

Transitions

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No one interested in contemporary comparative politics can be unfamiliar with the notion of transition. What Ruti Teitel calls “transitional jurisprudence,” whose central topic is “the role of law in political transformation,”¹ has become a major genre of contemporary legal analysis as the frequency of such transformations has become well-nigh dazzling, in countries and regions ranging from Albania to Uruguay and from El Salvador to South Africa.² All of these countries represent the shift from dictatorship—or, as in the case of South Africa, an oppressive *herrenvolk* democracy—to a more liberal democratic order. Thus, South Africa’s President, Nelson Mandela, has referred to the “remarkable movement in various regions of the world away from undemocratic and repressive rule towards the establishment of constitutional democracies.”³ There may be examples of transitions in the other direction—one may well wonder if this is not underway in contemporary Russia—but, for obvious reasons, they do not generate the same interest among liberal political theorists and constitutional theorists as do the other, presumably far happier, transitions.

I consider Bruce Ackerman to be America’s greatest theorist of transition, at least with respect to the fundamental legal questions attached to transitional regimes.⁴ Though his primary interest is transition within the

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1. Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L.J.* 2009, 2009 (1997); see also RUTI TEITEL, *TRANSITIONAL JUSTICE* (forthcoming 1999) (studying transitional regimes, particularly in Latin America and Eastern Europe).

2. 1-3 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (Neil J. Kritz ed., 1995) [hereinafter *EMERGING DEMOCRACIES*]; see also *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES* (A. James McAdams ed., 1997) (describing various transitions, including those in Greece, Hungary, Bolivia, South Africa, Argentina, Chile, East Germany, and Poland).

3. See Nelson Mandela, *Foreword to 1 EMERGING DEMOCRACIES*, *supra* note 2, at xi, xi.

4. I am also an unabashed admirer of Ackerman’s general enterprise, as evidenced by my comment, on the back jacket of the first volume of *We the People*, describing Ackerman’s work as “[t]he most important project now underway in the entire field of constitutional theory.” 1 *BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS* at bookjacket (1991). No one has had more influence on my own work over the past decade. See, for example, *RESPONDING TO*

American constitutional system, he is scarcely uninterested in many of these other transitions, about which he has written a significant, albeit short, book.⁵

Ackerman's enterprise has both empirical and normative dimensions. That is, the first contribution that Ackerman makes is to a better understanding of how constitutional change has in fact occurred, especially in episodes that can be easily described as transitional for the United States.⁶ The empirical reality that these changes scarcely fit any orthodox understanding of Article V generates the concomitant necessity, for anyone trying to construct a plausible normative theory of constitutional legitimacy, to take account of the actualities of change rather than continue to take pious refuge in civics-book accounts of the process. Ackerman, of course, presents a legitimating account that allows us at once to understand and then to celebrate the creativity of Americans as constitution-makers and constitution-revisers. Facts and values end up conjoined in an ultimately happy unity, at least so far as the United States is concerned. To be sure, things are not all perfect, but they have been consistently getting better.⁷

A central question facing any and all transitional regimes is the stance to be taken toward the miscreants of the now happily discredited political order. Americans⁸ may underestimate the importance of this question, both empirically and normatively, because of some peculiar elements that may have made our own history particularly happy (or, at least, less unhappy than that of other countries that have undergone significant transitions). Begin with the elemental fact that the losers in the colonial civil war that broke out in 1775 and concluded in 1783 were kind enough to slink away to Canada and England. Early Americans did not then have to decide what to do with the Loyalist leaders who had cast their lot with King George III and his minions. Less fortunate successor regimes, who must confront former oppressors as flesh-and-blood presences, must always decide how much to settle scores from the past, as against attempting to integrate the losers by a tactful silence about what has happened. Should one attempt to discover the

IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995) [hereinafter *RESPONDING TO IMPERFECTION*], which was distinctly inspired by Ackerman's (and his colleague Akhil Amar's) critiques of the conventional understanding of constitutional amendment within the American system.

5. BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (1992).

6. I also greatly admire, and have been influenced by, the work of Stephen Griffin, who asks, especially at the empirical level, similar questions. See STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM* (1996); Stephen M. Griffin, *Constitutional Theory Transformed*, 108 *YALE L.J.* 2115 (1999).

7. Lucas Powe questions the progressive narrative in his own review of Ackerman. See L.A. Powe, Jr., *Ackermania or Uncomfortable Truths?*, 15 *CONST. COMMENTARY* 547, 560-61 (1998) (reviewing 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998)).

8. At least when "American" is taken to mean persons within the United States who fixate exclusively on the history of the United States.

specifics of past misconduct and then seek to engage in corrective justice by punishing those who engaged in such behavior? Or is it better to adopt a policy of self-conscious blindness?

Ackerman almost wholly ignores this issue in his otherwise remarkably detailed analysis of Reconstruction politics and constitutional theory. Should, for example, Robert E. Lee and Jefferson Davis, among many others, have been tried (and executed) for treason? Or was it desirable to adopt a Lincolnian policy of "charity" toward the white Southern losers, even if this were to mean, as a practical, legal, and moral matter, that the legal consequences of the War were limited to the adoption of the Thirteenth Amendment? *Transformations* is, obviously, devoted to examining the conflict that ensued between President Andrew Johnson and the Republicans who thought that more—indeed, much more—was required, but it is worth noticing how comparatively detached Ackerman is in presenting his account. Thus, as I shall also note later, Johnson is as much hero as villain, inasmuch as he played at least a quasi-heroic role in standing firm (as the antithesis) against the Republicans (with their thesis as to how the Constitution must be revised), thus making clear to the American electorate how truly radical were the changes that the GOP sought (and how radical, in addition, were the methods of change they were willing to adopt). There is basically no discussion, for example, of the calls for some measure of just punishment of those who had led the South into disaster, save for brief reference to the policy of barring "white Southerners of doubtful loyalty from the new black-and-white voting registries."⁹ There is no mention even of such important cases as *Ex parte Garland*¹⁰ or *Cummings v. Missouri*,¹¹ both involving the use of retroactive loyalty oaths to bar participants in the rebellion from certain occupations (*Cummings*) or from practicing law in federal courts (*Garland*). Being barred from participation in the new governments should have been the least worry of many of those who had engaged in the great insurrection (unless, of course, one credits the constitutional argument behind secession and, therefore, finds Lincoln's decision to go to war problematic).¹²

The persona behind *Transformations* is someone whose passions are primarily engaged by the great conflicts among constitutional theorists rather than someone who is passionately involved in the flesh-and-blood

9. 2 ACKERMAN, *supra* note 7, at 212, 463 n.8 (1998).

10. 71 U.S. 333 (1867).

11. 71 U.S. 277 (1867).

