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Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's *We the People*

Walter Dean Burnham[†]

INTRODUCTION AND OVERVIEW

For some years past, Professor Bruce Ackerman has been engaged in a mighty effort to reconceptualize American constitutional development. *We the People: Foundations*,¹ sets forth his basic model. This model can be said to rest on a liberal, historicist (or contextualist) perspective on the subject, a perspective in sharp conflict with a standard narrative that has held sway in the relevant research community.

Anyone who proposes a new paradigm in any scholarly field is nearly certain to prompt controversy, and Professor Ackerman is no exception to this rule. As a political scientist, albeit one with some background in American constitutional law and history, I necessarily bring an outsider's perspective to these intramural controversies. But this monumental work, now completed through Ackerman's second volume, *Transformations*,² is clearly the most ambitious effort to rethink our political system as a whole—and its legal dimensions in particular—that has been offered in decades. This is a magisterial work. Moreover, in *Transformations*, the author has demonstrated qualities of a first-rate historian. But, as usual, there is more to be said. This is a particularly congenial task since, far more than most works in either history or political science, *We the People* virtually invites cross-disciplinary discourse.

This Essay falls into four parts. The first assesses the major element of the argument of *We the People* in the context of a professional milieu that has striking differences from those that most political scientists encounter. One might here refer to Professor Ackerman's contribution to law and

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

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

political science. The second part of this Essay is devoted to a presentation of my own theory of American political and constitutional stability and transformation. This theory originally grew out of my work on critical realignments in the realm of electoral politics and policy formation, enriched as this was at one stage by an intense exposure to American constitutional law and history. This view has since then extended in the direction of the analysis of apparently stable equilibria and their abrupt disruption as a strikingly recurrent process across this history, what I discuss in this part as “punctuated equilibria.” As we shall see, my own research into the historic dynamics of the American political system discloses the existence of six punctuated upheavals spaced a long generation apart. Ackerman’s “constitutional moments” coincide with three of these. Few would doubt that in terms of sheer magnitude, the three he analyzes stand out far above the others.

Ackerman’s model focuses necessarily on a phase of the upheaval sequence that comes toward the end of a protracted set of “flipover” dynamics from one relatively stable equilibrium to the next. This phase is the point in time at which constitution-remaking occurs, when decisions are made by the public and politicians that will define the foundational contours of the next extended regime order. But one should pay attention to two points along the way. First, preceding “exceptional” events during the whole upheaval process must sometimes be included in the analysis if one seeks a fuller explanation of the peculiarities of a particular constitutional moment. Second, each of the bursts of rapid change in system state that Ackerman does not include in his discussion has also been associated with substantial (if not quite so cosmic) levels of constitutional modification.

Thus, I find some striking convergence between Ackerman’s work and what in political science sometimes has been called “critical realignment theory.” His ideal-typical analysis of the processes of interaction among the public, politicians, and courts during “constitutional moments” is compelling. Yet my own perspective produces some substantial doubts and disagreements about parts of this account. Parts III and IV of this Essay center on four points of divergence: (1) differences concerning war powers or “the grasp of war” as a central aspect of the Reconstruction dialectic; (2) differences over periodization, particularly with regard to the upheaval in politics, judicial doctrine, and the role of the Supreme Court that materialized in the 1890s; (3) connected differences over whether all “constitutional moment” changes in our history need be progressive changes; and (4) different interpretations of the American political landscape in the 1990s.

I. *WE THE PEOPLE*: ANALYTIC THEMES, PROFESSIONAL POSTURE

It is of course impossible to do full justice to the richness of the analytic tapestry that Professor Ackerman has woven in these two volumes, and I assume that in any case, readers of this Essay will have already read the original. At base, his model presupposes two major states of affairs in American constitutional history. In the normal case, there is a stable set of dominant constitutional ideational and operational arrangements. Lawmaking is of the normal variety, operating within these parameters. In such times, a largely private-citizen-oriented public is satisfied to play the reactive role so well-documented in the field of survey research.³ Such arrangements are never without challenge, such as the dissents of Justices Holmes, Brandeis, and Stone against the Old Court's jurisprudence from 1905 onwards,⁴ joined as these were by an increasing chorus of objections among leading constitutional scholars.⁵ But the challenges are contained as long as the dominant world-view continues to rest on solid political support in the country at large.

A nearly opposite set of conditions prevails during the rare sequences of events Ackerman calls "constitutional moments." These moments involve the overthrow of preceding ruling arrangements, including the important role in these arrangements played by established judicial doctrine. These constitutional moments are necessarily extremely high-temperature, high-pressure bursts of energy that sweep across the whole political system. Forces demanding change, given the right circumstances, transcend the normal boundaries of the accepted and capture control of institutions, employing their power resources there to further their cause. The public, normally reactive, becomes proactive and indeed not infrequently moves ahead of its leaders. A process of extended deliberation is launched in which the change-demanding forces, by winning more than one election in a row on the appeal of their agenda, gain the upper hand. At this stage, conflict is framed institutionally, with the institution resisting

3. The locus classicus, so far as the dominant Michigan survey-research model is concerned, is ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* (1960), especially chapters 6, 8, and 10.

