⁷⁸ He even asserts that

the mark of [periods] of constitutional solution is a rare convergence in the language and concerns of leaders in the capital and ordinary citizens in the streets. Ordinary Americans are no longer looking upon their leaders with their usual skepticism. The constitutional rhetoric in Washington resonates in billions of conversations on the job, around the breakfast table, and countless social settings.¹⁷⁹

177. *Id.* at 118-19.

178. *See, e.g., id.* at 131 (suggesting that "[f]or most Americans, the [Emancipation] proclamation is a symbol comparable to the Constitution itself as a landmark of American liberty"); *id.* at 133 (quoting but not elaborating on Harold Hyman's observation that "[w]hat was different in 1864 was the intense interest of ordinary voters in issues and principles, men and measures, causes and aspirations"); *id.* at 162 ("I will argue that it was *the People themselves* who took this decision [about adding the Fourteenth Amendment to the Constitution] away from competing political elites in Washington and decided it on their own responsibility. It is this decision of a mobilized People, and not any textual formalism, that lies at the foundation of the Fourteenth Amendment."); *id.* at 361 (discussing the Court's decisions immediately after the "switch in time," Ackerman suggests "the general public was most interested in the Court's *holdings*"); *id.* at 377 ("Americans of the 1930s knew what they were doing—and were not shy about saying that they were rebuilding, and not merely rediscovering, the foundations of popular sovereignty in America.").

179. *Id.* at 409.

Ackerman, however, never offers any concrete—or, for that matter, anecdotal—evidence to demonstrate the shift in public attention, discourse, and behavior. Moreover, the scholars who can confirm or dispute these claims about the public's attitudes and conduct—particularly the degree to which "ordinary citizens" understood, discussed amongst themselves or their leaders, and agreed with particular reforms or strategies being pursued by national leaders—are social historians, whose work Ackerman dismisses.

Instead, Ackerman argues that national political institutions were trying to vindicate popular sovereignty by making appeals for public support, and by claiming that the public supported their endeavors to make higher law.¹⁸⁰ Such appeals, however, prove nothing; they are commonplace in politics, regardless of whether ordinary or higher lawmaking is at stake. Such appeals do not substitute for actual data (based, for instance, on polling or referenda) reflecting the caliber and extent of the public's understanding and evaluation of the constitutional choices placed in front of it.

Nor does Ackerman fully explore the obstacles to public participation in the constitutional decisionmaking undertaken during Reconstruction and the New Deal, much less how national political leaders tried to break down these barriers to facilitate interaction or communication with the public on the great issues of the day. These impediments included, particularly during Reconstruction, the absences of modern polling techniques; the absence of technology that would have allowed for swift reporting of breaking news events to the American people on a wide-scale basis, such as through radio or cable television;¹⁸¹ and the proliferation of media outlets that served (particularly during Reconstruction) primarily as partisan mouthpieces.¹⁸² Moreover,

180. *See id.* at 10-11, 20-21.

181. Obviously, radio was available as a means of communication between President Franklin D. Roosevelt and the American people, and the President used this technology to his fullest advantage. We do not know from Ackerman's book, though, how many people owned radios or televisions, much less what media people used to follow the events discussed in his book, such as the congressional hearings on the Court-packing plan.

182. *See, e.g.,* FONER, *supra* note 137, at 350 (noting presence of Republican news-

the indirect election of senators undercuts his argument that the mid-term election of 1866 gave a "popular mandate" to congressional Republicans to seek constitutional transformation in the configuration of the Fourteenth Amendment.¹⁸³ Indeed, the indirect election of senators suggests the likelihood that most Americans would not pay close attention to debates in Congress, or at least in the Senate, because senators were not directly accountable to the people. Ackerman's argument that, prior to 1917, a close connection existed between the thinking of representatives in Washington and the people throughout the country is based on an unsupported assumption, rather than empirical proof.

IV. ACKERMAN'S INTERPRETATIONS

Ackerman argues that a critical function performed in the past by the Supreme Court has been the rendering of "transformative opinions—texts that gave affirmative doctrinal meaning to the constitutional revolution under way" in constitutional moments.¹⁸⁴ The problem is that in trying to establish or illustrate the significance or nature of "transformative opinions," Ackerman distorts some and overlooks other seminal Supreme Court opinions relating to Reconstruction and the New Deal.

A. Reconstruction

The first example of Ackerman's flawed reading of an important Supreme Court decision from the Reconstruction period is his discussion of the *Slaughter-House Cases*.¹⁸⁵ According to Ackerman, the Court's opinion in the *Slaughter-House Cases* represents "the last great step in the[] consolidation [of the Reconstruction amendments]."¹⁸⁶ According to Ackerman, two key passages of the opinion confirm this reading. The first is the statement by Justice Samuel Miller in his majority opinion that "within the last eight years three other articles of amendment of vast importance have been added [to the Constitution] by the

papers as "essential to party organization").

183. See 2 ACKERMAN, *supra* note 9, at 188.

184. *Id.* at 368.

185. 83 U.S. (16 Wall.) 36 (1872).