12. Ackerman in fact scants the deep constitutional issues at the heart of the secession issue, taking as a (relative) given the illegitimacy of secession. For what it is worth, I think there is substantial merit in the Southern position and that the war was justified by the *injustice* (rather than the illegality *per se*) of the Confederate regime.

issues, including those involving retribution and punishment, occupying many of the actual participants in politics.

The same persona is apparent, I believe, in some of Ackerman's comments regarding transitions in Eastern Europe. He is severely critical of those who would "squander moral capital in an ineffective effort to right past wrongs—creating martyrs and fostering political alienation, rather than contributing to a genuine sense of vindication."¹³ Indeed, he says, "[m]oral capital is better spent in educating the population in the *limits* of the law"¹⁴ rather than engaging in "a quixotic quest after the mirage of corrective justice."¹⁵ And Ackerman is concerned not only about the effective expenditure of political capital, where his skeptical notes may be well-taken. He also cautions that any attempts to engage in corrective justice will generate "the perpetuation of moral arbitrariness and the creation of a new generation of victims"¹⁶ because of the inevitable deviations from (a perhaps idealized notion of) due process that would attach to trials.

What should be the fate, for example, of the various files that detail the injustices visited in past regimes (and, quite often, the identity of the wrongdoers)? Ackerman's answer is remarkably forthright: "Burn them"¹⁷ Only such a suppression of even truthful materials about the past will prevent a "spiral of incivility, which will poison the political atmosphere by leading to charges and countercharges, public and private, over past collaboration."¹⁸ Ackerman believes that it is essential to dampen the new political winners' urge toward retribution against their former oppressors. "There is enough pain in the world without our creating more in the hope that it will somehow ease our collective confrontation with the past—especially when the demand for retribution endangers the community-building process central to constitutional legitimation."¹⁹ The task for "liberal revolutionaries" is "to shape retributive urges into manageable forms,"²⁰ and one mode of such shaping, apparently, is the suppression of the past.

There is, obviously, nothing necessarily "wrong" with such advice; rather, the point is that one has to have a certain notion of what it is realistic

13. ACKERMAN, *supra* note 5, at 72 (1992); see also Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707, 709 (1999) (discussing the tension between international-law norms demanding accountability for violations of human rights and the possible necessity, on the part of transitional democracies, to sacrifice such accountability in order to safeguard fragile democratic institutions).

14. ACKERMAN, *supra* note 5, at 72. (emphasis added).

15. *Id.* at 73.

16. *Id.*

17. *Id.* at 81

18. *Id.*

19. *Id.* at 98

20. *Id.*

to ask of people, including asking them essentially to suppress any urges they might have to punish those who did them grievous harm.

As I learned this past May, during a visit to South Africa to participate in a conference on that country's Truth and Reconciliation Commission, Ackerman's fame is indeed worldwide—though partisans of the Commission deem him, I think accurately, far more foe than friend. I find Ackerman's views disturbing, given my own view of the Commission as a remarkably innovative, indeed inspiring, approach to coming to terms with the appalling history of the prior regime (and those who ran it), while remaining within the boundaries generated by the desire to prevent civil war and ultimately to capture the loyalty of that regime's adherents.²¹

What is at stake is most eloquently expressed by the English historian Timothy Garton Ash in *The File*,²² a truly remarkable meditation on the proper response to the now-available files that allow people to discover the identity of those who informed the East German security apparatus, the *Stasi*, about them. Such information revealed the faithlessness of associates, friends, family,²³ and, in one notable case, an individual's husband.²⁴ "Had the files not been opened, they might still be brother and brother, man and wife—their love enduring, a fortress sure upon the rock of lies."²⁵ As Garton Ash writes:

Two schools of old wisdom face each other across the valley of the files. On the one side, there is the old wisdom of the Jewish tradition: to remember is the secret of redemption. And that of George Santayana, so often quoted in relation to Nazism: those who forget the past are condemned to repeat it. On the other side, there is the profound insight of the historian Ernest Renan that every nation is a community both of shared memory and of shared forgetting. "Forgetting," writes Renan, "and I would say even historical error, is an essential factor in the history of a nation." . . . Historically, the advocates of forgetting are many and impressive. They range from Cicero in 44 BC, demanding just two days after Caesar's murder that the memory of past discord be consigned to "eternal oblivion", to Churchill in his Zurich speech

21. See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 52-90 (1998) (discussing truth commissions and, more specifically, the Truth and Reconciliation Commission).

22. TIMOTHY GARTON ASH, *THE FILE: A PERSONAL HISTORY* (Flamingo Pub'g ed. 1997).

23. See *id.* at 18 (disclosing the identity of an individual's brother as an informant).

24. See *id.* (detailing Vera Wollenberger's discovery that her husband—whom she subsequently divorced—had been informing on her to the *Stasi*).

25. *Id.*

two thousand years later, recalling Gladstone's appeal for "a blessed act of oblivion" between former enemies.²⁶

I think it is fair to describe Ackerman as a proponent, at least in the contexts presented earlier, of "oblivion." There is, of course, a certain irony in this portrayal of Ackerman as an ally of Renan in counseling forgetting, for no one who reads his work on America's own transitions can miss Ackerman's zeal to destroy the traditional "professional narrative,"²⁷ which rests, he convincingly demonstrates, on a willful blindness to the uncomfortable truths of our enacted constitutional history. This version of Ackerman might well be compared to the relative at the family reunion who insists on interrupting the family patriarch during his ritual telling of the family's received myth and pointing out that great-grandfather or grandmother was scarcely so conventional as the myth suggests. The family should be forced to realize that its later prosperity may rest on the foundation of stolen land (or, perhaps more tellingly, given Ackerman's overall thesis, land whose possession was ultimately legitimized by operation of the peculiar doctrine of adverse possession).

For Ackerman, our congealed historical myth portrays a decidedly antiseptic version of American constitutional development with two dire consequences. Not only does the professional narrative make it impossible to grasp what truly happened, but, just as importantly, it also weakens present-day Americans as a people. We have, much to our detriment, chosen to discard the stirring example provided us by our nation's greatest leaders, who were capable of rising to the challenges posed by broader developments within the American society and economy and, if need be, discard the received legal idols in order to respond to what Holmes called "[t]he felt necessities of the time."²⁸

Assuming that I am correct in detecting a tension between these two phases of Ackerman's thought, how might they be resolved? One might begin by recognizing the extent to which Ackerman is best conceptualized as a decidedly *normative* theorist, not a "mere" historian. That is to say, to the extent that he advises Eastern European countries—or, indeed, South Africa—to stop dwelling on the past, he is doing so for *political* reasons. There are certain secrets best left unexposed, either forever or at least until the exposure does not carry with it the potential for adverse political consequences. A more disciplinarily-rooted historian might well believe that her task is to ferret out the secrets of the past regardless of the consequences. It is not *her* responsibility, or so the argument might go, to

26. *Id.* at 200-01.