4. Undoubtedly the best known instance of this is Justice Holmes's dissent in *Lochner v. New York*, 198 U.S. 45, 75 (1905) ("The 14th Amendment does not enact Mr. Herbert Spencer's SOCIAL STATICS."). See also Justice Holmes's dissent in *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) ("I cannot believe that the [Fourteenth] Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions . . ."); and Justice Harlan F. Stone's dissent in *United States v. Butler*, 297 U.S. 1, 79 (1936) ("Courts are not the only agency of government that must be assumed to have capacity to govern . . . [T]he only check upon our own exercise of power is our own sense of self-restraint . . .").

5. See WALTON H. HAMILTON & DOUGLASS ADAIR, *THE POWER TO GOVERN: THE CONSTITUTION—THEN AND NOW* (1972); ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941). Also noteworthy are various works in the legal-realist tradition, such as JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

change in intense combat with the institution(s) attempting to realize it. At length, a “switch in time” is executed by the person or persons in charge of the change-resistant institution and the constitutional moment is at that point past its peak. What then follows is a network of transformations in the practical and ideational meaning of the Constitution itself, not to mention myriad (and often very important) implementing policy details.

As Ackerman quite correctly observes, in constitutional-moment crises any of the major institutions of the federal government may be held by change-forcers, just as any may be held by change-resisters. It all depends on the specifics of the moment in question. Another point of significance that is central to Ackerman’s argument is that, while Article V is the only formal vehicle for amendment that the Constitution prescribes, in fact such change has occurred by severely bending the Constitution (as during the Reconstruction moment) or even ignoring it altogether on joint agreement among the Supreme Court and the political branches (as during the New Deal moment).

We the People is a work of profound scholarship, but it is also a work of advocacy. Addressed to Ackerman’s professional colleagues, this richly dynamic model of stability and upheaval in American constitutional history is designed not merely to join a professional debate but to overthrow a previously dominant paradigm and replace it with something very different indeed. To any formalist, that something plays fast and loose with enduring constitutional principles. Addressed to the public at large, Ackerman’s view of a benign “dual democracy” is profoundly reassuring. The “will of the people” can be realized through such moments. Moreover, the countermajoritarian-difficulty questions that have persistently surrounded the Supreme Court can now be laid to rest once and for all. The Court plays its specialized role in the dialectic of stability and upheaval, but neither it nor any other institution can long withstand the processes of extended, public-incorporating (and sometimes public-led) deliberation in this democracy that leads to permanent constitutional transformation. The ultimate legitimacy of our unique experiment in ordered self-rule is thus rendered very solid indeed. Not only do constitutional moments not disrupt it, they are ultimately the price that must be paid to maintain it.

I will now turn to the professional paradigm that Ackerman seeks to overthrow. It is served in the kind of ahistorical, acontextual constitutional scholarship that gave us the Revised Standard Version account of the Republican era of jurisprudence that preceded the New Deal. In this version, the whole era can be regarded as a massive and illegitimate deviation from right principles as laid down by Chief Justice John Marshall

and rediscovered by the Supreme Court during 1937.⁶ Such a perspective has much in common with a particular brand of theological argument: The truth has always been clear from the beginning in all significant particulars. Therefore, there can be no “evolution of the dogmas.” Relatedly, therefore, error has no rights, no matter how long or widely it has been followed.⁷ And in truth, there is a problem with these circumstances. To historicize is to contextualize, and thus it is to run a serious risk of relativizing normative legal values believed by many to be absolute.

There are probably few political scientists or historians who would be happy with a mode of analysis concerning the pre-1937 juristic universe from such premises. That Ackerman must lay such stress on viewing the era in its own time speaks volumes about the different problematics and modes of analysis to be found across diverse research communities. For many political scientists, I would suppose that Ackerman’s argument rings so true at this point that it is almost a matter of course. No doubt, as the author of *The Go-Between* reminds us, “The past is a foreign country; they do things differently there.”⁸ All the more reason to avoid the “sin” of anachronism to take an era and its prime actors on their own terms rather than ours. If we do this job, often personally disagreeable to us today, *Lochner*-era jurisprudence will make more sense than if we do not. For it is surely true, whatever else one may say about this era, that it rested on political foundations just as robust as those of the New Deal era that followed. In very broad terms, most major questions of either policy or constitutional doctrine in that period were settled the way most elites and most of the public wanted them settled.