186. 2 ACKERMAN, *supra* note 9, at 245.

voice of the people.”¹⁸⁷ The second critical passage is Justice Miller’s acceptance of the legitimacy of the Reconstruction amendments without question: “Statesmen” who realized the need for the Fourteenth Amendment “passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.”¹⁸⁸ Ackerman suggests that when these two passages are read together with the dissent’s own unquestioning acceptance of the Reconstruction amendments, it is clear that “[t]he Justices speak with a unanimous voice. . . . [A]ll nine unconditionally accept the[] *validity* [of the Reconstruction amendments].”¹⁸⁹ Ackerman argues that by accepting the new amendments without referring at all to any of the improprieties associated with their ratifications, the Supreme Court had “finesse[d] the question of validity [of the new amendments and, in so doing,] acted consistently with common law norms in ignoring the deep questions that everybody knew lurked just below the surface.”¹⁹⁰

This reading is flawed for two major reasons. First, it rests on the mistaken assumption that the Court could have—and perhaps should have—questioned the legitimacy of the Reconstruction Amendments. Ackerman himself notes that none of the parties to the case challenged the legitimacy of these amendments.¹⁹¹ Hence, it would have been difficult (if not practically impossible) for the Court to have questioned the legitimacy of the constitutional amendments both parties were asking it to construe, even if it had wanted to do so. Questioning such legitimacy would have been—and would still be—unprecedented. The Court generally tries to confine its decisionmaking in a constitutional case to the precise question in front of it.¹⁹² Hence, by

187. *Id.* (quoting *The Slaughter-House Cases*, 83 U.S. at 67).

188. *Id.* at 245-46 (quoting *The Slaughter-House Cases*, 83 U.S. at 70-71).

189. *Id.* at 245.

190. *Id.* at 246.

191. *See id.*

192. *See, e.g.,* ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 48 (2d ed. 1994) (noting that “the judicial role is limited to deciding actual disputes”); *see also* 2 ACKERMAN, *supra* note 9, at 246 (stating that “[u]nlike constitutional courts in Europe, the Supreme Court gives no advisory opinions”).

accepting the legitimacy of the Reconstruction Amendments and by not raising any legal issues regarding their ratification on its own, the Court was following a conventional rather than a revolutionary practice.

The second problem with Ackerman's reading of the *Slaughter-House Cases* is that he neglects to acknowledge, much less to assess the significance of, the Court's ruling in the case. In an opinion with lasting consequences for constitutional law, the majority effectively nullified the Privileges or Immunities clause of the Fourteenth Amendment.¹⁹³ The *Slaughter-House Cases* decision was the first in a series of opinions obstructing federal efforts to protect newly freed slaves and their families.¹⁹⁴ According to the majority, the Privileges or Immunities Clause did not provide general federal protection for citizens, but rather protected only a few rights, "which owe their existence to the Federal government, its National character, its Constitution, or its laws."¹⁹⁵ Moreover, in addressing the petitioner's equal protection argument, the majority "doubt[ed] very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."¹⁹⁶

Besides not discussing the real significance of the *Slaughter-House Cases*, Ackerman fails to discuss several other important judicial precedents from the Reconstruction era. These precedents cannot be ignored in any attempt to analyze the dynamics of higher lawmaking during the Reconstruction era, for they demonstrate that the consolidation of which Ackerman speaks is largely illusory.

The first sign of trouble came in *United States v. Reese*,¹⁹⁷ which involved a federal criminal prosecution against two Kentucky municipal elections inspectors who had been charged with

193. The Privileges or Immunities Clause of the Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

194. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 82 (1872) (stating that the Court did not see in the Thirteenth and Fourteenth Amendments "any purpose to destroy the main features of the general system").

195. *Id.* at 79-80.

196. *Id.* at 81.

197. 92 U.S. 214 (1875).

violating two of the voting rights sections of the 1870 Enforcement Act for refusing to permit a black man to vote.¹⁹⁸ The relevant sections of the act were not expressly limited to state action that was racially motivated; therefore the Court struck them down as exceeding Congress's power under the Fifteenth Amendment and ruled that any prosecutions under them were, as a consequence, illegitimate.¹⁹⁹

Even more devastating to the promise of Reconstruction than the *Slaughter-House Cases* or *Reese* was the Court's 1875 decision in *United States v. Cruikshank*.²⁰⁰ The case arose from the Colfax Massacre, "the bloodiest single act of carnage in all of Reconstruction."²⁰¹ Indictments were brought under the Enforcement Act of 1870, alleging a conspiracy to deprive the victims of their civil rights.²⁰² On the grounds that the wording of the indictments failed to specify race as the rioters' motivation, the Supreme Court overturned the only three convictions that the federal government had managed to obtain.²⁰³ More was at stake than faulty language, however, for the Court argued further that the Reconstruction Amendments only empowered the federal government to prohibit violations of black civil rights by the states; the responsibility for punishing crimes by individuals rested where it always had—with local and state authorities.²⁰⁴ The decision did uphold the federal government's authority to protect the "attribute[s] of national citizenship,"²⁰⁵ but these had been defined so narrowly in the *Slaughter-House Cases* as to render them all but meaningless to blacks.²⁰⁶ In the name of federalism, the decision rendered national prosecution of crimes committed against blacks virtually impossible, and gave a green

198. See *id.* at 215.

199. See *id.* at 218-21; see also *Virginia v. Rives*, 100 U.S. 313, 318, 321-23 (1879) (holding that a "mixed jury in a particular case is not essential to the equal protection of the laws").

200. 92 U.S. 542 (1875).