27. 2 ACKERMAN, *supra* note 7, at 7.

28. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

rein in the truth in the service of political goals. For Ackerman, however, the decision to become, on the one hand, a dedicated historical archeologist, uncovering lost secrets, or, on the other, the stern opponent of “making unnecessary (and politically dysfunctional) trouble,” is the product of distinctly political judgment.

Ackerman’s central political goals are twofold and, perhaps, slightly contradictory, as one would expect from someone both as democratic and as liberal as he is. One goal expresses Ackerman’s democratic impulse. He wants to generate, both in the United States and abroad, a feeling of empowerment on the part of the *demos*, who will exercise the basic right of self-determination to create their own political worlds and forge their own political futures. For Ackerman, the history of American constitutional development *is* the story of such self-determination: a story that is inspirational to all, at least if that history is retrieved and taught to the citizenry (and, indeed, to the entire world). But the other goal is to preserve the basic structure of individual rights as understood by the great tradition of liberal thought, as developed in Ackerman’s own *Social Justice in the Liberal State*.²⁹ Thus, as already noted, one of the reasons for his opposition to corrective justice in transitional regimes is the inability to adhere to liberal norms. He argues that “*liberal* revolutionaries,” i.e., those who proudly proclaim that they want something more than rule by an untrammelled majority, “will take the claims of criminal due process seriously,” which means that “[t]hey can ill afford to begin their regime with show trials reminiscent of the Communist or Nazi past.”³⁰ For Ackerman, “[t]here must be *punctilious* procedural safeguards: the accused must be given abundant opportunity to defend themselves with skilled lawyers,”³¹ who, presumably, must be provided by the states should the defendants not be able to afford such attorneys. Moreover, “guilt must be proved beyond reasonable doubt.”³² To put it mildly, it is so unlikely that any transitional regime can meet such standards—to pay for the lawyers alone would bankrupt many struggling regimes—that it is better to forego *any* attempt at corrective justice.

I believe that this exposes a deep tension within Ackerman’s thought. On the one hand, Ackerman, our greatest theorist of transition, wants us to realize that the suggested binary opposition between “transitional” and “constitutional democratic” regimes is an altogether dubious one. Were Ackerman more like his colleague Jack Balkin, he might well describe his project as a “deconstructionist” one, whereby we are led to realize, against

29. BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

30. ACKERMAN, *supra* note 5, at 74.

31. *Id.* (emphasis added).

32. *Id.*

the resistance provided by our adherence to congealed conventions—i.e., the “professional narrative”—that the traits we identify with transitional regimes, including deviations from the presumed imperatives of mature “constitutional democracy” (if they were already conforming with such imperatives, they would, after all, not be labeled “transitional”) are in fact present in the most mature, well-established constitutional political orders. That is, it is not only Albania, Uruguay, or South Africa that must confront the deep legal dilemmas presented by transitions; it is also the United States itself. On the other hand, however, Ackerman seems resistant to his own insight insofar as he sometimes appears to deny the real *costs* of transitions, the eggs that must be broken in order to create the omelets of a new political order. One is rarely presented the luxury of being able to bring about the fundamental changes one desires while, at the same time, remaining impeccably faithful to one’s favorite notions of procedural regularity.

One might try to minimize the tension by noting the following difference between the three “constitutional moments” that are the subject of *Transformations*—the drafting and ratification of the Constitution, Reconstruction following the Civil War, and the New Deal—and the contemporary realities of South Africa. The participants in the American moments, in contrast to, for example, South African Nationalists or ANC revolutionaries, are now, with few exceptions, safely dead and buried. Indeed, given that these few exceptions are, obviously, the protagonists in the great New Deal struggles, it is not simply that they are now in their eighties and nineties; much more important is that even at the time of the New Deal, almost no one suggested that “corrective justice” be visited upon the “Old Order” that took America into Depression.³³ Whatever his opponents thought of Herbert Hoover, no one thought of him as a criminal; indeed, he had made his reputation as a great humanitarian. Even though this reputation was tarnished by his seeming inattentiveness to the victims of the Depression, few could have plausibly described Hoover as a moral monster.

This is, however, obviously not the case with the denizens of the Old South responsible first for slavery and then for secession (and the death of one in fifty Americans).³⁴ They are, of course, long dead, as are those who

33. See generally ARTHUR M. SCHLESINGER, JR., *THE CRISIS OF THE OLD ORDER* (1957) (describing the political and economic philosophies that prevailed in the United States between 1919 and 1933).

34. “[A]t least 620,000 American soldiers lost their lives . . .” James M. McPherson, *Civil War*, in *THE READER’S COMPANION TO AMERICAN HISTORY*, 182, 185 (Eric Foner & John A. Garrity eds., 1991). The total population of the United States in 1860 was approximately 31,513,000. See *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970*, at 8. The population of males 15 and over in 1860 was approximately 9.5 million, 8.5 million of whom were white. See *id.* at 16-17. Thus, notes McPherson, the war “killed one-quarter of the

opposed American independence, so that there is currently no political movement calling for corrective justice against them.³⁵ This may help to explain, regardless of whether it justifies, Ackerman's somewhat detached posture in regard to the events he describes.

This kind of detached sensibility that can be adopted when writing about transitions long ago is hardly so available when confronting contemporary transitions. Instead, whether one considers Eastern Europe, the primary topic of Ackerman's *The Future of Liberal Revolution*, or South Africa, one must wrestle with the human desire to settle scores. Ackerman's rather Olympian advice may reveal quite dramatically how little Americans are equipped to understand the emotional meaning of transitions.

In any event, I want to elaborate my sense of the Ackermanian paradox by exploring two aspects of Ackerman's understanding of America's own transitions. The first involves Ackerman's emphasis on the constitutional orderliness of transitions. The second concerns the frequency with which transitions present themselves, with all of the problems attendant to explicitly transitional—as distinguished, presumably, from ostensibly “normal”—politics. Both go to the more empirical aspects of Ackerman's project, though they have obvious implications for Ackerman's normative arguments—both with regard to the United States and abroad.

First, how orderly have American transitions been? Ackerman presents the United States as a special kind of transitional polity: Even when engaged in transformative constitutional development, the United States nonetheless adheres to deep constitutional norms, even though they are not the norms taught by the absurdly naive professional narrative that desperately attempts to shoehorn into Article V the actual amendatory transitions that have characterized American constitutional development. The point of Ackerman's overall project, *We the People*, is to grasp these norms. Why is this so important? After all, only professional lawyers believe in the professional narrative; no political scientist has taken it seriously for years. The political scientist, though, is likely to be a cynic or, more charitably, an agnostic, without any genuine faith in the presence of *any* overarching legal norms that dictate the outcomes of political battles. No one could possibly confuse Ackerman with the cynic. He is as

Confederacy's white men of military age.” McPherson, *supra*, at 185. Though the percentage was necessarily less for the much more populous Union states, there can be no doubt that “[t]he Civil War was the great trauma and tragedy of American history.” *Id.* Ackerman is undoubtedly aware of all of these facts, but it is precisely the “trauma” and “tragedy” that tend to be absent in his account.