But much more is involved in Ackerman’s analysis, of course, than the place of the Old Court in American legal and political history. He develops what could be called under any other than American conditions a model of (bounded or limited) revolutionary change as an integral part of his concept

6. This statement is, of course, a rather crude caricature of more complex legal arguments. Still, it would seem that this is at least a subtext of the voluminous law school criticism of the Old Court’s jurisprudence before the “switch in time.” See, e.g., HAMILTON & ADAIR, *supra* note 5; JACKSON, *supra* note 5. One has always understood that finding the way back to Chief Justice Marshall’s expansive interpretation of national legislative power was the prescription that accompanied this criticism and that the success of that program entailed the development of the Revised Standard Version that Ackerman attacks.

7. Denial of the “evolution of the dogmas” is of course easiest to see where religious doctrine is concerned, for example, in the struggle of Pope Pius X against “modernist” intellectual currents within the Roman Catholic Church. See the text of his *Oath Against Modernism* of 1910, prescribed for all priests until Vatican II, in THE CHRISTIAN FAITH 51-54 (Jacques Dupuis ed., 1996). But for a modern American judicial classic in a very similar genre, see Chief Justice Burger’s opinion for the Court in *INS v. Chadha*, 462 U.S. 919 (1983). This decision invalidated the legislative veto provisions of more than 200 statutes, some with a use extending back to 1932, on grounds that the legislative veto violated the Presentment Clause. See U.S. CONST. art. I, § 7, para. 2.

8. L.F. HARTLEY, *THE GO-BETWEEN* 1 (1953).

of “dual democracy.” This change is concentrated in his now famous three “constitutional moments”—the Founding, Reconstruction, and the New Deal. The analysis is comparative, though not spatially. Indeed, the author stoutly (and I think excessively) opposes the importation of European concepts to explain the workings of the American constitutional order.⁹ Rather, the comparison relies largely on a contrast between these workings under conditions of normal politics on one hand, and the higher politics and higher lawmaking that occur during constitutional moments. From this model flows something of considerable interest to historians and political scientists like myself: a periodization scheme, or Ackerman’s three successive republics, each separated from the other by a rapid burst of transformation.¹⁰

Few of us at our end of the scholarly enterprise would deny the genuinely Constitution-(re-)making nature of these mega-events. My own work in this area reaches substantially the same conclusions, while finding plenty of evidence for other “moments” dividing each of these “republics” into two equal parts, with each “moment” having its own, if lesser, component of constitution-modification. Many political scientists, however, would probably wish to see a somewhat broader time frame for these regularly recurring upheaval sequences than is provided here. In general, Ackerman’s “moments” fall—naturally enough, if one stops to think about it—toward the end of these sequences.

By definition, revolutions constitute a more or less radical breach of the previous norms of legality on which the state rests. This is, of course, most evident in the first “moment,” the more protracted segment of which begins with the American Revolution itself. Out of this epochal experience, with traditional institutions shattered, new ones had to be built. And without question, as has been well-known for decades, the actions of the men of 1787 went so far beyond their brief under the Articles of Convention that they amounted to a *coup d’état*. Beneficent and successful as has been universally acknowledged for more than two centuries now, it was a *coup* nevertheless. Any black-letter rigorist could only conclude that the whole enterprise was more or less grossly illegal. Ackerman dwells on this at length to underscore his basic point that this “moment,” like both its successors, includes significant procedural irregularities and other abnormalities. (His opposition could reasonably point out, however, that this *was* the Founding, and that once accomplished, the regrettable lapses

9. 1 ACKERMAN, *supra* note 1, at 34-37, 210-12

10. Issues surrounding periodization are of prime importance to historiography. One of the most lucid and penetrating discussions of the subject is found in MARTIN J. SKLAR, *THE UNITED STATES AS A DEVELOPING COUNTRY: STUDIES IN U.S. HISTORY IN THE PROGRESSIVE ERA AND THE 1920S*, at 1-36 (1992).

from simon-pure legality need never be repeated now that the Constitution itself was in being.)

Some critics of *Foundations*, Volume I of Professor Ackerman's project, may have faulted it for the thinness of its historical evidence. If so, *Transformations* should conclusively put such criticism to rest. Its whole purpose is to give historical flesh to the barer bones of his earlier account. This history is very well, and often brilliantly, executed. The quality and depth of the Reconstruction battle account alone is worth the price of admission. It is outstanding for its depth, extent, and penetration. The same is also true of the author's account of the New Deal constitutional crisis between the Old Court and the other branches, and the "switch in time" that terminated it. But the latter case is generally far better known, with a very extensive modern literature. It is much more recent and inaugurates the third (or contemporary) American republic.