201. FONER, *supra* note 137, at 530.

202. See *Cruikshank*, 92 U.S. at 548-49.

203. See *id.* at 556-59.

204. See *id.* at 552, 554-55.

205. *Id.* at 555.

206. See *The Slaughter-House Cases*, 83 (16 Wall.) 36, 92 (1872) (Field, J., dissenting).

light to acts of terror where local officials either could not or would not enforce the law.

In *United States v. Harris*,²⁰⁷ the Court reached a similar result with respect to the criminal conspiracy sections of the Ku Klux Klan Act of 1871. The Court held that, because the Fourteenth Amendment did not reach purely private conduct, Congress lacked the power to punish members of a lynch mob who had seized prisoners held by a state deputy sheriff.²⁰⁸

The most damaging judicial attack on Reconstruction legislation came, however, in the *Civil Rights Cases*,²⁰⁹ in which the Court invalidated the public accommodations sections of the 1875 Civil Rights Act. In an opinion by Justice Bradley, who had cast the pivotal vote making Hayes president,²¹⁰ the Court denied that either the Thirteenth or the Fourteenth Amendment conferred upon Congress the power to prohibit private discrimination in public accommodations.²¹¹ The Court held that the "first section of the Fourteenth Amendment . . . [is] prohibitory in its character, and prohibitory upon the States. [It] is State action of a particular character that is prohibited. . . . Individual invasion of individual rights is not the subject-matter of the amendment."²¹²

This latter reading of the Fourteenth Amendment grew out of the same view of the states as the primary protector of individual rights that the Court previously had expressed in the *Slaughter-House Cases*.²¹³ The Court in the *Civil Rights Cases* found the statute constitutionally defective partly because it "applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment."²¹⁴ In the Court's view,

207. 106 U.S. 629 (1882).

208. See *id.* at 638-44.

209. 109 U.S. 3 (1883).

210. See 2 ACKERMAN, *supra* note 9, at 247-48.

211. See *The Civil Rights Cases*, 109 U.S. at 25.

212. *Id.* at 10-11.

213. See *supra* text accompanying note 206.

214. *The Civil Rights Cases*, 109 U.S. at 14.

[a]n individual cannot deprive a man of his [rights] . . . ; he may, by force or fraud, interfere with the enjoyment of the right in a particular case . . . ; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right . . . ; he will only render himself amenable to satisfaction or punishment.²¹⁵

It followed that, "in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State[,] it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with the power to provide a remedy."²¹⁶

The Court also refused to find that Congress had the authority under the Thirteenth Amendment to pass legislation punishing certain kinds of private conduct.²¹⁷ In the Court's view, the crucial question was whether the discriminatory refusal to serve a black person in a public accommodation was similar to the kinds of "badges" or "incidents" of slavery that the Thirteenth Amendment was designed to abolish.²¹⁸ The Court answered the question in the negative. It stated that a refusal of service

has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State; or if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or State action, prohibited by the Fourteenth Amendment.²¹⁹

It is possible that Ackerman will discuss the significance of the Court's dismantlement of Reconstruction legislation in the final volume of his project, *Interpretations*. In the meantime, Ackerman leaves his readers with the misimpression that it is possible to separate the consolidation of Reconstruction from its

215. *Id.* at 17.

216. *Id.* at 17-18.

217. *See id.* at 20.

218. *See id.*

219. *Id.* at 24.

nullification or narrowing by the Supreme Court. As Ackerman notes, the Court "will characteristically serve as the conservative branch, leading a principled challenge to a rising movement of revolutionary reform."²²⁰ While this concession helps to set the stage for Ackerman's reform proposals,²²¹ it also accepts that there is nothing democratic about a sequence of events in which the Supreme Court not only failed to take the lead in a constitutional revolution but was also an active participant in closing it down.

B. The New Deal

Ackerman's theory of transformative opinions as judicial action that helps to consolidate a constitutional revolution is central to his argument that the New Deal was a constitutional moment. In his view, such opinions unfold in two stages. The first is through the Court's dicta, which

may give the naive reader an impression of substantial doctrinal continuity. The only trouble is that a yawning gap has opened between these quasi-traditional dicta and the course of concrete decisions—making it clear to a common lawyer that some new propositions of law, unexpressed in the opinions, are doing much of the real work.²²²

Ackerman explains further that "[t]his disequilibrium between revolutionary holdings and traditional dicta creates cultural pressure for a second stage of opinion-writing—in which a transformed Court elaborates new canonical doctrines that make sense of its earlier revolutionary holdings."²²³

In trying to demonstrate the first phase of the transformative character of the New Deal Court's opinions, Ackerman engages in a very close reading of the Court's 1936 and 1937 decisions. This reading leads Ackerman to conclude that

[w]hereas Roberts and Hughes often voted with the conservatives in 1936, they suddenly and systematically voted with

220. 2 ACKERMAN, *supra* note 9, at 291.

221. See *supra* notes 51-56 and accompanying text.

222. 2 ACKERMAN, *supra* note 9, at 360.

223. *Id.*

the liberals *all the time* in 1937—not only in ‘leading’ cases, but in all cases where federal power was challenged. Given the common law’s sensitivity to a systematic pattern of holdings, lawyers had no trouble detecting the deeper theme: Despite the Court’s quasi-traditionalist dicta, the partisans of the traditional Constitution were always on the losing side.²²⁴

In other words, Hughes’s and Roberts’s switch, beginning in but extending beyond *West Coast Hotel Co. v. Parrish*,²²⁵ signaled that some kind of sea-change in constitutional jurisprudence was afoot.