35. It is worth noting, though, that analogous passions can certainly be seen in regard to the memorialization of these long-dead Confederates. See generally SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998) (detailing contemporary controversies involving monuments to Confederate leaders).

committed a legalist as, say, Henry Hart, and he is as committed as Hart ever was to discovering the immanent legal process that does indeed give legitimacy to even our most fundamental transformations.

Ackerman has two principal enemies. The obvious one is the proponent of the professional narrative. The other, however, is the person who gladly accepts his general critique of the professional narrative but goes on to argue that we should understand the U.S. Constitution as effectively containing—as the Indian Constitution does or, far more ominously, the Weimar Constitution did³⁶—“suspension clauses” establishing that, in time of war or other similar emergencies (including, perhaps, great economic depressions), the law and the Constitution are silent. The replacement for the naïve understanding of law captured in the professional narrative is therefore the conception of law as raw political power (and the will to use it).³⁷ Although, at the end of the day, Ackerman may be closer to such

36. See V.N. SHUKLA, *THE CONSTITUTION OF INDIA* 564-73 (reviewing §§ 352-60 of the Indian Constitution); *CONSTITUTIONS THAT MADE HISTORY* 367 (reprinting the text of Article 48 of the German Constitution of 1919) (Albert P. Blaustein & Jay A. Sigler eds., 1988).

37. Perhaps the most relevant citation, in terms of intellectual stature, is the German (and Nazi) legal theorist Carl Schmitt. See, e.g., JOSEPH W. BENDERSKY, *CARL SCHMITT, THEORIST FOR THE REICH* (1983); PETER C. CALDWELL, *POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY & PRACTICE OF WEIMAR CONSTITUTIONALISM* (1997); DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS Kelsen AND HERMANN HELLER IN WEIMAR* (1997); Ellen Kennedy, *The Politics of Law in Weimar Germany*, 77 *TEX. L. REV.* 1079 (1999) (reviewing CALDWELL, *supra* & DYZENHAUS, *supra*); Neil MacCormick, *Jurisprudence, Democracy, and the Death of the Weimar Republic*, 77 *TEX. L. REV.* 1095 (1999) (same); G.L. Ulmen, *“Integrative Jurisprudence” and Other Misdemeanors*, 77 *TEX. L. REV.* 1107 (1999) (same); see also Izhak Englard, *Nazi Criticism Against the Normativist Theory of Hans Kelsen: Its Intellectual Bias and Post-Modern Tendencies*, 32 *ISRAEL L. REV.* 183, 194 (setting out Carl Schmitt’s theory of “decisionism”). My colleague Hans Baade has stated in conversation that he views Ackerman as altogether Schmittian insofar as Ackerman ultimately assigns to existential decisions emanating from “We the People” a higher rank than the specific provisions of the Constitution as written. See, e.g., 1 ACKERMAN, *supra* note 4, at 15 (“In America, . . . it is the People who are the source of rights”). Ackerman would, for example, have no hesitation in accepting as constitutionally legitimate, albeit normatively dreadful, a repeal of the present First Amendment and its replacement by a new amendment stating that “Christianity is established as the state religion of the American people, and the public worship of other gods is hereby forbidden.” *Id.* at 14. Another colleague, Willy Forbath, has told me that a German friend has indicated that the German translation of *We the People* is creating quite a stir, precisely because of its perceived Schmittian affinities. The heart of the controversy involves the meaning of popular sovereignty. If, after all, “the voice of the people is the voice of God,” ALCUS, *EPISTLES* (c. 800), *quoted in* H.L. MENCKEN, *A NEW DICTIONARY OF QUOTATIONS ON HISTORICAL PRINCIPLES FROM ANCIENT AND MODERN SOURCES* 901 (1966), at least in the sense that the same obeisance must be paid to the “voice of the people” just *because* it is the popular voice—I take it this is the defining characteristic of all theories of popular sovereignty—then this necessarily constitutes a kind of normless “decisionism” associated with Schmitt and, perhaps, all forms of sovereignty-oriented positivism. One notes that the very sovereignty of God generated the basic conundrum of whether God can be bound by norms of justice. See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 143 (1810) (Johnson, J., concurring) (“I do not hesitate to declare, that a state does not possess the power of revoking its own grants. But I do it, on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity . . .”). This suggests that God lives within a “foundationalist” (and thus limiting) universe, a theologically

understandings than he might like to admit, he clearly wishes to emphasize the presence of legal structures, whether or not “foundational,” that make the American constitutional saga something other than the tale of how power has in fact been exercised.

Ackerman thus takes pains to renounce what he, following Richard Henry Dana, labels the “grasp of war” argument,³⁸ which Ackerman views as decidedly “less attractive” than his own, far more complicated argument that allows us to view the Fourteenth Amendment (and other non-Article V transformations) as the product of “the constitutional will of the American people” rather than of “the guns of the Union Army”³⁹—or the sheer political power of the dominant party of the moment. “[T]he entire point of this book,” Ackerman informs the reader, “is to reject this dichotomy between legalistic perfection,” defined as scrupulous adherence to Article V, “and lawless force.”⁴⁰ As already suggested, I find Ackerman overwhelmingly convincing in his critique of “legalistic perfection[ism],” just as I find him convincing in his argument that the alternative to such perfection is not the starkly Hobbesian image of “lawless force.” But it is Ackerman’s very subtlety in regard to American history that makes his blunderbuss approach to the issue of corrective justice appear far less sophisticated and nuanced.

If Ackerman is making an argument of sheer principle—that is, because all such attempts at corrective justice are likely to have certain legal flaws, they should therefore all be rejected—his position would be as utopian as the view held by many of the people he is criticizing, which is that we are required to “play by the rules” of the fatally cumbersome procedures of Article V even if this dooms us to a decidedly “suboptimal” set of outcomes.⁴¹ After all, Ackerman’s fame comes from arguing first, as a descriptive matter, that we have *not* always played by the Article V rules when the costs have been deemed too high, and, secondly, as a normative matter, that these deviations from the rules were defensible in the past and should be inspiring to us in the present. So Ackerman *must* be arguing

controversial assertion. In any event, Ackerman clearly rejects foundationalism insofar as the sovereign People are concerned. See 1 ACKERMAN, *supra* note 4, at 15.

38. 1 ACKERMAN, *supra* note 4, at 115. “We have a right to hold the rebels in the grasp of war until we have obtained whatever the public safety and the public require.” *Id.* at 446 n.5 (quoting RICHARD HENRY DANA JR., *The “Grasp of War” Speech*, reprinted in SPEECHES IN STIRRING TIMES 234, 247 (Richard H. Dana III ed., 1910)).