As to the procedures through which the Fourteenth Amendment was ratified by July 1868, these were very questionable indeed, as Ackerman carefully demonstrates. The Thirteenth Amendment was ratified between February and December of 1865 with the assistance of the eleven "late rebel states," ten of which had legislatures that had been presidentially reconstructed. Yet these same ten rejected the Fourteenth Amendment by near-unanimous majorities, with President Johnson's enthusiastic encouragement. These legislatures were then abolished by Congress under the Reconstruction Acts of March 2 and 23 of 1867, and new ones were elected on the basis of universal adult male suffrage. Adoption of the Fourteenth Amendment was made an explicit condition of final readmission of these states to the seats in the Senate and House from which they had been excluded as the first order of Congress's business in December 1865. Little wonder that Secretary of State Seward expressed serious doubt on July 20, 1868, as to whether the Fourteenth Amendment had actually been ratified!¹¹

A great many of these irregularities might be more adequately accounted for, as will be seen below, if one proceeds on the assumption that a civil war that is also the first modern "total war" is really different from anything else in our experience, and that we need a better conceptual grasp of just how and in what ways, and for how long, the system moves from armed hostilities to actual peace. It is enough to say here that a true constitutional rigorist fully consistent with his or her principles would declare that the Fourteenth Amendment's title deeds are fatally defective, and that it thus should be re-ratified today. Of course, time moves on and "error" (if such it was) may have some rights after all. If one finds it hard

11. See J.G. RANDALL & DAVID DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 633-36 (2d ed. 1961).

to imagine that any serious constitutional scholar today would advance such extreme if consistent views, there is still a purpose to this brilliant narration. This is Ackerman's belief that "hypertextualism" and allied approaches are incompatible with the empirical facts of a living and changing constitutional order.

With the New Deal revolution, we find an apparently (but perhaps only apparently) final burial of Article V as a specified vehicle for constitutional transformation. It is enough, in Ackerman's view, that eventually and through whatever means, all three branches of the federal government come into agreement on the fundamentals of this transformation. Even more than the Reconstruction instance, this "moment" gives good empirical evidence for Ackerman's general process model: Demand for change and signaling, or extended deliberation; victory for the changers in a series of successive elections, or institutional conflict; and a switch in time by the resisting institution, or a new constitutional order. The argument seems at all essential points to be upbeat, and it assumes that once transformations with or without the aid of Article V are instituted and institutionalized, they can never be reversed. Another account, even one agreeing so much with Bruce Ackerman's analysis, may present some serious doubts on this score.

In any event, the analysis identifies an important reality. Depending on the concreteness of the specific political situation during a "moment," any institution may be the prime focus of demand for change, and any may be cast in the role of leading the resistance. Clearly, Congress (with the House of Representatives marginally leading the way) was the prime mover in the Reconstruction instance, and both President and Congress led in the New Deal transformation. According to Ackerman's account, during Reconstruction, President Johnson was the chief institutional resister who eventually "switched,"¹² while the Supreme Court had an insignificant role in the matter. In the 1930s, of course, the Old Court was the chief institutional resister that finally did the switching. Assuming, *arguendo*, that the political upheaval of 1994 were to eventuate in yet another constitutional moment, it would be evident that the initial impetus for change again came from Congress, with the House again taking a particular lead. To the extent that this upheaval has been resisted, that resistance has

12. See 2 ACKERMAN, *supra* note 2, at 227-36 (1998). My own view is that Johnson's "switching" is less noteworthy than Ackerman claims. By and just after the impeachment exercise of 1868, he had been completely stripped of influence over events, had only nine months or less remaining in his term, and was assured of removal from office if he took one further step in his resistance. In addition, I cannot refrain from a comment on the assertion, derived from John H. Franklin's contribution to the Schlesinger volumes on presidential elections, that a national majority of whites voted for the Democratic candidate in 1868. *Id.* at 236. This is an old canard that should be laid to rest. My own detailed unpublished analysis sustains the view that Grant, the Republican, had a majority of about 50,000 among white voters North and South—even in the face of gross fraud and violence in Georgia and Louisiana.

come from the presidency, and it will continue to do so as long as it remains in Democratic hands. It is also noteworthy, despite Republican disappointments, that that party retained control of both houses of Congress in 1998, the third consecutive election in the post-1994 “new era.” Things political are murky at the moment of writing, and it is always hazardous to attempt to tell the future. Still, considering this scenario is useful for the sake of argument.

Professor Ackerman’s second major preoccupation as an advocate is to persuade the public at large that this structurally very conservative regime can and does accommodate popularly-demanded transformation. In this view, the “countermajoritarian difficulty” often raised about the metapolitical functions exercised by nine old parties in the Supreme Court of the United States is essentially a non-problem. Like everything else in our complex governmental scheme, though very differently from anything else, the Court and its jurisprudence must ultimately rest on public opinion. Long ago, in between terms on the Court, Charles Evans Hughes called attention to the Court’s “self-inflicted wounds.”¹³ These would certainly include at the least its infamous 1857 *Dred Scott* decision, as well as the Old Court’s more notable anti-New Deal decisions of 1935-1936.¹⁴ Such wounds are particularly likely to be inflicted when, caught up in the passions associated with a sea change in the Justices’ environment, the Court’s majority forgets this fundamental condition for its exercise of power.