Ackerman’s account of the first phase of the New Deal Court’s transformative opinions is problematic for two reasons. First, it is fair to say that most Americans (who are not lawyers) would fall into the category of “naive readers,”²²⁶ who, Ackerman has suggested, would not detect an impending sea-change in Commerce Clause jurisprudence on the basis of the Court’s superficial analysis. Instead, they would likely accept at face value the Court’s adherence to traditional language in economic due process cases as signaling the absence rather than the presence of a ratifying or consolidating event of revolutionary proportions.

The second problem with Ackerman’s discussion of the first phase of the New Deal Court’s transformative opinions is that he fails to come fully to terms with the fact that the Court had not uniformly ruled against progressive economic regulations prior to 1937. Nor had the Court been unanimous in its adherence to economic due process prior to 1937. Ackerman neglects, for example, to mention that a significant illustration of the nonlinear movement to disassemble the legacy of the great case symbolizing judicial activism on behalf of economic due process—*Lochner v. New York*²²⁷—is the recognition in recent scholarship that *Lochner* verged on being an anomaly in its own era.²²⁸ Indeed, the Court effectively overruled *Lochner* in 1917.²²⁹

224. *Id.* at 367-68 (emphasis added).

225. 300 U.S. 379 (1937).

226. 2 ACKERMAN, *supra* note 9, at 360.

227. 198 U.S. 45 (1905).

228. See JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920, at 115-16, 167-68 (1978); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Pro-*

Moreover, *Lochner* itself began on shaky ground, decided five-to-four, with two powerful dissents filed, one by Justice Harlan in which Justices White and Day joined,²³⁰ and the other by Justice Oliver Wendell Holmes.²³¹ These dissents were just the first salvoes in a movement of opposition to *Lochnerian* thinking. Moreover, the Four Horsemen—Pierce Butler (appointed by Warren Harding), James McReynolds (appointed by Woodrow Wilson), George Sutherland (appointed by Warren Harding), and Willis Van Devanter (appointed by William Howard Taft)—had all cast several votes prior to 1937 in favor of New Deal initiatives.²³² Likewise, Chief Justice Hughes and Justice Roberts, the swing justices, “had hardly been consistent foes of activist government prior to the plan’s announcement.”²³³ In addition, President Hoover’s appointment of Benjamin Cardozo placed on the Court a man whose opposition to *Lochnerian* thinking was well-known at the time of his brief confirmation hearings in 1932.²³⁴ Cardozo was among the justices whose opinions prior to 1937 helped to create, in Edward Purcell’s words, “a doctrinal passageway” through which Hughes and particularly Roberts were able to go en route to overturning *Lochnerism* for good.²³⁵ The existence of legal doctrine prior to 1937 that countered

gressive Era, 1983 SUP. CT. HIST. SOC’Y Y.B. 53, 55, 62, 69. The classic statement of this view is Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 295 (1913) (collecting decisions and concluding that the “National Supreme Court, so far from being reactionary, has been steady and consistent in upholding all State legislation of a progressive type”).

229. See *Bunting v. Oregon*, 243 U.S. 426, 438 (1917) (accepting the judgment of the state legislature and state supreme court in upholding a ten-hour work day law as “necessary or useful ‘for the preservation of health of employé’s’”).

230. See *Lochner*, 198 U.S. at 65 (Harlan, J., dissenting).

231. See *id.* at 74 (Holmes, J., dissenting).

232. The old-age provisions of the Social Security Act, the Wagner Act, and the Tennessee Valley Act are among these initiatives. For an inventory of cases in which some or all of the Four Horsemen signed onto New Deal initiatives, see Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 246-48 n.255 (1994); Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 252-53 (1996) (reviewing WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* (1995)).

233. Klarman, *supra* note 13, at 774-75 n.98.

234. See ANDREW L. KAUFMAN, *CARDOZO* 461-63, 467 (1998).

235. See Edward A. Purcell, Jr., *Rethinking Constitutional Change*, 80 VA. L. REV. 277, 280 (1994).

Lochnerian thinking provided a legitimate basis on which Hughes and Roberts could rely in making the turn they made in 1937.

Ackerman's account of the second phase of the Court's transformative opinions during the New Deal era is no more convincing than his account of the first phase. For Ackerman, three cases symbolize the Court's dismantlement of the old constitutional order: *United States v. Carolene Products Co.*,²³⁶ *Erie Railroad Co. v. Tompkins*,²³⁷ and *United States v. Darby*.²³⁸ A fourth case, *Coleman v. Miller*,²³⁹ is important to Ackerman because he believes it explicitly endorsed the New Deal revolution.²⁴⁰

Generally, Ackerman's reading of these four cases is problematic because he assumes but never shows that the American people in the late 1930s and early 1940s appreciated the significance of the innovative or revolutionary dimension Ackerman has identified in the cases. There is no evidence, or at least Ackerman produces none, to show that the American people scrutinized the Court's opinions as closely as Ackerman has done, or with sufficient scrutiny to expose their revolutionary nature. It is safe to assume that most Americans did not read the cases. It is also fair to assume that because the decisions came down on the eve of the Second World War, many, if not most, citizens were directing their attention elsewhere.