39. 1 ACKERMAN, *supra* note 4, at 115.

40. 1 *id.* at 116. Professor Powe, who is generally sympathetic to Ackerman’s specific narrative of Reconstruction events, nonetheless finds a War Powers justification far more persuasive than Ackerman’s. See Powe, *supra* note 7, at 562-64.

41. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE* 100-02 (1991) (arguing that “playing by the rules” entails that one accept the cost of “suboptimal outcomes” that could, perhaps, be avoided by ignoring the rules in favor of seeking the best result in any given case).

something like the following: The actual costs for Americans of the transformative deviations from standard legal norms have been acceptably small, at least on Ackermanian criteria; the costs for Eastern Europeans and others of such deviations, however, would be unacceptably high.

Perhaps Ackerman is correct, but one would like more details of the calculus he is using. It is possible, for example, that he underestimates some of the costs to the United States of unconventional transformation, just as I am confident that he may overestimate the costs to norms of due process of institutions like the Truth and Reconciliation Commission.

There is indeed a critique of the Commission's work based on its deviation from perhaps idealized norms of due process,⁴² though I do not find it at all convincing. But the question in which I am primarily interested here is whether our own transitions have necessarily provided greater models of fidelity to due process. There are only two analytic tasks before us as we try to answer such a question: defining "transition" and defining what counts as "due process" or as "arbitrariness."

Let me begin with the first task. When Ackerman first arrived on the scene as a student of American constitutional transitions, he seemed to limit the set of transitions to three: the Founding, Reconstruction, and the New Deal.⁴³ Although he presented a complex schema of "Constitutional Impasse, Electoral 'Mandate,' [a] Challenge to Dissenting Institutions," and, finally, a "'Switch in Time'" by the dissenting institution,⁴⁴ the schema was scarcely specific enough to provide clear and unequivocal guidance as to the existence (or, just as importantly, the non-existence) of the "constitutional moments" that were the centerpiece of his analytical structure.⁴⁵ Some early commentators on Ackerman's work built their own critiques around this failing. Michael McConnell, for example, argued that one could view the politics surrounding the Compromise of 1877 as a "constitutional moment" that legitimated the unraveling of whatever

42. See *Truth & Reconciliation Comm'n v. Du Preez & Another*, 1996 (3) SALR 997, 1009-10 (Cape Provincial Div.) (rejecting the claim of a party accused of human rights violations that the party had a right to be notified of the general elements of the accusation for which the party was called to answer), *overruled by* 1997 (3) SALR 204 (A). The two cases come to conflicting conclusions concerning the meaning of "fairness" in regard to persons identified by ostensible victims as the perpetrators of the injustices against them. In particular, the Appellate Division held that alleged perpetrators are entitled to prior notice "of the substance of the allegations against him or her, with sufficient detail to know what the case is all about," *Du Preez*, 1997 (3) SALR at 234, though the court acknowledged the ability of the Commission, when necessary, to withhold disclosing the identity of particular witnesses. See *id.* at 235, 236.

43. See, e.g., Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); see also 1 ACKERMAN, *supra* note 4, at 458-80 (1991) (discussing the Founding, Reconstruction, and the New Deal as key constitutional transitions).

44. Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION*, *supra* note 4, at 63, 79.

45. The notion of "constitutional moments" is well-articulated in Michael McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENTARY 115, 121-22 (1994).

promise of racial justice was contained in the Fourteenth Amendment and, further, legitimated the Supreme Court's opinion in *Plessy v. Ferguson* and its general acquiescence to Jim Crow.⁴⁶ McConnell offered such arguments more as a *reductio ad absurdum*, given his general lack of sympathy with Ackerman's entire project and his specific lack of sympathy with anyone who would view *Plessy* as "good law" even in 1896. Other, more sympathetic critics suggested that the transformations effected by the Civil Rights Movement in the 1950s and 1960s also should have counted as a constitutional moment. As the result of a splendid conference at Yale in April 1998 on the constitutional status of Puerto Rico, I am convinced that the transition of the United States to a full-fledged colonialist power as a result of the Spanish-American War and the capture of Puerto Rico and the Philippines was a genuine constitutional moment, reflected most noticeably, for constitutional lawyers, in the so-called *Insular Cases*.⁴⁷

Ackerman has in effect accepted this basic criticism, for his entire *oeuvre* now recognizes as transformative moments the election of 1800—the subject of a book he is now writing—and the demise, following World War II, of the Treaty Clause as a procedural limit on foreign agreements.⁴⁸ Although one might still believe he has been less than forthcoming in providing what social scientists might call an operational test of constitutional moments—a problem that has particular significance today, as I shall argue presently—it is clear that Ackerman no longer limits the set to three. To be sure, these other moments may not have established new "regimes,"⁴⁹ but they involve fundamental changes in the American polity

46. See *id.* at 122-40 (1994). Ackerman replies to McConnell in 2 ACKERMAN, *supra* note 7, at 471-74 n.126. Professor Powe offers another example of a most unfortunate constitutional moment that occurred in the 1950s: McCarthyism. See Powe, *supra* note 7, at 566 n.29.

47. See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901); see also OWEN M. FISS, 8 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 225-56 (1993); "FOREIGN IN A DOMESTIC SENSE": PUERTO RICO, AMERICAN EXPANSIONISM, AND THE CONSTITUTION (Christine Duffy Burnett & Burke Marshall eds., forthcoming 2000).

48. See generally Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (discussing the history of the Treaty Clause and its implications for the constitutionality of NAFTA).

49. On Ackerman's identification of the distinctive "*constitutional regime*" as "the basic unit of analysis," see 1 ACKERMAN, *supra* note 4, at 59. Thus, Ackerman titles a chapter of his volume, *One Constitution, Three Regimes*. *Id.* at 58. Ackerman also refers to these separate "regimes" as "republics." *Id.* at 62-63 (discussing the "early," "middle," and "modern republics"). I owe this point to Jim Fleming, who, commenting on an earlier draft, argued that Ackerman's emphasis on distinctive "regimes" means that he has not in fact adopted the view that I ascribe to him in the text as to the presence of additional constitutional moments beyond the three that form the topic of *Transformations*. Perhaps the answer is to distinguish between "strong" and "weaker" constitutional moments that differ in the degree to which they transform the regime and nonetheless recognize that all of them involve significant constitutional changes that cannot be explained by the standard-model of Article V (or, of course, by the Supreme Court's simply discovering what was, though unrecognized, already in the Constitution to be discovered by the skilled interpreter).

nonetheless that, importantly for Ackerman's overall analysis, hardly comport with the Article V verities.