The major difference between politics as usual and the higher politics linked to constitutional moment crises involves an only partly recognized principal-agent relationship. Decades ago, the political scientist E.E. Schattschneider sagely observed that the public is like a very rich man who cannot possibly supervise all of his investments by himself. He needs agents. A chief issue for any democratic politics thus lies in this “rich man[’s]” finding ways and means to compel his agents to define his options.¹⁵ In normal times, this public is generally content to let its agents have quite wide discretion to define these options as they see fit. The public retains the ultimate sanction of throwing politicians out of office if they misread such cues as a normally passive, not particularly attentive, public sees fit to give them. The situation is fundamentally different in our rare recurrent bouts of political upheaval, constitutional moments of course

13. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 50 (1928).

14. *See, e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating the Guffey Coal Act of 1935, and essentially overruled by *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), *overruled by West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *United States v. Butler*, 297 U.S. 11 (1936), essentially overruled in *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

15. E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 139 (1960).

included. These convulsions produce a polarized intensity of feeling that those living in normal times would find hard to grasp. They are about things that very large numbers of Americans regard as fundamentally important; and, as in 1864, 1866, and 1936, this intensity pivots on a simple but potent choice: yes or no.

Most political scientists studying public attitudes and voting behavior through survey research would probably find Ackerman's argument hard to credit at this point, for his argument includes the view that in constitutional moment crises the public is also transformed for the duration of the crisis. It becomes energized, mobilized, and, even less plausibly, proactive rather than reactive, as it usually is. At these times, the public can and sometimes does lead politicians, rather than the other way around. None of these assertions are supported by the survey-research models.¹⁶ But they do find support in historian Paul Kleppner's empirical survey of the upheaval of the 1890s.¹⁷

As it happens, my own work has led to conclusions identical to Ackerman's and Kleppner's. These conclusions are based, as they have to be when dealing with eras prior to the construction of modern survey research in the 1950s, on inference from circumstantial evidence. The testimony of contemporaries is a basic element of that evidence. Two primary reactions among them occur repeatedly. The first, at the outset of the crisis sequence, is one of vast disorientation. The immense political earthquake of 1854, for example, prompted a Democratic paper in upstate New York to observe, "We doubt if there has ever been . . . so much confusion . . . both among whigs and democrats, as there is at the present time." A Whig editor in Maine asserted that "the political elements are in a state of commotion that baffles all calculation and all foresight."¹⁸ In Massachusetts, a twenty-year Whig dominance was obliterated in a torrent of votes for the Know-Nothings. One of the most prominent Whig leaders, former Speaker of the House Robert C. Winthrop, lamented, "Poor old Massachusetts! . . . Who could have believed the old Whig party would have been so thoroughly demoralized in so short a space of time?" A knowledgeable Whig journalist concurred, saying, "I no more suspected the impending result than I looked for an earthquake which would level the

16. See, e.g., Donald E. Stokes, *Spatial Models of Party Competition*, in ELECTIONS AND THE POLITICAL ORDER 161-79 (Angus Campbell et al. eds., 1966).

17. See PAUL KLEPPNER, CONTINUITY AND CHANGE IN ELECTORAL POLITICS, 1893-1928, at 239-49 (1987).

18. WILLIAM E. GIENAPP, THE ORIGINS OF THE REPUBLICAN PARTY, 1852-1856, at 129 (1987). Gienapp's splendid work, the definitive contemporary analysis of the subject, is a gold mine of archival digging and aggregate data analysis. Noteworthy, insofar as the public's role in such explosive processes is concerned, is a Massachusetts Whig journalist's reflections on the 1854 massacre: "[H]aving become wearied of the follies of what are called 'leaders,' the people took the matter into their own hands, and decided the contest in a manner that has astounded all, not even excepting themselves." *Id.* at 137.

State House and reduce Faneuil Hall to a heap of ruins.” Charles Francis Adams summarized 1854 with precision: “There has been no revolution so complete since the organization of the government.”¹⁹

As frequently encountered is the awareness of contemporaries that the public is actively, quite abnormally involved in this political turmoil. Consider the testimony of a worker for Senator Stephen Douglas in his 1858 Illinois Senate race against Abraham Lincoln:

It was no ordinary contest, in which political opponents skirmished for the amusement of an indifferent audience, but it was a great uprising of the people, in which the masses were politically, and to a considerable extent socially, divided and arrayed against each other. In fact, it was a fierce and angry struggle, approximating the character of a revolution.²⁰

The crisis of the 1890s proved similar. The editor of the *Chicago Daily News Almanac*, whose introduction to the preceding year’s happenings was normally anodyne, struck a very different and much more urgent note when reviewing the events of 1894.²¹ Two years later, in addition to stressing the singularity of the events of 1896, he made a prediction that future generations could only endorse:

From a political standpoint the year 1896 has been the most remarkable in our history. It has witnessed the partial disruption of one of the great parties, the formation of the free-silver party, the union of one wing of the democratic with the people’s party and the harmonious action of the other wing with the republicans to compass the defeat of the regular nominee of the democratic party. How permanent any one of these changes may be no one can tell, but the election in November, 1896, will always be one of those

19. *Id.*

20. HARRY V. JAFFA, *THE CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES* 23 (1959).

21. The editor observed:

Few years in times of profound peace have been so crowded with stirring political and social events as 1894. The year opened with serious and disastrous labor troubles, which continued, with almost unabated intensity, until the middle of July. . . . [T]he November elections were a surprise to all parties. . . . Add to these disturbances the financial panic, which caused so much distress during the whole year up to the first of October, and the year 1894 becomes the most interesting of any in our history since the close of the (civil) war.