Much of the revolutionary quality of the Court's decisions recognized by Ackerman is only perceivable by hindsight. This is especially true with respect to the fourth footnote in *Carolene Products*,²⁴¹ which, in Ackerman's judgment, "began to fill the gap left by the disintegration of traditional principles. [It] offered up a theory of New Deal democracy as an organizing framework."²⁴² Ackerman recognizes that "[i]t would take years for the emerging majority to wrestle with [the] affirmative impli-

236. 304 U.S. 144 (1938).

237. 304 U.S. 64 (1938).

238. 312 U.S. 100 (1941).

239. 307 U.S. 433 (1939).

240. See 2 ACKERMAN, *supra* note 9, at 117, 261-66.

241. *Carolene Products*, 304 U.S. at 152-53 n.4.

242. See 2 ACKERMAN, *supra* note 9, at 369.

cations [of the footnote] in full-blown opinions of the Court.²⁴³ Even if this were true, it undercuts Ackerman's point that the second phase of the revolution gained legitimacy because it further vindicated the will of a particular generation of the American people.²⁴⁴ It is unlikely that the public was aware of the footnote, much less supportive of the future directions in which the Court would likely take the footnote.

Ackerman also overstates the significance of the *Carolene Products* Court's adoption of a presumption that the state economic legislation rested upon a "rational basis."²⁴⁵ Ackerman regards this portion of the opinion as revolutionary because subsequent to the opinion "the Court has never again struck down a regulatory statute as arbitrary. *Carolene's* 'rational basis' test has become a fixed star in the modern constitutional universe—no less important than formulae like 'equal protection' that derive directly from the constitutional text."²⁴⁶ Ackerman neglects to acknowledge, however, that the Court used a rational basis test in economic due process cases prior to *Carolene Products*, most notably in *West Coast Hotel Co. v. Parrish* in 1937²⁴⁷ and *Nebbia v. New York* in 1934.²⁴⁸ Hence, *Carolene Products's* use of a rational basis test was not novel; it followed from and even paralleled the language from prior decisions.

The Court's decision in *Erie* arguably fits more neatly into Ackerman's theory. By holding that there was no federal common law and rejecting the Court's past practice of using state common law to define constitutional baselines (i.e., the property or contract interests that would receive constitutional protection), the Court

sought to create a new foundation for economic freedom through democratic politics and legislative reform. From this perspective, the great sin of the *Lochnerian* era was the Court's effort to constitutionalize the categories of the com-

243. See *id.*

244. See *id.* at 360-62, 367-75.

245. *Carolene Products*, 304 U.S. at 153.

246. 2 ACKERMAN, *supra* note 9, at 369.

247. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

248. See *Nebbia v. New York*, 291 U.S. 502, 537, 538 (1934).

mon law—striking down legislative reforms in the name of their own judge-made definitions of property, contract, and torts.²⁴⁹

In short, the Court “destroy[ed] the foundations of *Lochnerian* jurisprudence by demystifying the common law.”²⁵⁰

There are two major problems with Ackerman’s reading of *Erie*. The first is that the Court was unanimous, including a concurrence by Justice Butler in which the most ardent of the Four Horsemen—Justice McReynolds—joined.²⁵¹ Justice Butler concurred on the ground that the case could be resolved without having to decide any constitutional questions.²⁵² Nevertheless, the lack of a dissent from Justice McReynolds surely signaled publicly the absence of the revolutionary implications attributed to the opinion by Ackerman. More importantly, in his opinion for the Court in *Erie*, Justice Brandeis relied heavily on Justice Stephen Field’s late nineteenth-century dissent to an extension of *Swift v. Tyson*²⁵³ in *Baltimore & Ohio Railroad Co. v. Baugh*²⁵⁴ as well as Justice Holmes’s repeated criticisms of *Swift* (joined by other justices) in the early twentieth century.²⁵⁵ Though he does not concede its significance, Ackerman himself includes Justice Brandeis’s quote from Justice Holmes’s earlier critique that *Swift* was “an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.”²⁵⁶ The fact that *Swift* could be viewed as problematic in the late nineteenth century in Justice Field’s dissent, as well as in Justice Holmes’s early twentieth-century dissents, suggests that the reasons for overruling *Swift* did not have as much to do with the

249. 2 ACKERMAN, *supra* note 9, at 370.

250. *Id.* at 371.

251. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938) (Butler, J., concurring).

252. See *id.* at 90.

253. 41 U.S. (1 Pet.) 1 (1842).

254. See *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting), *quoted in Erie*, 304 U.S. at 78.

255. See *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting), *cited in Erie*, 304 U.S. at 79; *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-72 (1910) (Holmes, J., dissenting).

256. 2 ACKERMAN, *supra* note 9, at 371 (quoting *Erie*, 304 U.S. at 79).

New Deal as Ackerman supposes. *Swift's* overruling was the culmination of a long period of questioning rather than a signal of something revolutionary.