For better or worse, I certainly will make no attempt to provide a satisfying test in my comments; indeed, it would probably be a fool's errand to pretend that one could trap all such moments within a single matrix of variables. It seems to me, however, that one way of recognizing the presence of a constitutional moment is the pushing of existing doctrine to unexpected places because of the political exigencies of the moment. The greater the "push," the more likely it is that the system is in transition from one relatively steady state, *A*, to another equilibrium, *B*. Surely a great deal of such "pushing" characterized the years of the Civil Rights Movement and helps to support the notion that it should be granted the status of an Ackermanian "constitutional moment."

Given my qualms regarding Ackerman's opposition to transitional regimes engaging in corrective justice, I want to consider one particular "push" that occurred in the aftermath of the passage by Congress in 1957 of the century's first civil rights bill. It represented the entry onto the congressional agenda—following courageous presidential action by Harry Truman in desegregating the armed forces and, of course, the Court's 1954 decision in *Brown v. Board of Education*—of what Gunnar Myrdal labeled the "American Dilemma,"⁵⁰ the patent conflict between American aspirations of equality and freedom on the one hand and the treatment of American blacks on the other. In addition to the domestic problems posed by continuing disregard for the plight of African Americans, one should also recognize the importance of the criticism the United States took in the Cold War debates with the Soviet Union about the treatment of American blacks. Indeed, the United States, in its amicus brief to the Supreme Court in *Brown*, referred to "the problem of racial discrimination . . . in the context of the present world struggle between freedom and tyranny" and noted segregation's "adverse effect" on America's winning that struggle.⁵¹ The War on Communism was surely as significant as the earlier wars in transforming what was thought constitutionally possible. Things simply had to be done, whether jailing communist leaders or confronting, however weakly, America's racial problem.

The 1957 legislation obviously pales in comparison to the far more significant statutes passed in the 1960s, when the Civil Rights Movement was at its height. Still, it was important in its own right. One of its more striking features was the creation of a United States Commission on Civil

50. GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (1944).

51. Amicus Brief for the United States at 6, *Brown v. Board of Educ.*, 347 U.S. 483 (1954) [(docket No. ?)], reprinted in 49 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES* 113, 121 (Philip B. Kurland & Gerhard Casper eds., 1975).

Rights that would be charged with investigating the situation and preparing a series of reports to Congress, which would presumably act on its recommendations.⁵² America's own version of a truth commission, it would attempt to elicit the facts regarding the systematic and widespread misconduct of public officials, elected and appointed, who refused to recognize the legal rights possessed by their black fellow citizens. Southern members of Congress opposed the creation of the Commission and then took umbrage at the appointment of some of its members, charging them with being biased against the South (by which they meant Southern whites) and possessing an undue commitment to civil rights. Although the courts were not in fact closed to black citizens who might want to protest their treatment, litigation was scarcely an attractive possibility insofar as it would almost inevitably be conducted before unsympathetic judges and decided by all-white juries.⁵³ Indeed, one of the major fights over the 1957 Civil Rights Act involved the right to a jury trial for those officials accused of violating the rights in question. Southern legislators fought hard for jury trials, invoking the traditional rights of free-born Americans.⁵⁴ No doubt, of course, the proponents of jury trials were making certain assumptions about the racial composition of the juries, as were those who saw the guarantee of trial by jury as an ill-disguised way to assure that criminals would in fact go unpunished.

Acting under its mandate to ascertain and then expose the often harsh truths of American society, the Commission held a variety of hearings throughout the South, including hearings in Shreveport, Louisiana, concerning voting discrimination.⁵⁵ Although the Fifteenth Amendment in 1870 had purported to deny exclusion from the voting booth on grounds of race, it represented a hollow aspiration so far as most Southern blacks were concerned. The Commission heard testimony from a number of blacks complaining that they had unjustifiably been denied the right to vote. These witnesses had often named specific Louisiana officials as the individuals placing hurdles in their way. The Commission subpoenaed a number of these officials to explain why so few black citizens were actually registered to vote in Louisiana, but several of these officials objected, arguing that the

52. See generally FOSTER RHEA DULLES, *THE CIVIL RIGHTS COMMISSION: 1957-1965* (1968) (describing the creation, objectives, and activities of the Commission).

53. Nor was the Supreme Court necessarily helpful. See, e.g., *Screws v. United States*, 325 U.S. 91, 98 (1945) (requiring proof of "knowing" and "willful" deprivation of constitutionally protected civil rights in order to sustain a conviction of a Southern sheriff who had killed an African-American prisoner in his custody).

54. They might have been able to argue even more eloquently if they had had the opportunity to read the work of Akhil Amar concerning the essential role of juries as a procedural safeguard against what local majorities perceive as governmental overreaching. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 84-88 (1998).

55. See *Hannah v. Larche*, 363 U.S. 420, 425 (1960) (noting the decision of the Commission to hold hearings in Shreveport beginning on July 13, 1959).

complaints against them had been made in “confidential” testimony before the Commission. The Commission defended the procedure as absolutely necessary, given the entirely reasonable fears of retaliation that many blacks had should their own names become part of the public record.

These Louisiana officials sued, complaining that the Commission’s procedures violated their Fifth Amendment right to due process. To be subjected to official interrogation by a federal investigatory body—and the possibility of being publicly identified as malefactors in subsequent reports of the Commission—without an opportunity to learn the identity of their accusers and to cross-examine them, they argued, violated basic tenets of due process, including “their right to be confronted by their accusers, to know the nature and character of the charges made against them,” and to be effectively represented by counsel who could interrogate their accusers.⁵⁶ These were surely not frivolous arguments, as recognized by the fact that the complainants had won their case at the trial level.⁵⁷

The case ultimately made its way to the Supreme Court, which, in an opinion by Chief Justice Warren, reversed the lower court and ruled against the officials. Beginning his Fifth Amendment analysis by noting that “the requirements of due process frequently vary with the type of proceeding involved,”⁵⁸ Warren went on to opine that the specific procedural rights sought by the officials, however “desirable in some situations,”⁵⁹ were not constitutionally mandated in the context of the Civil Rights Commission.⁶⁰ “[W]hen governmental action does not partake of an adjudication” or an otherwise authoritative determination of legal rights and obligations, the Court held, procedural rights can be relaxed.⁶¹ Although the courts below had implied that additional protections were required “since the Commission’s proceedings might irreparably harm those being investigated by subjecting them to public opprobrium and scorn, the distinct likelihood of losing their jobs, and the possibility of criminal prosecutions,” Warren dismissed these as “conjectural.”⁶² Moreover, even if they occurred, “they would not be the result of any affirmative determinations made by the Commission.”⁶³ No one would be ordered to ostracize or otherwise take action against those described as having engaged in the suppression of blacks’ civil rights. Any potential negative social or legal consequences would, the Court concluded, be merely indirect results of otherwise legitimate governmental activity.

56. *Id.* at 428.

