

## ACKERMANIA OR UNCOMFORTABLE TRUTHS?

**WE THE PEOPLE: TRANSFORMATIONS.** By Bruce Ackerman.<sup>1</sup> The Belknap Press Of Harvard University Press. Cambridge, Ma. Volume 2, 1998. Pp. xi, 515. \$29.95.

*L.A. Powe, Jr.*<sup>2</sup>

There is probably not a single constitutional scholar in the country who is not familiar with Bruce Ackerman's claim that Article V is not the exclusive means of constitutional amendment. From his Storrs Lectures to the initial volume of his projected three volume set, *We the People*, Ackerman has argued that the Reconstruction and the New Deal constitute "constitutional moments" of higher law-making at which the Constitution was fundamentally altered outside the formal amendment process by "We the People" (a phrase Ackerman repeats as often as humanly possible).

To say that Ackerman's thesis has been controversial is much like stating a Texas summer is warm. His argument, that under the proper historical conditions Americans can (and do) successfully engage in higher law-making, invites evaluation of both his historical and his constitutional claims. Reviewers of volume one, *We the People: Foundations*, were up to the task. Some claimed Ackerman's history was thin and sloppy; others found his legal thesis off the wall. A few, like Suzanna Sherry, agreed with both critiques.<sup>3</sup> While everyone agreed volume one was a tour de force—really imaginative—if an up-down vote on the thesis could have been arranged, it is doubtful Ackerman could have carried the zip code 06520, much less anywhere else.

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1. Sterling Professor of Law and Political Science, Yale University.

2. Anne Green Regents Chair, The University of Texas.

3. Suzanna Sherry, *The Ghost of Liberalism Past*, 105 Harv. L. Rev. 918 (1992).

Now, with a pause of seven years since volume one, he's back, unrepentant and as confident as before.<sup>4</sup> Volume Two, *We the People: Transformations*, begins with a restatement of his thesis that allows all the old juices to begin flowing again. America, so Ackerman claims, has a tradition of dualist democracy. At most times Americans are engaged in ordinary politics where the people wisely live a balanced life and the problems of the country are but one of many things, like a Monday Night Football game, competing for attention, and the output of the political class, even if unattractive, is basically untroubling. But periodically politics takes the center stage. In these periods of heightened awareness, it is possible, if appropriate conditions are met, for a majority of the American people to empower a branch of government to speak authoritatively in the name of "We the People" and permanently change the Constitution without regard for forms of Article V. Thereafter, with the new changes in place, Americans can again revert to the pleasures of their normal lives, and the Supreme Court is duty-bound to apply the new Constitution to the cases coming before it.

Having restated what he spent the bulk of *Foundations* laying out, Ackerman turns to what is new. What's new is history, lots of history, superb history. Ackerman's sophisticated discussion of Reconstruction and the New Deal puts to rest any claim that his thesis rests on thin or sloppy history.

Constitutional moments begin with a constitutional impasse, created (for example) by the functional unamendability of the Articles of Confederation, by slavery and secession, or by the perceived need to regulate the national economy. Constitutional moments end with consolidation as the dissenting institutions run up the white flag. At the Founding, North Carolina belatedly but voluntarily joined the eleven states ratifying the Constitution, and Rhode Island then gave up when threatened with economic sanctions. After the Civil War, the Presidency eventually came into line with the Congress when Andrew Johnson yielded in 1868 under the threat of impeachment by the Senate, while the South provided the necessary ratifications of the Fourteenth Amendment, and then the country elected U.S. Grant. During the New Deal, the Supreme Court caved in with Owen

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4. He even ends the new volume with a proposal that any president who serves two terms would be allowed to offer constitutional amendments which, if approved by the voters at the next two presidential elections, would become part of the Constitution. (p. 410) Perhaps Ackerman was influenced by Bill Clinton's concern over the "legacy" thing. In any event, I will leave analysis of this proposal to those who may care.

Roberts' "switch in time that saves nine," and shortly thereafter FDR gained eight appointments.

Ackerman begins with a winning illustration because the Founding Era did engage in higher law-making in creating the Constitution. The delegates at Philadelphia had to exceed their instructions (by miles). The Articles of Confederation had to be ignored because not only did they proclaim a "perpetual union," they required unanimity for any proposed changes—something that, at a minimum, "Rogue" Island would never allow. I had thought I was basically familiar with the sources of the Founding, but Ackerman's analysis, showing unconventional uses of existing institutions against persistent claims of illegitimacy, is far richer than what I had known.<sup>5</sup>

Ackerman enthusiastically boasts that if extraconstitutional measures were good for the Framers (with their limited concept of direct democracy) and the nation, then they can be even better for subsequent generations, which have a more mature and inclusive view of democracy. Naturally, constitutional moments are rare. We have had none in the past six decades, so the New Deal's constitutional synthesis continues to govern Americans.

Like *Foundations*, *Transformations* demands attention both to the history it presents and to the non-Article V thesis it expounds. Copying John Marshall in *McCulloch* on the Tenth Amendment, Ackerman holds that if the Framers wanted Article V to be exclusive, "they could have written an explicit proviso: 'This Constitution can *only* be amended when . . .'" (p. 72) (emphasis in original) (This from someone who believes everyone who disagrees with him is a "hypertextualist"!.) While the thesis remains roughly the same, *Transformations*' history is first-rate not only at the Founding, but at Reconstruction and the New Deal as well. Ackerman fully validates his historical descriptive claim, and while some would like to undo the New Deal, presumably no one is so bold as to claim the Thirteenth and Fourteenth Amendments should be deemed void. Therefore, Ackerman rightly demands that there be an explanation for the changes in our constitutional understanding that is consistent with the historical facts, and he claims that only his approach accomplishes the necessary work.

Because there can be no legitimate debate as to whether the Founding was a constitutional moment where the old forms of

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5. This sentence could be repeated for both Reconstruction and the New Deal.

constitutional change were rejected,<sup>6</sup> I will focus first on Reconstruction and then on the New Deal. After offering more praise, I will turn to the harder questions of what to make of a very compelling historical narrative and whether its implications can be honestly avoided.