Darby is even more important to Ackerman's theory of transformative opinions than *Erie*. Although the Court's decision to uphold the constitutionality of the Fair Labor Standards Act of 1938 was "utterly predictable" in Ackerman's estimation, *Darby* is a "landmark" for Ackerman because "[i]t was unanimous."²⁵⁷ The unanimity was important because, Ackerman argues, "a constant stream of dissenting opinions testify to the continuing relevance of the tradition."²⁵⁸

By making this argument, Ackerman hoists himself on his own petard. By acknowledging that dissenting opinions reflect "the continu[ed] relevance of . . . tradition,"²⁵⁹ Ackerman concedes that the dissents to *Lochnerism* prior to the "switch in time" were part of a tradition. If a majority adopts the same reasoning as these dissents, it necessarily must belong to the same tradition. Moreover, dissents are important to Ackerman because "they will serve as a priceless resource should a new President come into office responsive to the constitutional values the dissenting tradition emphasizes."²⁶⁰ This is, of course, precisely what happened: a litany of dissents set the stage for the dismantlement of *Lochnerism*. The fact that its dismantlement was reflected at some point in a unanimous opinion does not necessarily say anything about the legitimacy or radicalism of the dismantlement. For one thing, Justice McReynolds, the last of the Four Horsemen to be on the Court at the time, joined in the Court's opinion without dissenting.²⁶¹ This surely sent another signal to the public that the Court's doctrine had not necessarily taken a turn that was completely incompatible with the pre-1937 constitutional order. In any event, the fact that the justices who adhered to *Lochnerian* thinking would die or retire from the Court was inevitable; that these vacancies all arose while Franklin Roosevelt was president was fortuitous.

257. *Id.* at 373.

258. *Id.*

259. *Id.*

260. *Id.*

261. *See, e.g., United States v. Darby*, 312 U.S. 100 (1941).

Coleman v. Miller also fails to fit Ackerman's theory of transformative opinions. In *Transformations*, Ackerman argues that *Coleman* recognized higher lawmaking outside of the formalities of Article V.²⁶² In *Coleman*, the Court refused to adjudicate a challenge to the validity of a state legislature's ratification of a proposed constitutional amendment, a vote that took place thirteen years after Congress had passed the amendment and twelve years after the same state legislature had considered and rejected it.²⁶³ The Court ruled that the case presented a nonjusticiable political question.²⁶⁴ Ackerman argues that by ruling the question to be political rather than legal, the Court legitimized non-Article V higher lawmaking in the form of the New Deal.²⁶⁵

Ackerman's reading of *Coleman* is implausible for three reasons. First, by finding the question in the case to be political rather than legal, the Court did not decide the case on the merits. It is thus misleading to argue that the Court had positively approved of higher lawmaking outside of Article V; in fact, the Court positively approved nothing. Second, *Coleman* was hardly the Court's first recognition or application of the political question doctrine. Prior to *Coleman*, the Court had applied the political question doctrine in other constitutional contexts,²⁶⁶ and the

262. See 2 ACKERMAN, *supra* note 9, at 261-66.

263. See *Coleman v. Miller*, 307 U.S. 433, 456 (1939).

264. See *id.* at 453-54. The Court stated that

the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. . . . [T]hese conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable.

Id.

265. See 2 ACKERMAN, *supra* note 9, at 263-66.

266. See, e.g., *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867) (refusing to hear a suit attempting to enjoin President Johnson's enforcement of the reconstruction laws); *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849) (refusing to decide the issue because it was "to be settled by the political power"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("Questions, in their nature political, or which are, by the

Court in *Coleman* cited many of its earlier applications of the political question doctrine to underscore that its decision to extend the political question doctrine to the realm of higher lawmaking was neither novel nor unusual.²⁶⁷ Third, and perhaps most importantly, there is no precedent before or after *Coleman* in which the Court has tinkered with the internal procedures of the amendment process. Higher lawmaking is a subject whose merits the Court has never addressed. Hence, in *Coleman*, the Court was following its conventional stance with respect to such lawmaking, i.e., leaving it entirely within the discretion of the political branches to decide.

V. ACKERMAN'S PROPOSALS

Ackerman's synthesis does not lead him to conclude that the American system of government is perfect.²⁶⁸ Instead, he accepts that our democracy is imperfect and requires significant revision to provide greater opportunity for the public to effect constitutional change. He makes two major proposals for facilitating popular sovereignty in higher lawmaking. I assess each below.

A. The Two-Thirds Requirement for Supreme Court Appointments

Ackerman's suggested requirement of a supermajority vote for Supreme Court nominations is designed to make Supreme Court selection more democratic. It would accomplish this end by changing the dynamics of Supreme Court appointments. It would prevent "an ideological President with a weak mandate [from using] a slim Senatorial majority to ram through a constitutional revolution."²⁶⁹ To command the supermajority required for confirmation, presidents would be forced "to consult with the political opposition and select distinguished professionals who

constitution and laws, submitted to the executive, can never be made in this court.").