Preface to *THE DAILY NEWS ALMANAC AND POLITICAL REGISTER FOR 1895*, at reverse side of title page (George E. Plumbe ed., Chicago, Chicago Daily News Co. 1895).

points of departure from which political reckonings must in the future be taken.²²

As for the atmosphere then prevailing, this is what historian J. Rogers Hollingsworth has to say about it: “Mammoth torchlight parades wound through the streets of cities and towns, with captains of industry as well as farmers and laborers marching in line. Men grew angry at the very sound of the names of McKinley, Cleveland, and Bryan.”²³

Very similar intensities were manifest in the election of 1860, as well as that pivotal election of 1866 to which Professor Ackerman devotes so much attention. Discussing this election in his splendid work *Andrew Johnson and Reconstruction*, the historian Eric McKittrick focused on the exceptional outpouring in the pivotal state of Ohio. He concluded in summary about the victorious Republican campaign that “there was a sense in which ‘the people’ had taken it over” from the politicians and the media.²⁴ As one would expect, election turnouts at these critical moments reached staggering heights. The pivot of 1896 was in the hotly contested Midwest. All five of the east-north-central states plus Iowa and West Virginia produced participation levels in excess of 95% of the potential electorate. In 1866, 85.9% of Ohio’s electorate came to the polls, by far the largest off-year congressional turnout in the state’s history; and eighteen Republican representatives were chosen compared to only three Democrats.²⁵

As McKittrick points out, Republicans in Ohio and elsewhere owed much of their sweeping success in 1866 to precisely the same Democratic help they had been given in 1864. In 1864, the question the Democrats presented to the Union’s electorate was a yes-no question: Was the war a failure? Rarely does the opposition prove so useful to a defending incumbent party. But it is reasonable to say that in some deep sense, the Democrats in the 1860s could not help themselves; for they too had an energized, mobilized, and proactive base in the electorate with which to deal.

The point of my digression here into “pure politics” is to underscore how remarkably different such times are than those with which succeeding

22. *Preface* to THE DAILY NEWS ALMANAC AND POLITICAL REGISTER FOR 1897, at reverse side of title page (George E. Plumbe ed., Chicago, Chicago Daily News Co. 1897).

23. J. ROGERS HOLLINGSWORTH, THE WHIRLIGIG OF POLITICS 72 (1963).

24. ERIC L. MCKITTRICK, ANDREW JOHNSON AND RECONSTRUCTION 446 (1960).

25. All references to estimates of voter turnout are based on my own lifetime’s labor in deriving them. Presidential data for the period 1824-1968 have been published in U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 1071-72 (1975). For a detailed discussion of the problems encountered and the procedures used to derive these estimates, see Walter Dean Burnham, *Those High Nineteenth-Century American Voting Turnouts: Fact or Fiction?*, 16 J. INTERDISC. HIST. 613 (1986).

generations of Americans have been familiar almost all of their lives. A vital centerpiece of Professor Ackerman's model is this energized, proactive public taking an active and maybe even directive part in the extended deliberation of a constitutional moment. It is not surprising that at such times, politicians are very likely to insist that their publics are leading *them*, and something like this seems to have been the case in 1866. One is reminded of the story of a French radical political leader as the February 1848 revolution broke out. Looking at the masses streaming below his Paris apartment window, he exclaimed, "There go my people! I must follow them, for I am their leader!" Ackerman's argument at this point is fully consistent with the empirical observations.²⁶

II: PUNCTUATED EQUILIBRIA, PUNCTUATED CHANGE, AND THE AMERICAN POLITY

It should be clear why those of us doing other kinds of work on the historical development of the American polity find Bruce Ackerman's work to be more than just interesting or stimulating. There are very important elements of convergence among *We the People* and the perspectives and findings of other social scientists. But at the same time, the work presents puzzles and confronts occasional dissent. In this Part, I will attempt to present the barest outline of a different perspective on the dialectics of continuity and change in our constitutional order.