## RECONSTRUCTION

Let's begin with some numbers. In 1865 there were thirty-six states; eleven were in the Confederacy and by Appomattox, twenty-five states supported the national cause. There were two theories on which an amendment could be ratified. First it could secure either twenty-seven ( $3/4$  of 36) states. Alternatively, it might need only nineteen Union ratifications ( $3/4$  of the 25) on the assumption that the Southern states were out until brought back in. Lincoln believed that excluding the Confederate states from the ratification process "would be questionable and sure to be persistently questioned" (p. 148) and in the brief period in which exclusion was viable, even the radical Henry Wilson, who thought it legitimate, eschewed reliance upon the nineteen Northern ratifications.

The Confederacy presented a constitutional dilemma. Once Andrew Johnson started with his vetoes, if the South were admitted to Congress, its representatives could join with Northern Democrats to block any legislation implementing the Thirteenth Amendment and, indeed, any further constitutional change. Yet if the South were excluded as states, no constitutional amendments beyond the Thirteenth could hope to achieve nineteen Northern ratifications.<sup>7</sup>

On December 18, 1865, Secretary of State William Seward proclaimed the Thirteenth Amendment had been ratified by the requisite twenty-seven states (including the constitutionally intriguing West Virginia as well as eight from the Confederacy). Yet, two weeks earlier, Republican majorities in the Thirty-Ninth Congress had refused to seat Southern Representatives and Senators. The exclusion included Horace Maynard from eastern Tennessee, even though he had been seated during the Civil War!

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6. Like the Confederacy, eleven states seceded from the "perpetual union" declared by the Articles. Only this time the remaining (two) states joined them.

7. Racism made any amendment, especially one that dealt with voting rights, a sticking point. Thus the Fourteenth does not touch voting rights except negatively in Section Two.

Problem One, therefore, is how a state can ratify an amendment but be denied representation in the national government. Problem One, however, is easy compared to Problem Two. With the South excluded, as it would be throughout the Thirty-Ninth Congress, the Congress by 2/3 votes of its Northern members in both Houses proposed the Fourteenth Amendment. The new amendment could not receive the needed nineteen Northern ratifications. Therefore, to reach the three-fourths mark, some, perhaps all, states of the Confederacy were essential. With the exception of Tennessee (which ratified quickly and was rewarded with its Congressional seats), the Confederate states rejected the Fourteenth Amendment. Congress responded, after an extensive debate, by adopting a policy of military reconstruction. It wiped out the existing Southern governments that had ratified the Thirteenth Amendment and replaced them with new governments, which were informed that they could not have Congressional representation until the Fourteenth Amendment was ratified. Like Andrew Johnson facing conviction on the articles of impeachment, the South, too, switched.

Problem Two requires explanation of how a state can be stripped of Congressional representation unless and until it agrees to a proposed constitutional amendment. Not surprisingly, the text of Article V does not authorize excluding states from Congress unless they assent to proposed amendments. Conversely, Article V textually states "that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." One need not be a dimwitted hypertextualist to understand that no representation for the South is not equal representation with the North.

With the South excluded and Johnson in a veto mode, the Republicans steeled themselves into a veto-proof majority and forwarded the Fourteenth Amendment to the states. Johnson told the South what it wanted to hear: don't ratify; the process is unconstitutional. The nation was treated to a very public constitutional debate, and the 1866 elections were contested on the issue of what to do about the South.

The Republicans had to win at least 122 Northern seats to have the necessary majority in the House counting the South so as to continue the policy of not counting the South (until Southerners behaved better).<sup>8</sup> Yet, a mere 122 seats would mean

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8. The risk was that if the Republicans did not have 122 and nevertheless still used

stalemate, for it would give the President more than enough Northern Democrats to sustain his vetoes through the life of the Fortieth Congress. But no stalemate occurred because the 1866 elections were a spectacular Republican triumph. Republicans carried the House by 144-49, won every Northern legislature, and every contested gubernatorial race. By winning in the states that counted, the Republicans made them the states that were allowed to count.

Meanwhile, Johnson clung to his former position and his hope for a different outcome in the 1868 elections. The lame-duck Thirty-Ninth, however, saw the elections that had created the Fortieth as strengthening its own mandate. The result, after three months of intense debate, was the (First) Reconstruction Act of 1867 establishing military rule in the South in order to create those better-behaved governments that would ratify the Fourteenth. The Act explicitly stated that the newly constituted governments would be readmitted to Congress only when the Fourteenth Amendment received the necessary twenty-seven ratifications. To preclude Johnson from appointing Supreme Court justices, Congress passed a Court-shrinking statute that had three seats disappear until the Court was reduced to seven (which ought to include Lincoln's five appointees). To preclude a vacuum favoring Johnson, the Thirty-Ninth also passed a statute bringing the Fortieth into session immediately after the Thirty-Ninth expired. The Fortieth followed quickly with a Second Reconstruction Act ordering the military to register the voters, black and white, that Congress deemed eligible. But that was just the beginning, for the Fortieth Congress was just as revolutionary as its predecessor.

Worried generally about how Johnson might interpret their handiwork, the Republicans arranged for a special summer session if necessary. It was. Attorney General Henry Stanbery issued an opinion, agreed to by the Cabinet, gutting military reconstruction. The Republicans came into session and passed a Third Reconstruction Act overruling Stanbery's restrictive interpretation. Afraid that the Supreme Court might declare military reconstruction unconstitutional, the Republicans passed a statute stripping the Court of jurisdiction even though the case, *Ex parte McCardle*, had already been argued. Afraid that John-

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their Northern majority status to exclude the Southern Democrats, Johnson might recognize the Northern Democrats and their Southern compatriots as the true Congress. (p. 178)

son would use his Commander-in-Chief powers to thwart military reconstruction, Congress passed the Tenure in Offices Act, and then the House proceeded to impeach Johnson (in part) for violating it.

The same numerical logic that had been operating to exclude the South was driving these events. If Johnson and the Democrats could successfully hold out, they could turn the 1868 elections into a battle over whether to adopt the Fourteenth Amendment (and whether to seat the South without the Fourteenth). In one sense, this was hardly an idle hope: Northern citizens would eventually tire of the constant political battles and some form of normalcy would reassert itself. The question was when. Because it might be 1868, the Republicans wanted the Fourteenth on the books before the elections.