57. *See id.* at 422.

58. *Id.* at 440.

59. *Id.* at 442.

60. *See id.* at 453.

61. *Id.* at 442.

62. *Id.* at 443.

63. *Id.*

Not the least persuasive part of the majority opinion was the thirty-two page appendix that followed it.⁶⁴ This appendix listed many different examples of federal congressional and administrative procedures that similarly failed to grant the full panoply of rights that a criminal defendant might have. It showed that there was nothing particularly unusual about the Civil Rights Commission, save, perhaps, the volatility of the issues that it was charged with studying. To identify the hearings of the Commission or of a congressional investigating committee with a judicial trial was to engage in a category mistake. Of course, one might well see the development of the congressional investigating committee itself as a form of constitutional transformation linked first to the Depression-era concerns about malefactors of great wealth and then, even more importantly, post-war concerns about communist infiltration. Although there had been prior congressional investigations of note,⁶⁵ it was the Depression that triggered such important political phenomena as the LaFollette hearings on labor.⁶⁶ Equally important, of course, was the creation of many new agencies of government that demanded ongoing congressional oversight. Finally, 1938 saw the creation of the House Un-American Activities Committee, which became a permanent committee of the House of Representatives in 1945 (it would eventually be abolished in 1975).⁶⁷ Its sole purpose seemed to be the conduct of invasive investigations, most of them upheld by the federal judiciary.⁶⁸

This background may help explain why the fiercest civil libertarian on the Court, William O. Douglas, filed a dissent that was signed by another great civil libertarian, Hugo Black. Douglas noted that the named individuals who were the subject of the hearings were liable to de facto adjudication, even if the Commission could not formally punish. The key word here may be “formally,” since the “court of public opinion” could certainly work its ways against those criticized by the Civil Rights

64. *Id.* at 454-85.

65. The earliest example given in the Court's appendix is an 1800 investigation, by the Senate Committee of Privileges, of charges that William Duane had published articles in his newspaper that defamed the Senate. *See id.* at 478. Far more importantly, the Joint Committee on the Conduct of the Civil War was established in 1861, which, the Court tells us, “frequently centered on the allegedly derelict conduct of specific individuals.” *Id.* at 481. Other pre-New Deal investigations include the House Committee to Investigate the Electric Boat Company of New Jersey (1908), and the House Committee to Investigate Violations of the Antitrust Laws by the American Sugar Refining Company (1911). *See id.* at 482.

66. *See generally* JEROLD S. AUERBACH, *LABOR AND LIBERTY: THE LA FOLLETTE COMMITTEE AND THE NEW DEAL* (1966) (depicting the social context that gave rise to the La Follette Committee).

67. *See House Un-American Activities Committee, in THE READER'S COMPANION TO AMERICAN HISTORY* 519 (Eric Foner & John A. Garraty eds., 1991).

68. *See id.*

Commission.⁶⁹ Interestingly enough, Douglas conceded that congressional committees could operate under rules similar to those of the Commission, but he distinguished “a Congressional Committee of Senators or Congressmen” from executive-branch agencies.⁷⁰ The basis of this distinction was left unexplained. It may be, as a practical matter, that Douglas thought that the Court would have more success in affecting the Civil Rights Commission and other executive-branch agencies than it would with Congress.

The principal point is that “due process” is indeed a highly flexible concept, as is “arbitrariness.” Definitions are subject to all sorts of contextual considerations, and any analysis that ignores this flexibility will be profoundly misleading.⁷¹ Moreover, if one approves of *Hannah*, I think it is because one approves of the ends to which the Commission was devoted. If one did not share that political commitment, it would be altogether easy to endorse the civil libertarian objections filed by Black and Douglas. But I take it that many of us believe that the encroaching on the due-process rights of racist Southern sheriffs was a cheap price to pay for the good provided by the Commission. This particular omelet certainly seems worth the breaking of the requisite eggs. I presume that Ackerman would agree. This might suggest, though, that he should be more receptive to paying similar prices in other transitional regimes in order to bring about a measure of corrective justice—and thus respond to the deeply felt and altogether understandable anguish of victims of often monstrous injustice.

Analysis would be far easier if American (or any other) society as a whole could be unequivocally labeled either “normal” or “transitional,” with attendant Ackermanian consequences for fidelity to pre-existing legal norms. Alas, political life is not that simple, and we discover that significant transitions may be occurring even during apparently “normal” times, at least if “normality” is measured against the baseline of civil war or the Great Depression. That is, society is *never* in complete equilibrium or undergoing complete transition. It is always more like Neurath’s famous

69. Many of the particular individuals bringing suit would probably not be punished by the “court of public opinion” inasmuch as they were the front soldiers of the attempt to maintain the traditional racial order. Perhaps this helps to explain why Chief Justice Warren, perhaps especially sensitive to the Southern “massive resistance” to any attempts to implement *Brown v. Board of Education*, 347 U.S. 483 (1954), found the claims of harm merely “conjectural.”

70. *Hannah v. Larche*, 363 U.S. 420, 497 (1960).

71. Ackerman acknowledges as a democratic reality that, even in the United States, liberal norms of due process have not been accorded a status any more transcendent than that of institutional norms (like the allocation of power between the President and Congress). See 1 ACKERMAN, *supra* note 4, at 320-21 (suggesting but questioning the ultimate efficacy of entrenching fundamental liberties against future transformations through the ratification of a new, unamendable Bill of Rights). He may, however, carry in his mind some idealized, immutable notion of due process by which he judges the actuality of any given legal order.

ship, being rebuilt and transformed plank by plank even as most of it goes on as before.

I have already offered the Civil Rights Movement and the move toward American imperialism as two such "limited," albeit no less important, transitions. I want to conclude, however, by addressing a possibly transitional moment that we are living through at this very instant and assessing Ackerman's own attempt to analyze the situation.

I refer, of course, to the issues surrounding President Clinton.⁷² Should he be pressured to resign because of his undoubtedly disgraceful conduct in office? Indeed, does the misconduct rise to the level of "high crimes or misdemeanors" requisite for impeachment? Learned savants argue about the intent of the Framers concerning the institutional Presidency and the standards of impeachment.⁷³ Ackerman himself has contributed such an analysis in the august pages of the *New York Times*.⁷⁴

I find at least two things astonishing about most of these discussions. The first is the assumption that we must necessarily comply with the wishes of the Founding generation in regard to presidential tenure in office and the standards for impeachment. Why would anyone believe this? To put it mildly, the Framers were living in a political and intellectual world radically different from our own. As Ackerman himself demonstrates in his current work on the election of 1800, the Framers rather fantastically envisioned a polity free of parties, in which the President would indeed be the best, i.e., most virtuous, man, chosen by electoral colleges of virtuous local notables. The President, presumably, was to have no particular policy

72. It is obvious that these issues are no longer as current as they were when I initially wrote this Article in late 1998. That said, it is still helpful, I believe, to note the particular stance taken by Ackerman and its possible relevance to his overall theory. I should also note that Ackerman's most important intervention was his argument, initially presented to the House Judiciary Committee and then published as a book, BRUCE ACKERMAN, *THE CASE AGAINST LAMEDUCK IMPEACHMENT* (1999), that any impeachment resolution voted upon by the lameduck House of Representatives expired at the end of the legislative session and thus could not be presented to the Senate without a new vote by the successor House. I think there is substantial merit in Ackerman's argument and very much wish that it had been taken far more seriously than it was. Ironically, the very fact that it was basically brushed aside, presented neither by the President's own lawyers nor by any member of the Senate, could be interpreted as a decision by "We the People" to adopt and make part of our settled constitutional doctrine an anti-Ackermanian understanding of the Constitution.