267. See *Coleman*, 307 U.S. at 454-56.

268. See 2 ACKERMAN, *supra* note 9, at 403-06.

269. *Id.* at 407.

would adopt an evolutionary approach to constitutional interpretation."²⁷⁰

The two-thirds requirement poses, however, two problems for Ackerman. The first is that it is important to Ackerman not only for the change it would effect in the dynamics of Supreme Court confirmation proceedings, but also for its symbolic value. In fact, the vast majority of people who have been confirmed as Supreme Court justices have been confirmed with the support of more than two-thirds of the Senate.²⁷¹ If the proposal would not change the outcome of most Supreme Court confirmation proceedings, the only reason it would have appeal for Ackerman is because it would signify something of great value to him—the overcoming of some significant hurdle or obstacle that could have been overcome only with widespread political support. Ironically, the satisfaction of Article V's criteria for constitutional amendment signifies the very same thing. After all, it is Article V's formality that constitutes its most important feature. The very fact that formal requirements have to be met in order for an Article V amendment to exist is an important source—some would say the only source—of an Article V amendment's legitimacy. For Ackerman to insist that a Supreme Court appointment must have a similar pedigree of formality to achieve the appropriate degree of legitimacy conflicts with the rest of Ackerman's arguments, for one also could argue that complying with the formal requirements of Article V would have greater legitimacy than doing otherwise.

Ackerman's proposal undoubtedly would achieve its stated objective of changing the dynamics of confirmation because each senator would know that his or her vote would have added weight under the new system. The ensuing problem is that in all likelihood this would make the future of the confirmation pro-

270. *Id.*

271. Assuming *arguendo* that senators would have voted the same way on Supreme Court nominees regardless of the rule, the rule would have prevented the confirmations of only a small number of justices—Clarence Thomas, William Rehnquist (for Chief Justice), Mahlon Pitney, Lucius Lamar, Stanley Mathews, Nathan Clifford, John Catron, and Roger Taney (for Chief Justice), each of whom had been confirmed by less than a two-thirds vote of the Senate. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 322-38 (2d ed. 1996).

cess unpredictable. We simply do not know whether a supermajority vote would have kept a number of well-qualified people off the Court in spite of their strong professional records.²⁷² Nor would we know whether the supermajority vote would enhance or impede popular sovereignty in the appointments of Supreme Court justices. Indeed, it is quite conceivable that a hugely popular president still could fail to win confirmation of his or her extremely well-qualified nominee because of some obstinate, unprincipled faction in the Senate.

Moreover, it is not clear why the supermajority requirement necessarily would lead to the appointment of justices who would follow a so-called "evolutionary approach to constitutional interpretation."²⁷³ The relationship between the supermajority requirement and the appointment of justices who favor a certain approach to constitutional interpretation is by no means clear. In other words, Ackerman fails to show why his proposed requirement necessarily would result in the appointment of justices with some (but not other) kinds of viewpoints regarding constitutional interpretation. Nor has Ackerman shown how the appointment of justices who adhere to an "evolutionary approach to constitutional interpretation" would represent a vindication of the will of "We the People"; he has not shown that the American people favor any particular approach to constitutional interpretation. Nor has he established why the "evolutionary approach to constitutional interpretation" should be the preferred mode of constitutional interpretation or be considered as better for the country than other approaches. In addition, Ackerman assumes that the supermajority requirement would dissuade a president from nominating "constitutional visionaries,"²⁷⁴ but a president disposed to find such a visionary might still find such a person in the guise of a nominee who lacks a paper trail reflecting how he or she would perform on the Court once confirmed. The fact

272. Conceivably, this rule might have led to different outcomes in the confirmation proceedings for some distinguished but controversial Supreme Court nominees, such as Charles Evans Hughes (for Chief Justice), Louis Brandeis, and Melville Fuller, each of whom was confirmed by barely more than two-thirds of the Senate. See *id.*

273. 2 ACKERMAN, *supra* note 9, at 407.

274. *Id.*

that a nominee lacks a paper trail of an ideology does not mean the person lacks or is not disposed to certain ideological viewpoints.

Indeed, it is conceivable that the proposal would, if adopted, be much more likely to frustrate rather than facilitate the making of meritorious appointments. The more accomplished a Supreme Court nominee, the more likely the nominee has done or said something in his or her distinguished professional life to stir the opposition of some faction. The two-thirds requirement empowers a small faction—at least one-third of the Senate—to wield veto power over a Supreme Court nomination. Rather than fulfill Ackerman's desire to ensure that confirmation of Supreme Court nominees will occur only with the demonstration of overwhelming support, a nominee's opponents will find it much easier to oppose a Supreme Court nomination because they would have to persuade fewer people than they have to convince at present.

Ackerman also neglects to consider the Founders' reasons for requiring a supermajority vote for removals and treaty ratifications but not for confirmations. The Founders reserved a two-thirds supermajority voting requirement to shift the presumption against certain matters they expected not to arise routinely in order to ensure greater deliberation on them, to decrease the chances for political or partisan reprisals on removals and treaty ratifications, and to protect an unpopular minority from being abused in Senate votes on these questions.²⁷⁵ The Founders required a simple majority for confirmations in order to balance the demands of relatively efficient staffing of the government with the need to check the president's discretion (as well as the composition or direction of the judiciary).²⁷⁶

B. The "Popular Sovereignty Initiative"

The major problem with Ackerman's proposed "Popular Sovereignty Initiative" is that, as Ackerman recognizes, it probably

275. See GERHARDT, *supra* note 93, at 12-13.

276. See GERHARDT, *supra* note 111.

would never be adopted.²⁷⁷ The significance of this concession should not be underestimated. If this proposal has no realistic chance of being adopted, one should consider the reasons for its likely failure. Deciphering those reasons will reveal a great deal about the dynamics of constitutional change.