First, the Supreme Court yielded by doing nothing prior to the election. It could have handed *McCardle* down, as Robert Grier and Stephen Field desired, in the period between the jurisdiction-stripping bill's passage and Johnson's inevitable veto, or it could have held that the statute could not bar a decision in a case that was *sub judice*. But it did neither. Instead it waited to hear arguments about the statute's effect at its December 1868 Term, thereby withholding its views on the constitutionality of Reconstruction.

Second, after the Senate heard one of the House managers, Ben Butler, argue that Johnson could be convicted not only for actual crimes but also if his actions were "*subversive of some fundamental or essential principle of government or highly prejudicial to the public interest,*" Johnson switched. (p. 227) (emphasis in original) He assured moderate Republicans that he would do nothing to violate the laws or Constitution if acquitted, but more importantly, he ceased his obstruction of Congressional Reconstruction in the South.

Next, Seward issued a wishy-washy proclamation noting the ratifications of six newly-formed Southern governments "*avowing themselves to be acting as*" real legislatures. (p. 233) (emphasis in original) He then gave the Fourteenth a conditional validity only if Ohio's and New Jersey's ratifications remained in effect after newly elected state legislatures revoked the two state's initial ratifications. A day later, the House and the Senate passed a concurrent resolution declaring the Fourteenth duly ratified with the assent of all the states that had ever ratified it. Seward then issued a new proclamation declaring that the Four-

teenth Amendment had been adopted as part of the Constitution.

Frank Blair, the Democrat's Vice Presidential candidate in 1868, publicly advocated revisiting the issue of ratification after the election. But he and Horatio Seymour lost to Grant, and with their defeat the question of legality was settled. In Ackerman's terminology, 1868 was a consolidation of the Republican's non-Article V victory. Five years later, the Court in the *Slaughter-House Cases* did not even pause over the validity of the new amendments.

Unlike too many constitutional theorists for whom facts are an inconvenience to be presumed, Ackerman is a genuine researcher. As such, he has rediscovered a constitutional history lost both to the complete repudiation of the Burgess-Dunning school<sup>9</sup> and to the changes in the historical profession generally. Too many years ago, I had read that the Fourteenth Amendment had not been properly adopted, but I brushed the story aside as part of the phony Southern history. I was wrong. As Ackerman notes, Southerners did make this claim, and even superb Northern historians, like Eric Foner,<sup>10</sup> now simply ignore it.

Ackerman shows how thoroughly the constitutional questions were vetted at every step of the way (at least as much as Lincoln's suspending of habeas and issuing the Emancipation Proclamation were vetted). And Ackerman has fully integrated the constitutional with the political history of the period and done so as a first-rate lawyer. His discussions of Guarantee Clause jurisprudence or the way the Republicans handled the technicalities of the Tenure of Offices Act could not have been written so clearly by someone lacking legal training. Needless to say, I find his conclusion that the Fourteenth Amendment was not ratified in anything approaching conformity to the spirit of Article V completely persuasive. Possibly another reviewer of

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9. John W. Burgess with *Reconstruction and the Constitution 1866-1876* (Charles Scribner's Sons, 1902) and William A. Dunning with *Reconstruction, Economic and Political* (Harper & Brothers Publishers, 1907) were the two leading turn of the century historians on Reconstruction. They propagated the view, lasting past mid-century, that Reconstruction was a terrible mistake imposed by venal radicals on an innocent South. This view was probably nowhere better expressed than in the title of Claude Bowers' best-selling *The Tragic Era: The Revolution After Lincoln* (The Literary Guild of America, 1929). The first paragraph of Bowers' preface perfectly captures the flavor of the Burgess-Dunning school: "The prevailing note was one of tragedy. . . . Never have American public men in responsible positions, directing the destiny of the Nation, been so brutal, hypocritical, and corrupt. The Constitution was treated as a doormat on which politicians and army officers wiped their feet after wading in the muck." Bowers at v.

10. Eric Foner, *Reconstruction* (Harper & Row, 1988).



*Transformations* will offer a plausible explanation for how the ratification of the Fourteenth Amendment is not questionable, but I cannot.<sup>11</sup>

### THE NEW DEAL

The New Deal story, being more recent, is far better-known than Reconstruction; indeed many Con Law professors were both taught and teach some version of it. After the rejection of Herbert Hoover in 1932, there was an outpouring of legislation during FDR's First Hundred Days. In the 1934 elections, the Democrats scored an unprecedented mid-term victory, but, in 1935 and 1936, the Supreme Court declared everything it could unconstitutional and seemed poised to strike down the more important legislation from the Second Hundred Days. After Roosevelt's landslide in 1936, he offered his Court-packing plan. Roberts pulled his famous switch, and the Court initially sustained the minimum wage, the National Labor Relations Act, and Social Security. This saved the Court from the indignity of packing, as the Court then reached results consonant with what the New Deal wanted. Anything any government did to regulate the economy was valid—indeed by 1941 unanimously valid. For Ackerman, the changed view of the central government's authority to regulate the economy is a second non-Article V constitutional transformation.

Let's do numbers again. There were four votes on the Court against anything the New Deal did; the Four Horsemen were incorrigible. Thus, the New Deal could win only by a 5-4 vote.<sup>12</sup> Second, Roosevelt was the first president to serve a full term without a single appointment to the Court. Third, the Court in 1936 was the oldest in American history.<sup>13</sup> Nevertheless, Roosevelt was more likely to lose by a 6-3 or a 9-0 vote than he was by a 5-4 vote; a single appointment would have helped but maybe not much. Or maybe not at all. As Ackerman notes, Hoover's appointees were not reactionaries. If Holmes had clung to his seat until 1933, then it would have been Senate majority leader Joe Robinson of Arkansas, not Cardozo, on the

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11. A "war powers" explanation, discussed in this article, still holds Article V problems.

12. At one point, Ackerman inexplicably, and undoubtedly accidentally, refers to *Nebbia* as a 6-3 opinion. (p. 364)

13. The geezers on the 1984 Court set a new record. L.A. Powe, Jr., *Old People and Good Behavior*, 12 Const. Comm. 195 (1995).

Court (probably changing the results in *Nebbia*, *Blaisdell*, and the *Gold Clause Cases*). If the oldest justice had died during Roosevelt's first term, Robinson would have replaced Brandeis.<sup>14</sup> The accidents of judicial mortality did not cause the constitutional crisis, no matter what our elders taught us.