A. *What Is Punctuated Equilibrium?*

I begin this phase of the discussion by noting that in essence, *We the People* proposes a punctuated equilibrium model of macrolevel constitutional order. The term "punctuated equilibrium" is derived from a seminal article published in 1972 by the paleobiologists Niles Eldredge and

26. The polar tensions prevailing at such times are hard to appreciate unless one has lived through them. President Franklin Roosevelt, surely the most distinguished living Harvard alumnus at the time of that institution's tercentenary in 1936, came back to his alma mater for the occasion. He was treated with conspicuous rudeness by Harvard President A. Lawrence Lowell and others there: FDR was, after all, a "traitor to his class." And I myself had one experience that has remained with me for a lifetime. A ten-year-old in 1940 with an already-developing passion for politics, and also well-socialized by Republican parents and neighbors in a Pittsburgh suburb, I ventured downtown one day on the bus. I proudly wore a number of Willkie buttons. On getting off the bus, I was promptly surrounded by a number of men, much more poorly dressed than my parents were. They intimated to me that they found this display disagreeable and that I should do something about it. I promptly removed the Willkie buttons, the men dispersed, and the incident ended. Two decades later, in university, scholars like Robert Alford taught me that 1940 was the most class-polarized election in American history; this was a lesson that I had already learned for myself. See ROBERT R. ALFORD, *PARTY AND SOCIETY: THE ANGLO-AMERICAN DEMOCRACIES* 103, 227 (1963).

Stephen Jay Gould to address major issues in their own field of science.²⁷ Mainstream evolutionary theory going back to Lyell and Darwin had proposed that speciation change occurs only incrementally—a subinfinite number of adaptations spread out over a subinfinitely long period of time. The problem with this view, Eldredge and Gould argue, is that there is by now too much evidence from the fossil record that cannot be fit into this model. Quite often, both conditions of this substantive uniformitarianism are violated empirically. In such cases, speciation appears to happen in a great hurry; and once it has, no subsequent change *at all* can be detected over extremely long periods of time. (And this is to say nothing of the problem that mass extinctions pose to this dominant field paradigm.)

The punctuated equilibrium alternative proposes instead the existence of Equilibrium I, its rapid disruption through a cluster of closely-paced transformative events, and out of this the establishment of a new plane of stability, Equilibrium II. This paradigm of change has been increasingly influential in certain reaches of political science.²⁸ The field has in general been considerably enriched in recent decades by analytic concentration on equilibria, including the factors at work to sustain and to disrupt them. Particularly great attention has been paid to equilibria in the subfield of rational or public choice. One depressing conclusion has arisen from this work: In politics, unlike in economics or the natural sciences, virtually no naturally occurring equilibria exist. This has distressed a number of workers in the field, including its great guru, the late William Riker. For this finding means by implication that, in politics, almost anything can (theoretically) happen at almost any time, as equilibria are suddenly disrupted with virtually no advance warning.²⁹ Two examples of this process, of fundamental importance to the course of world history in the twentieth century, can be cited here: the post-1928 Nazi surge among major parts of the German electorate—an essential condition for the elite decisions that brought Hitler to power in 1933—and the abrupt and wholly unpredicted collapse of the Soviet Union in 1991 and 1992.

It follows that politicians, reacting to these embedded instabilities, do what they can to produce structure-induced equilibria as substitutes for naturally occurring ones. As John Aldrich has recently explained, this search and its results are fundamental to the history of American (and other)

27. Niles Eldredge & Stephen Jay Gould, *Punctuated Equilibria: An Alternative to Phyletic Gradualism*, in *MODELS IN PALEOBIOLOGY* 82-115 (J.M. Schopf ed., 1972).

28. See, e.g., FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (1993); *THE DYNAMICS OF EVOLUTION: THE PUNCTUATED EQUILIBRIUM DEBATE IN THE NATURAL AND SOCIAL SCIENCES* (Albert Somit & Steven A. Peterson eds., 1992).

29. See WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 181-95 (1982).

political parties.³⁰ But perhaps the clearest example lies in the activities of the Founders of 1787 and their consequences. Normally, equilibria in politics are sustained by a dense network of rules and learned norms—and of course lawyers generally and courts in particular are among the chief keepers and sustainers of these rules. Under normal conditions, those demanding change are thus marginalized in a variety of ways, normative and operational; and the larger the prospective change is, the more severely do the processes of marginalization work. Negative feedback dominates the system as a whole. Ideally, from a system-conserving point of view, demand pressures for change run into continuing declines in marginal utility per unit of demand until either (1) the demanders give up and go away; or (2) contexts change so radically that the socioeconomic basis for the demand disappears.

In certain respects, the Constitution itself can be read as a nearly (but not quite) perfect negative feedback machine; and the normal American legal and political regime is a profoundly conservative regime. Were the pace of technologically—and otherwise—induced change pitched at the near-zero levels found in ancient Egypt or China, there would probably be no endogenous pressure for change in this conservative regime of any kind and therefore nothing looking like “political development.” But, of course, such conditions are the polar opposite of the historic American pattern. The chief agent of transformation is, in the broadest sense, the logic and consequences of capitalist development across the course of American history. In various ways that I cannot go into here, this “permanent revolution” in due course produces massive events that collide with and disrupt apparently invulnerable equilibria.