First, as Ackerman notes, the "popular sovereignty" proposal would fail because state leaders would be predisposed not to support the idea of excluding the sovereignty they represent from the amendment process.²⁷⁸ It is likely, however, that many federal officials would also be reluctant to accept the proposal. Although it is possible that federal officials often support mechanisms that enhance their own authority, the problem in this instance is that they generally do not become federal officials without significant support from party leaders and other constituencies in their home states. The strength of political parties and local party leadership as a base for successful national politicians remains formidable. Ackerman's proposal does not, of course, suggest doing away with this structure, but his proposal has little or no chance for passage without its support. Of course, there are other organizations, including interest groups and the media, whose support makes a huge difference to political leaders, and any significant proposal for change must win the approval of these groups as well.

Ackerman undoubtedly seeks to reduce the power of small groups (e.g., political parties, states, interest groups, and the media) over the interpretation, implementation, and amendment of the Constitution. Such groups nonetheless continue to wield enormous power. To illustrate this problem, one need look no further than the latest formal addition to the Constitution—the Twenty-seventh Amendment. The fact that the Twenty-seventh Amendment could be adopted without significant public support or awareness²⁷⁹ says two important things about Ackerman's thesis. The first is that, if we care about the need for greater public participation in higher lawmaking, the newest amendment's inclusion as part of the Constitution is disturbing,

277. See 2 ACKERMAN, *supra* note 9, at 415.

278. See *id.*

279. See *supra* notes 87-92 and accompanying text.

for it demonstrates that higher lawmaking that arguably complies with the formalities of Article V can occur without public awareness, interest, or support. It demonstrates further the need to adopt incentives to ensure that government officials, the media, and interest groups each do what they can to keep the public adequately informed of mobilized efforts by some political elites to make higher law.

The second lesson derived from the Twenty-seventh Amendment's inclusion as an enduring part of the Constitution is that increasing direct citizen participation in higher lawmaking, as suggested by Ackerman, is long overdue. One strategy for overcoming the inertia of the political process and increasing citizen participation is what Ackerman has already tried to do in his second volume—that is, directly educating the public about its potential to lead or to effectuate change or reform. The “Popular Sovereignty Initiative”²⁸⁰ is one such approach to implement this goal. For those who trust Congress or the states (more than they trust the President) to represent accurately their views on the need for constitutional reform, Ackerman's solution is obviously unattractive. Their alternative is either the system that presently exists or a new amendment that would allow for direct citizen input on higher lawmaking, such as through referenda. The extent to which radical change of the sort just described does not happen would be another illustration of the fact that “We the People” do not have the power Ackerman claims we do.

CONCLUSION

In *Transformations*, the second volume of his projected three-volume series, Bruce Ackerman attempts to demonstrate how the institutions of the national government interact with the American people to transform the Constitution. According to Ackerman, this interaction has produced a common law of higher lawmaking, the critical components of which are the principles and rules he derives from the public statements and actions of national leaders, including the Supreme Court, during Reconstruction and the New Deal. Though his analysis is often provoc-

280. See 2 ACKERMAN, *supra* note 9, at 414-17.

ative, it ultimately fails to achieve its desired objective. The very sources on which Ackerman relies to establish his thesis do not support a common law of higher lawmaking. To begin with, the text of the Constitution recognizes no method for amending the Constitution outside of Article V, and recognizing any such method in the absence of explicit constitutional authorization would render Article V (and other similar powers-granting provisions) superfluous. Also, the record of constitutional change suggests that it occurs in many different ways, some simpler, and some more complex or subtle, than Ackerman's five phases of higher lawmaking, but virtually no constitutional change has occurred with the kind of public support, awareness, or input Ackerman has supposed is a necessary prerequisite for higher lawmaking. His five phases of higher lawmaking exist only as an artificial framework superimposed on historical events. The institutions of the national government, including the President, Congress, and the Supreme Court, have neither recognized nor endorsed a common law of higher lawmaking. Moreover, Ackerman has yet to produce the historical record to substantiate his claim that the public played an integral role in leading or specifically approving the constitutional changes embodied in the Founding, Reconstruction, and the New Deal. Nor do judicial opinions help Ackerman, for they uniformly fail to recognize explicitly Reconstruction and the New Deal as constitutional moments. Furthermore, the New Dealers never said a single word about Reconstruction as a model for their efforts. Their silence suggests that they understood that Reconstruction was an Article V experience, not a constitutional moment to which they might look for guidance and common law precedent. In addition, for more than half a century the Court repeatedly has insisted that its upholding of the constitutionality of the New Deal is consistent with the pre-1937 constitutional order rather than a recognition of a revolutionary upheaval of it.

None of this is meant to suggest that Ackerman's project is a categorical failure. It does mean that Ackerman has thus far failed to meet his objective of building a convincing case in favor of the existence of a common law of higher lawmaking. One more volume of his project remains. The purported focus will be the ways in which the Supreme Court has preserved constitu-

tional change, particularly the revolution embodied by the New Deal.²⁸¹ The third volume also will provide him with another opportunity to deal comprehensively and responsibly with the sources on which a common law of higher lawmaking should be based. Until such time as Ackerman takes full advantage of this chance and makes the requisite showing in the manner of the good common law lawyer he purports to be, he will have failed in his quest to explain the dynamics of higher lawmaking and thus to provide an enduring moment of constitutional enlightenment.

281. *See id.* at 403.