Unlike Reconstruction, there are several alternative explanations for what happened during the New Deal. Both Ackerman and I were taught that it was a constitutional restoration. Beginning with *Lochner*, the Court had gone astray. But *Jones and Laughlin Steel* returned the Court to the sensible interpretations of John Marshall in *McCulloch* and *Gibbons*.<sup>15</sup> More recently, two scholars have offered explanations that down-play the idea that the changed jurisprudence was a revolution. Richard Friedman has suggested that it was the luck of the draw.<sup>16</sup> If *Carter Coal* and *Butler* had come first and *Nebbia* and *Blaisdell* had followed, then the switch in 1937 would look different and more naturally incremental. Somewhat relatedly, Barry Cushman has claimed that the key change was in *Nebbia* and it just took the Court (by which he means Roberts) some time to grasp its implications.<sup>17</sup> Furthermore, Cushman attributes the New Deal impasse to bad statutory drafting. Once the New Deal lawyers got the hang of things, they drafted better statutes which the Court sustained.

These alternative accounts do not require a constitutional moment of higher law-making to explain what happened in 1937, and they are consistent with Roberts' own claim that had *Tipaldo* been presented properly, he would have sustained the minimum wage law then. Ackerman nevertheless believes that lawyers are wearing blinders. He holds a joint appointment in Political Science and prefers that discipline's more sensible and long-held understanding that the New Deal was a peaceful revolution in American constitutionalism to the legalist explanation that it was either a fluke of mortality or just incrementalism.

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14. Roosevelt's commitment to Robinson suggests that even the architect of the new order was not thinking seriously about the role of the Supreme Court and how it would relate to his proposed solutions to the Depression.

15. John Marshall, premature New Dealer; somehow I don't see him sustaining the regulation of Farmer Filburn's wheat.

16. Richard Friedman, *Switching Time and Other Thought Experiments*, 142 U. Penn. L. Rev. 1891 (1994).

17. Barry Cushman, *Rethinking the New Deal Court* (Oxford U. Press, 1998) (Cushman does believe the doctrinal changes of the 1940s were revolutionary, not incremental).

Instead of seeing the Court as obstructionist, Ackerman claims that “judicial resistance contributed to the democratic character of the outcome.” (p. 312) First, it forced Roosevelt to choose between the corporatism of the National Industrial Recovery Act and the regulation of the Second Hundred Days. Second, it focused Roosevelt, the Republicans, and the Nation on the fundamental changes the New Deal was initiating. After Roosevelt’s lengthy public “horse and buggy” attack on the Court for *Schechter*, the press engaged in various speculations about what the president’s next constitutional step might be. The public debate focused all parties, and it required the people to choose in elections. Had the Court sustained the NIRA in *Schechter*, Roosevelt might have continued with that misguided corporatist approach and the nation might not have had the great debate on whether fundamental change was necessary. “The 1936 election would have occurred under foggier conditions.”<sup>18</sup> But it did not. Instead “even the 17 million Americans who voted against Roosevelt in 1936 would find it hard to deny that the People had embraced the ideal of regulated capitalism *with their eyes open.*” (p. 380-81) (emphasis in original) By waiting until after the 1936 elections, Roberts’ switch was perfectly timed. The people had spoken. Nevertheless, it would have been better for Ackerman to acknowledge that the constitutional issue could have been more clearly drawn since FDR never mentioned the Court during the 1936 campaign. The people spoke and I think clearly, but perhaps not about the Court.

Indeed, rather than ask whether the Court retreated too late, Ackerman asks the more provocative question: Did the Court retreat too soon? A frequent complaint about Ackerman’s thesis, powerfully put by Richard Posner in an acid review in *The New Republic*, quite reminiscent of the reviews of *Foundations*, is that there is no text for the supposed-post-1936 constitutional amendments.<sup>19</sup> Ackerman’s response in advance (which Posner never mentioned in his review) was that if the Court had continued on its course, there probably would have been text as the overwhelming Democratic majorities in Congress used Article V to create new amendments. But because the Court yielded so completely there was no need of textual amendments even though plenty were ready; indeed, the *New York Times* stated on

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18. Id.

19. Richard Posner, *This Magic Moment*, *The New Republic* 32, 35 (April 6, 1998).

its front page in January 1937 that amendments were "one of the main issues awaiting the new Congress." (p. 316)

Republicans let the Democrats lead the Court-packing fight, and much of the Democratic opposition revolved around the appropriateness of Article V amendments. Roosevelt felt three decisive elections in four years gave him the mandate to go forward. Democratic Senator Burton Wheeler, LaFollette's running mate in 1924, led the opposition. He wanted an Article V solution (one that would create a legislative override of Court decisions). There was not only a split over Article V, there was a split over Presidential versus Congressional leadership. Then the Court's switch "took the steam out of this great debate." (p. 333) The Court-packing plan's support dropped five points after *Jones and Laughlin Steel* and five more after Van Devanter announced his retirement. With the debate largely over, the chances for a constitutional amendment were over as well.<sup>20</sup> Hence Ackerman's "central thesis:" "in the American system, *the Supreme Court largely determines whether a constitutional revolution will be codified in Article Five terms.* Only if the Justices refuse to recognize the legitimacy of a transformation do the President and Congress have an incentive to take the Article Five path." (p. 315) (emphasis in original) This is clearly correct.<sup>21</sup>

What of the legalist critique? Ackerman acknowledges Friedman and Cushman but does not specifically treat their arguments. Nevertheless, if his discussion of the Court is right, theirs is not. Like FDR, who was wary about Roberts' and Hughes' switch and therefore wanted more than just a replacement for Van Devanter, Ackerman, as a doctrinalist, sees 1937 as incomplete. In retrospect, we know the Court surrendered and that no New Deal measures were ever again declared unconstitutional. But the New Dealers did not know that. The key transformation, now in the Con Law casebooks, is *West Coast Hotel v. Parrish*, where an alternative ground offered was the

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20. Gregory Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81:4 Am. Poli. Sci. Rev. 1139, 1148 (1987). Joe Robinson's death killed whatever chances a compromise Court-packing plan had. William Leuchtenburg, *The Supreme Court Reborn* 152 (Oxford U. Press, 1995).