73. See, e.g., Scott Gerber, *Would the Framers Impeach President Clinton?*, in *LAW AND COURTS: NEWSLETTER OF THE LAW AND COURTS SECTION OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION* 4-6 (Fall 1998). My own view is that the answer to this question ought to be of no interest to anyone contemplating the merits of impeaching President Clinton. See Sanford Levinson, *Clinton and Impeachment: Some Reflections*, in *LAW AND COURTS: NEWSLETTER OF THE LAW AND COURTS SECTION OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION*, Fall 1998, at 7.

74. Bruce Ackerman, Editorial, *What Ken Starr Neglected To Tell Us*, *N.Y. TIMES*, Sept. 14, 1998, at A33.

agenda or, indeed, provide anything much in the way of "leadership."⁷⁵ Why we should feel bound by this obsolete vision of American politics is entirely mysterious. It is like arguing that we should acquiesce in the notion of a Constitution unamendable except through Article V or a national government confined to such limited powers as to have made the New Deal impossible.

As the co-editor of a book on "constitutional stupidities,"⁷⁶ let me say that I regard the notion of a fixed-term President who is impervious, as a practical matter, to removal as a true stupidity. What I find remarkable, however, is that Ackerman has enlisted himself on just this side, writing in the *New York Times* how important it is that President Clinton hang in there, resisting the calls by his critics to resign and let Vice President Gore assume the Presidency. Although Ackerman is blessedly free of references to the Framers, he does seem to count it as a strong argument that resignation under pressure would take us closer to a parliamentary system. Indeed, he says overheatedly, "Nothing less than our system of separation of powers hangs in the balance."⁷⁷ To force Clinton from office, at least in the absence of clear proof of a "high crime" or "misdemeanor," would create, according to Ackerman, a terrible precedent, encouraging "further acts of congressional aggrandizement." Then comes a quite remarkable sentence: "If a man can be driven from office for lying about his sexual misadventures, why should he not also be driven from office for something like making a disastrous decision on a fundamental matter of public policy?"⁷⁸ Why not, indeed?

The first thing to say is that a system that replaces a discredited leader of a political party with another, more creditable, member of the same party is scarcely what most of us mean by a "parliamentary system." It is not as though Clinton's enemies are trying to force new elections or to replace the party in power with its opposition. (I concede that some of them may have fantasies that the Republican Speaker of the House, currently Dennis Hastert, will succeed to the Presidency upon the resignation or impeachment of President Gore, though I think that one answer to that scenario is Akhil and Vik Amar's brilliant demonstration that the Presidential Succession Act of 1947 is unconstitutional.⁷⁹) Let me concede, arguendo, that Clinton's displacement via either forced resignation or conviction on something less than the standards of "high crimes and

75. See, e.g., JEFFREY TULIS, *THE RHETORICAL PRESIDENCY* (1987) (providing a critical history of the development of the modern Presidency).

76. *CONSTITUTIONAL STUPIDITIES/CONSTITUTIONAL TRAGEDIES* (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

77. Ackerman, *supra* note 74, at A33.

78. *Id.*

79. See Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995).

misdemeanors” endorsed by originalist professors *would* be a constitutional transformation. So what? Is it not the point of Ackerman’s scholarship to demonstrate that We the People (almost always capitalized in Ackerman’s lexicon) have been ingenious and inventive in overcoming constitutional barriers to doing what was thought necessary and proper to achieve great national ends? Modification of our increasingly dysfunctional presidentialist system would, I believe, serve the public in the same way as did, say, modification of the pre-World War II treaty system, which eliminated the constitutionally mandated, but altogether stupid and costly, veto power enjoyed by one-third-plus-one of an outrageously malapportioned Senate.

What I am suggesting is that we may be living in a constitutional moment, a transition to a more sensible system of presidential accountability that allows us to escape the inefficacious system bequeathed us by the Framers. Ackerman is playing the role, however, of one of the Supreme Court’s “Old Men,” using all of his considerable talents to suggest an almost self-evident duty to adhere to a system that made little sense in 1787 and makes even less sense today.

As Jack Balkin has suggested in conversation, this may mean, among other things, that Ackerman provides no guidance at all as to how one should think *during* a constitutional moment, in part perhaps because he has provided too little guidance, when all is said and done, on the rules of recognition for such moments.⁸⁰ More to the point, his theory requires that there be both attackers and defenders of the status quo; indeed, if anything, he tends almost to romanticize the defenders, seemingly praising the egregious President Johnson or the New Deal Court for their adherence to principle in resisting the constitutional revolutionaries and thus, in an almost Hegelian way, providing the thesis against which these revolutionaries could posit their antithesis that would ultimately be accepted and legitimated by an aroused People who have the nation’s deepest interests at heart. Ultimately, Ackerman’s theory is basically backward looking, truly useful only after Minerva’s owl has flown away and the historian-theorist can indeed say that we have completed a constitutional moment (and, therefore, that well-trained lawyers must adhere to the new understanding). That is no small accomplishment, but it is still altogether different from providing guidance to someone who feels caught up (or perhaps trapped) in a constitutional moment.

That said, one wonders if such a success conforms with Ackerman’s own ambitions, set out at the very beginning of his new volume, to speak in

80. See Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 845 (1996) (discussing the difficulty of ascertaining a proper response when one realizes that one is living in a possible constitutional moment).

a “prophetic voice” to his “fellow Americans” and encourage them to “retake control of their government.”⁸¹ This “prophet” seems far more the voice of the legalist, at least in regard to our current constitutional moment. Perhaps like most prophets, he may turn out to be distinctly unhappy with those, like myself, who seem to have learned the most from his teachings. I close with this question: Is Ackerman’s commitment to the institutional status quo a failing of Ackerman the empirical analyst or of Ackerman the constitutional theorist? Or, ultimately, are the dancer and the dance one, inextricably united and incapable of the analytical separation presumed by this question?

81. 2 ACKERMAN, *supra* note 7, at 3.