21. It does leave open the interesting possibility that the Court might enter an era where it was creating its own "constitutional moment." If the political branches agree or do nothing, has the Constitution changed? In *Foundations*, Ackerman worries that the Court might prematurely yield to the political branches before they could gain the necessary authority to speak for the people. (p. 286) He never considers an overly active Court combined with the acquiescence of the political branches.

theory of the public subsidy of the employer. But this could have been ignored in the future. Neither *Jones and Laughlin Steel* nor *Steward Machine* overruled the precedents they were rejecting.

The fundamental doctrinal changes began to be solidified beginning in 1938 when Hugo Black and then Stanley Reed joined the Court and made a return to the Old Order highly unlikely. The doctrinal changes were then cemented before the 1940 election with appointments to Felix Frankfurter, William O. Douglas, and Frank Murphy. Wendell Willkie challenged FDR on the third-term tradition, but not on the constitutionality of the regulatory state.

In the eight years encompassing 1937-44, the New Deal Court created a new constitutional order, overruling thirty cases. That is two-thirds as many as had been overruled in the Court's previous history!<sup>22</sup> "When a lawyer consulted *Darby*, he found *no* indication that the *Lochnerian* principles elaborated over two full judicial generations were still to be taken seriously. The significance of unanimity cannot be underestimated. Even when one or two Justices are willing to elaborate a doctrinal tradition, the older principles remain a vital part of the living constitution." (p. 373) (emphasis in original) But when no one is left to carry on even a dying tradition, "practical men and women of affairs no longer ha[ve] any reason to learn or remember." (p. 373) Ackerman ends his New Deal discussion with "the best for last." (p. 377) It is FDR's speech in Philadelphia on the 150th anniversary of the Constitutional Convention. Like Ackerman, Roosevelt drew contrasts between those who viewed the "Constitution as a layman's instrument of government and those who would shrivel the Constitution into a lawyer's contract." (p. 377) The President noted the constant cry of "unconstitutional" whenever there was an "effort to better the condition of our people." (p. 377) "Such cries have always been with us" and he spoke of 1787, slavery, and the New Deal's efforts to rejuvenate the economy (and the judiciary). (p. 378)

Ackerman can be justly proud of uncovering the speech, which so nicely ties Ackerman's three constitutional moments together. Yet Ackerman immediately criticizes Roosevelt's un-

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22. To use a more familiar period, in the seven years encompassing 1963-69, the Warren Court overruled 33 prior decisions. When Warren replaced Fred Vinson, the Court had overruled 88 cases in its history. When Warren introduced Burger as the new Chief Justice, forty-five more precedents had been confined to the scrap heap of history. Lucas A. Powe, Jr., *The Warren Court and American Politics* (forthcoming 1999).

derlying assumptions. Roosevelt was arguing that separation of powers must allow “law to ‘catch up’ with life” and that delays were intolerable. (p. 380) Wrong, Ackerman notes; delay is the way our system determines whether those who claim to speak for the people truly do so. Only by sustained victories over time—like the Republicans in the 1860s and the Democrats in the 1930s—are dissenting institutions properly brought into line. “Legalistic resistance was not a pointless ‘luxury’” as Roosevelt thought; rather, it is essential to the process of “legitimation” of fundamental change. (p. 380)

As with Reconstruction, I find Ackerman’s narrative descriptively accurate. Furthermore, it is sprinkled with a number of illuminating “what ifs” that encourage the reader to think about potential alternatives. As with the discussion of Reconstruction, Ackerman has unearthed far more contemporaneous nonjudicial discussion of constitutional issues than either the traditional historical or legal narratives have offered. What Ackerman shows is that the politicians, no less than the justices, were serious people who understood the constitutional issues facing the nation (even as they differed on appropriate solutions). Indeed, as with the debates over the creation of the Bank of the United States, there is not an implausible case to be made that the politicians’ sense of the Constitution is every bit as good, if not better, than the Justices’.

### CAN CONSERVATIVES WIN, TOO?

A not unnatural reading of both the Storrs Lectures and *Foundations* (with similar hints in *Transformations*) is that Ackerman believes in history as progress, and progress comes only from more liberalism.<sup>23</sup> The constitutional implication of Ackerman’s whiggish view of history seemed clear—only liberals get to engage in higher law-making. Ackerman’s claim that Ronald Reagan should not have sent Robert Bork to the Senate told readers that the New Deal and the Warren Court were sacrosanct if Ackerman could be the constitutional king. (Ackerman now denies that he was one of those liberals who believes the Warren Court “[got it] right once and for all.”) (p. 419)

*Transformations* continues the same claims and indeed adds the further one that Newt Gingrich isn’t leading a revolution (yet) either. I was very cool to *Foundations* because I believe

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23. Accord *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966).

that conservatives win elections, too, and that with winning comes some of the perquisites of governing. *Transformations* answers my qualms.

It's numbers all over again. When Reagan defeated Jimmy Carter, the Republicans finally took control of the Senate, and that control would continue for six more years. Yet, the Republicans were never able to push their Senate representation past 54. Indeed, the number dropped to 53 after Reagan's slaughter of Walter Mondale. During the Reagan years, the Republicans never captured the House, and in the 1982 mid-term elections they lost 22 seats, dropping them to a piddling 167. Contrast the New Deal numbers. In 1934, the Republicans dropped from 117 to 103 in the House and from 35 to 25 in the Senate; two years later the few Republicans left standing were almost eradicated. Republicans dropped 89 Congressmen and 16 Senators. The Reagan Republicans lost control of the Senate between the nominations of Antonin Scalia and Bork. Again, contrast the New Deal where after the Democratic losses in 1938, there were still 69 Democratic Senators available to confirm Frankfurter and Douglas.<sup>24</sup>

Bork was an avowed agent of massive constitutional change. Why should the party of the status quo confirm him? If he had been nominated a year earlier instead of Scalia, he probably would have made it. But the election cycle makes it hard to control all branches of government, and without control of the Senate, controversial nominees face a bleak prospect.<sup>25</sup>

Failed revolution still holds for Gingrich (although the jury is out awaiting future elections). Bob Dole was not exactly the candidate of revolutionary change, and, of course, he lost. It is quite possible that the Republicans will win the presidency in 2000 as well as hold both Houses. If so, maybe we will see transformative judicial appointments. Ackerman may be uneasy because beyond winning elections he demands that the constitutional issues be clear to the people. Whether the Republicans would play by his rules is hardly certain, but Ackerman is now clear that conservatives can also change the Constitution in non-Article V ways, if they win elections (and play by his rules). That clarification, if that is what it is, is progress and without it, *Transformations* would be decidedly less credible.

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24. Although four of them deserted Douglas, believing the taint of the SEC might make him too cozy with big business.

25. Affirmative action nominees excepted.

## ALTERNATIVES?

While I have indicated that I find Ackerman's narrative persuasive, I suspect that that will not be a universal reaction. Others will offer alternative explanations that they find cogent. Such alternative explanations for Reconstruction and the New Deal are available, but in relation to Reagan, Ackerman's right.

Ackerman does not discuss Lincoln and the Civil War very much, although he understands that much of what Lincoln did was of questionable constitutional validity. Lincoln crossed the line with habeas and probably with the Emancipation Proclamation, but there is also the blockade (sustained by only one vote in the *Prize Cases*), the draft, and legal tender. Like the Court in *Korematsu*, we could announce that "war is hell" and leave the issues alone. Assuming we did so, why not just prolong the war-time situation for three more years? We had a constitutional breakdown and when the Constitution got fixed and operative again, it was different.

Ackerman treats this idea briefly but finds it very unacceptable because "it would place the Reconstruction amendments on a radically different, and much less attractive, constitutional foundation than all other parts of our Constitution." (p. 115) One answer is "so what?" The era ended thirteen decades ago, and we all like the Fourteenth Amendment now regardless of how it was born—and only Ackerman celebrates the way it was born.

Ackerman also claims that a war powers—his phrase is "grasp of war" (p. 115)—rationale is bad history because the killing had stopped and because the argument slights the democratic basis of the choices made when genuine choices among constitutional solutions were available. The killing had indeed stopped, but its effects lingered, and to deal with the effects, the Republicans adopted a policy of military reconstruction. The military is, quite obviously, intimately connected to the war powers. Under the circumstances as Ackerman describes them, war powers is an economical explanation of how the Republicans imposed their solution on the South. By 1862 Lincoln had already stated that the South "cannot experiment for ten years trying to destroy the government, and if they fail still come back into the Union unhurt."<sup>26</sup> I have consistently told my Con Law I

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26. Quoted in James M. McPherson, *Abraham Lincoln and the Second American Revolution* 81 (Oxford U. Press, 1991).



class that the Thirteenth and Fourteenth Amendments are best understood as the terms of the peace.

The war powers explanation, by cutting the legs off Ackerman's theory with respect to Reconstruction, also leads to solving the New Deal problem Posner highlights—no text—by offering a simple conclusion: Since Ackerman's theory fails at Reconstruction where, because of the text placed in the Constitution, it is strongest, there is no need to go beyond the legalist explanation for the New Deal.

Beyond the war powers solution, the best response to Ackerman on Reconstruction is to attempt to pull the plug on the underlying premise of his argument. Ackerman demands that "we the people" speak authoritatively over a substantial period of time. Surprisingly, perhaps because the answer is obvious, Ackerman does not spend much time asking who "we" are although what he does say is an apt illustration of his whiggish viewpoint.

As Ackerman winds up his discussion of the Framing, he notes that our white, male, property-owning forefathers were not perfect because they were not as inclusive as we are. Reconstruction was better because African-Americans could vote in some Northern states and in the South under the Reconstruction Acts. The New Deal was better still because of amendments Fifteen, Seventeen, and Nineteen. (Presumably the Reagan era was the best of all because some teenagers had been added to the rolls.) "We the People" is best approximated with "the exercise of popular sovereignty in the United States." (p. 124)

The key constitutional questions of Reconstruction were decided by "*the People themselves*" by taking decisions away from "competing political elites and Washington" and decided "on their own responsibility." (p. 162) (emphasis in original) Did the Southern losers take the decisions away from political elites in Washington? Well, no. If the decisions were taken away, they were taken away by Northern victors. In the words of one of Ackerman's heroes, John Bingham: "The Republic, sir, is in the hands of its friends, and its only safety is in the hands of its friends." (p. 168) By Ackerman's own narrative, the Northern Republicans excluded the South, remade Southern governments, and mandated ratification of the Fourteenth as a condition of readmission to Congress.

The Northern voters gave the Republicans overwhelming victories, but where do the Southerners come into this? Like the

Thirty-Ninth Congress, Ackerman never seriously counts them—although he does have a quote by William Pitt Fessenden to the effect that 95% of white Southerners were opposed to the Republicans. (p. 202) Assuming that the freed slaves were 100% behind the Republicans, what is the balance? Ackerman never asks (although the answer is roughly 50-50). Because his model has a dissenting institution that yields to the sustained voice of the people, the South's function is to be obstructionist and then to yield. By yielding, they became part of the people agreeing to the Fourteenth Amendment. (Of course, they didn't yield. They ratified the Fourteenth, but nullified its enforcement for almost a century with persistent violence and obstruction.)

Ackerman's model works a lot better when the dissenting institution is Rhode Island or Andrew Johnson's presidency or the Supreme Court. Once the South is in the picture, "we the people" look suspiciously Northern. And frankly, I like my acquiescence more affirmative. Indeed, if "we" are the victorious Northerners forcing the Fourteenth down our defeated brothers' throats, then aren't we really talking war powers instead of higher law-making? Ockham's Razor could usefully be applied to pare "signaling," "triggering," "mandate," "consolidation" and especially "bandwagon" from the discussion. The adoption of the Fourteenth still doesn't conform to Article V, but it doesn't conform to Ackerman's specific theory either.

There is a final way law professors could think of the ratification problem—the way the Supreme Court ultimately chose to think about it. *Coleman v. Miller* held that there is no judicial function whatsoever in the amendment process, and what the political branches say is the final word. At one level, that is an open invitation to law professors not to think about it. After all, if the decision is just politics, then it belongs elsewhere, like in Political Science Departments. The invitation was so good that until Ackerman it had been all but universally accepted for over half a century. But the Congressional decision is not "all politics." Legal arguments will be made and might influence some politicians. The allure of *Coleman v. Miller* is that it caused generations to forget; that blessing vanished once Ackerman forced us to remember.

Nevertheless, if either war powers or political questions offers a theory that renders Ackerman's history less (or ir) relevant, then maybe the same can be done to the New Deal. If so, his project can be accepted as the tour de force it is and simulta-

neously ignored as theorizing by yet another Yalie who is too smart for his own good.

I have already alluded to the alternative views of the New Deal both from the older generation and from Friedman and Cushman. To a considerable extent, both the latter alternatives turn on *Nebbia*. Basically the argument goes like this: if *Nebbia*, then no *Lochner*; if no *Lochner*, then no crisis. I think this is wrong factually and legally. Factually, the only state case during 1935 and 1936 to enter the picture is *Tipaldo*. Assume Roberts votes to sustain the New York minimum wage law. We still have the undoings of the NIRA, the AAA, the Guffey Coal Act, the Railroad Retirement Act, and farm relief in Frazier-Lemke. That, not state efforts, was the crisis, and that is why the NLRA and Social Security were headed for oblivion in 1937 without a change of votes.

For legal analysis *Nebbia* mistakes our world-view with theirs. In the post-1937 constitutional world, especially over time, *Lochner* came to symbolize *everything* that was wrong in the previous three decades. Hence the "*Lochner* era." But *Lochner* dealt with the substantive question of regulatory power. The New Deal was losing its laws because of retroactivity, because of the limits on the commerce power, and because of the idea that there were some things that were inherently local and therefore beyond any federal power. None of these had anything to do with *Lochner*. Understanding the implications of *Nebbia* may well yield the constitutionality of the minimum wage, but it does not yield *Jones and Laughlin Steel*, much less its companion in *Friedman-Harry Marks Clothing Co.* (with its \$2 million per year of business).<sup>27</sup> (On a different point, *Nebbia* did not influence *Alton Railroad* a year later which reads like a roadmap attack on the New Deal—and was, like *Nebbia*, a 5-4 Roberts opinion.) Legally, something had to happen to sustain the New Deal, and that something began to happen in the spring of 1937. Give Roberts his "nonswitch" in *West Coast Hotel*; he nevertheless did switch in *Jones and Laughlin Steel*, *Friedman-Harry Marks Clothing*, and *Steward Machine*, and those cases were by far the more important.

If the legal alternative to Ackerman fails, how about the factual alternative? This rests with Roosevelt's silence about the Court during 1936. If the key to higher law-making is height-

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27. *NLRB v. Friedman-Harry Marks Clothing Co.*, affirmed on the basis of *Jones and Laughlin Steel*, 301 U.S. 58, 75 (1937).

ened public awareness, ought not the public be treated to a full discussion? Ackerman is more than happy to quote at length from Roosevelt's "horse and buggy" attack on the Court after *Schechter* and his speech on the 150th anniversary of the Constitutional Convention. But the former was in May 1935 and the latter in September 1937. Even his "Fireside Chat" attack on the Court came in March 1937, months after his landslide victory. On Ackerman's own terms for the people to speak authoritatively, they must know what they are saying.

As I have already indicated, I agree with Ackerman that the voters knew. The voters wanted an activist federal government dealing with the nation's economic problems. If the Court had stood in the way in 1937, the Court would have lost. Thus as with Reconstruction, I think there are alternatives to what Ackerman offers, but with the New Deal, I also think he has the better of the facts and the debate. Maybe, because of his research, others will become more engaged, and alternatives will surface. Until they do, I think Ackerman's specific claim is valid. The Constitution changed during Reconstruction and the New Deal, and neither change complies with Article V.

#### BUT WHERE'S THE TEXT?

It is not nit-picking to note that if it is the people's Constitution, then they—and not just lawyers—ought to be able to read it.<sup>28</sup> That works for the Thirteenth and Fourteenth Amendments however they found their way into the document, but the New Deal left no text. How are courts or "We the people" to interpret the New Deal "amendments"? Ackerman suggests that the Americans during constitutional moments drew on the British analogies of the Convention/Parliament of 1688 and Lords-packing in 1911; perhaps he should have added one more—an unwritten constitution.<sup>29</sup>

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28. Sandy Levinson would have me change the latter part of the sentence to "it would be preferable that they be able to read it." He added: "Then go trash Article V as the cause of all the embarrassment." Sanford Levinson, ed., *Responding to Imperfection* (Princeton U. Press, 1995) (trashing it).

29. I will leave for other reviewers the discussion of whether there were three and only three constitutional moments, especially since Ackerman has found a mini-fourth with foreign affairs and treaties. Other candidates might be Michael McConnell's Compromise of 1877 as justifying *Plessy* or my personal favorite, 1948-52 as justifying McCarthyism. As any number of the reviewers of *Foundations* have pointed out, if no text is required at the end of a constitutional moment, then everyone can play. And who is to say that Ackerman's rules govern?

There are no perfect answers to where's the text, although looking, as Ackerman does, at the proposals for amendments during the New Deal might cause us to point to one or two and conclude that they encapsulate what the New Deal was all about. As an alternative, I have no trouble at all synthesizing the New Deal transformation because I do it in Con Law I every year. Amendment One: "[1] Congress shall have the power to regulate the economy in the general welfare. [2] A Congressional determination of the general welfare shall not be open to challenge in any court of law." Amendment Two: "The States shall have the power to regulate their economies in the general welfare, so long as the regulation does not interfere with Congressional policies or unduly interfere with interstate commerce." The two amendments might be better drafted, but I don't believe anyone can disagree that if the New Deal did amend the Constitution, my two amendments represent the substance of the transformation.

The problem, however, is that I am quite sure that Ackerman disagrees with me. Of course, he would go with my two, but killing *Lochner* was one thing; killing the possibility of protecting civil liberties was quite another. "Congressional debate on a second front was less advanced. There was a pervasive recognition of the Court's yeoman's service in protecting individual rights, but Congress found it hard to frame amendments that would preserve this function without causing other difficulties." (p. 338) Ackerman implies that had the process gone forward some civil liberties type amendment would have gotten through, and at a different point he gushes over one that would look like Footnote Four of *Carolene Products*.

Ackerman offers no support for his claim of the "pervasive recognition." Furthermore, the Court's protection of individual rights in 1936 consisted of a few freedom of speech and the press cases, a rudimentary right to a fair trial, and the *Lochnerian* family values of *Meyer* and *Pierce*. That's not much to go on. Hence, on one hand, it is not surprising that Congressmen were finding it hard to write an appropriate amendment. On the other hand, if they had gotten over the analytical block, there is no evidence for Footnote Four.

Possibly I am wrong about Ackerman's text being Footnote Four, since his one example of a nonequality right in *Foundations* was *Griswold* and in *Transformations* the single most cited case unrelated to Reconstruction or the New Deal is *Roe v. Wade*. Neither is a good Footnote Four fit. Furthermore, *Roe*

doesn't fit at all in a volume on Reconstruction and New Deal history. So how did it get there?

One way *Roe* fits is to go to higher generality. For a quarter century, the "project" of constitutional theory has been to explain (and far more often than not, justify,) *Roe*. Let me offer a nifty syllogism: Constitutional theory is about *Roe*. *We the People* is about constitutional theory. Ergo, *We the People* is about *Roe*. Okay, the syllogism is too simple-minded. But consider this: "The destruction of *Roe*, moreover, would have shaken the ground beneath all of the great landmarks built up by the Justices in the half-century between Roosevelt and Reagan." (p. 492 n.10) Read that sentence again. It should cause you to wonder whether Ackerman is a bad historian or a bad lawyer—or perhaps, with the reviewers of *Foundations*, both.

He said "all;" therefore: Overruling *Roe* places *Brown v. Board* in jeopardy because . . . Overruling *Roe* places *Reynolds v. Sims* in jeopardy because . . . Overruling *Roe* places *New York Times v. Sullivan* in jeopardy because . . . Overruling *Roe* places *Gideon*, *Miranda*, *Mapp* etc. in jeopardy because . . . Overruling *Roe* places *Heart of Atlanta* in jeopardy because . . . Overruling *Roe* places *Griswold* in jeopardy because . . . the distinctions between contraception before intercourse and after conception are too elusive to distinguish. Hmmm; okay score one possible, but only one, for Ackerman—although if one reads the commentary on *Griswold* through the end of the Warren Court, one will not find the slightest hint that *Griswold* might be a wedge into creating a constitution right to an abortion.

To put it mildly, the suggestion that overruling *Roe* would undercut fifty years of constitutional results is profoundly amiss (although it would make the *Bowers* dissent very shaky). My syllogism does not look so simple-minded; nor does Posner's conclusion that, compared to Ackerman's textless world, hyper-textualism looks pretty good.

The New Deal constitutional crisis was, as Ackerman knows, a crisis over the regulation of the economy. It was not a crisis over the right to choose between childbirth and abortion. To suggest that the New Deal constitutional synthesis means (or protects or justifies or even suggests or collaterally supports) *Roe v. Wade* is not only playing fast and loose with history and (non)text, it suggests a lack of seriousness. Ackerman's view of *Roe* detracts from an argument that is bound to be controversial, and it is bound to make those who were skeptical about Acker-

man's thesis even more skeptical. We the People have not endorsed *Roe*—although perhaps we have (through consistent poll results) endorsed *Casey*'s compromise of a reasonably regulated right guaranteed by constitutional adverse possession.

### WITHER VOLUME THREE?

There are a few hints in *Transformations* of what Ackerman will do in *We the People: Interpretations*, and they all point to its being Court-centered. It will try to clarify the judicial challenges that lie ahead by following “the Court as it struggled to reconcile older constitutional traditions of liberty and equality with newer affirmations of activist government for the general welfare.” (pp. 349, 405) But it will also treat the “crucial problem of erosion—and what can be done to solve it.” (p. 386)

A full chapter in *Foundations* introduced the problem of intergenerational constitutional synthesis, where Ackerman points to creating a flourishing individual-rights jurisprudence. In brief but provocative discussions of both *Brown* and *Griswold*, he tried to illustrate the new synthesis the Court was negotiating. Both cases, coming under the New Deal constitution, needed to accommodate the activist state with rights drawn from an earlier period (and not implicitly rejected by a later period). Thus *Brown* rests on equality and nationalism from the Reconstruction; *Griswold*, individual liberties from the Framing. I found the discussion in *Foundations* too truncated to be at all convincing, but a full volume will offer ample space to cure that problem. A much bigger problem, however, is his view that *Roe v. Wade* is a center-piece of post-New Deal constitutional law on which the great landmarks are built. The easiest solution is to beat a hasty retreat into reality. Assuming that proves too far from Yale, a dominant part of *Interpretations* will have to be the defense of *Roe*.

The problem of “erosion” is more ambiguous. Understandings do erode. Time passes. Erosion therefore seems inevitable. I am not sure what Ackerman deems the real problem of erosion to be, but with Posner I suspect he wishes us to maintain more fealty to our New Deal fathers than we have of late, continuing to believe that their path is the true path. In describing the New Deal's accomplishments, Ackerman states: “the Wagner Act gave disorganized workers new tools to bargain effectively with their bosses; the Holding Company Act eliminated abusive concentrations of big capital; the Social Secu-

riety Act guaranteed all workers the prospect of a decent old age after their usefulness to the market was over.” (p. 302) Referring to the second statement, Posner contemptuously asks “who believes that anymore?”

Implicit in both *Foundations* and *Transformations* is Ackerman’s originalist position that “this” is our Constitution and it must be followed until changed by formal amendment or higher law-making. Unlike the Borkians, Ackerman has found a way to make originalism look more modern, but it still suffers from all the flaws of originalism. If the New Deal no longer seems relevant to us, why not treat it as history rather than religion and make a series of incremental moves away from it?

#### NONARTICLE v. AMENDMENT

Ackermania? The post-New Deal constitution doctrine resting on *Roe*, yes; otherwise, no. Uncomfortable truths? Mostly. A book that, like John Hart Ely’s *Democracy and Distrust* so many years ago, will be a major factor in how we conceive and teach the Constitution? You bet.

Ackerman is right; the Constitution was fundamentally changed during Reconstruction and the New Deal. I join him in believing that the Fourteenth Amendment and the ability of Congress to regulate the economy for the general welfare are positive developments. I join him in believing that Article V cannot describe with acceptable accuracy what occurred. I join him in believing that non-Article V higher law-making will occur at some unforeseeable future time. Where we part is what to make of it. I am less enthusiastic about his belief that the higher law-making process can be regularized by watching its stages through his political science checklists. And I am not the whig that he is. The future does not hold infinite progress; it holds infinite change.