It should be noted that no cyclicity at all is implied in the original Eldredge-Gould model of punctuated equilibrium and punctuated system change. Nor, studying the histories of other Western political systems, can one find any such thing, though system-transforming upheavals can be pinpointed for many of them. Speciation happens when it happens, and so elsewhere do critical realignments such as the Nazi upheaval of 1928-1932 in Germany. What is unique about the United States is that such upheavals have regularly recurred during every generation from national independence through at least the late 1960s. These processes are importantly cyclical in character, and they arise out of the collision of very large disruptive events with a stasis-prone constitutional order.

Here I pause to refer to a remarkable work written in 1925 by the historian Frederick J. Teggart. Teggart’s analysis is chiefly devoted to an attack on both the Darwinian evolutionary theory of his time and theories of human history derived from eighteenth-century thought. In both, mega-

30. See JOHN H. ALDRICH, *WHY PARTIES?* 3-61 (1995).

events are excluded from analysis. “Eventless evolution” was the prime focus of Teggart’s attack. He thus pointed in the direction of a punctuated-equilibrium theory of system transformation nearly half a century before the term was coined by Eldredge and Gould:

If we are to undertake the study of “how things have come to be as they are,” it will be necessary to eliminate (1) the assumption that progressive change is “natural” and to be expected, (2) the assumption that the task of science is to discover the orderly provision which nature has made for progressive change, and (3) the idea that “events” are not an essential part of the *modus operandi* of change in time.

. . . The explanation of any present status or condition will require a determination (1) of the processes manifested in the persistence of old forms, and in the stability of forms in general, (2) of the processes manifested in slow modification (which, however, do not produce anything “new”), (3) of the historical conditions under which changes have actually taken place in the past, and (4) of the processes manifested in such circumstances.³¹

Ackerman’s “normal politics” and “normal lawmaking” aptly describe many attributes of American political institutions and processes during periods of equilibrium, which fall roughly under the headings of the first two items in Teggart’s second excerpted paragraph. The third and fourth of Teggart’s points constitute a very large part of Professor Ackerman’s project in *Transformations*.

We have already discussed some characteristic peculiarities of the political dynamics associated with punctuated-equilibrium flipovers. Here again, Ackerman has done a very creditable job of identifying and specifying them as manifested in concrete historical instances. As Frank Baumgartner and Bryan D. Jones have observed in their impressive account of the rise, maintenance, and destruction of policy monopolies where interest groups play a central role, these flipovers are generally marked by the sudden replacement of negative-feedback conditions by positive-feedback ones. Realignments, bandwagon effects, circumstances in which given increments of demand for change produce amplifying and spillover effects, a kind of cascading sequence—all these mark such times. In a sense, change feeds on itself during this part of the cycle until some final limit is reached.³²

As these authors observe, such processes begin with small but then exponentially and unidirectionally increasing rates of transformation until,

31. FREDERICK J. TEGGART, *THEORY AND PROCESSES OF HISTORY* 150-51 (1941).

32. See BAUMGARTNER & JONES, *supra* note 28, at 1-25.

when the outer limit is reached (which can mean, and in their field of study often has meant, the total destruction of the preceding system of action), the rate of change eventually slows to a stop, at which point Equilibrium II comes into being and is then consolidated. Similar modes are found in the literature of biomedical contagions and epidemics, and in literature dealing with the diffusion of innovations. The time-bound trajectory of such processes follows a statistical pattern—the logistic or S-curve—that was first created by biometricians in 1920 to study contagion processes. It is the measure I employed to graph the spread of Nazi “contagion” in Weimar German elections.³³ There appears to be no reason in principle why all such flipover sequences from Equilibrium I to Equilibrium II could not be graphed the same way, though empirical evidence can often be quite refractory to the use of any statistical method.

Such sequences, by my reckoning, have occurred on six previous occasions in American history. Three of these coincide with particularly large upheavals, the later phases of which include Professor Ackerman’s constitutional moments. I will present the pattern that emerges, with some commentary, in Table 1. Assuming that such a table is a general—if hugely abbreviated—reflection of reality, certain points merit a more extended discussion, since they bear at least tangentially on Professor Ackerman’s analysis in *Transformations*.

There is no doubt that “political time” is notably compressed during the upward-thrust phase of the S-curve. As we have seen, this is a phenomenon to which, again, many contemporaries bear witness. But transformations of course take time to be completed. Just how much time will depend, among other things, on the depth of the crisis and the magnitude of the issues to be worked out, and not least on the powerful intervention of contingency in history. A clear example of the latter is President Lincoln’s assassination on April 14, 1865, and the succession of the Jacksonian Democrat Andrew Johnson to the presidency. The minimum time period seems to have been three or four years. In the Nazi case mentioned above, inflection begins in October 1929 and is completed by July 1932, or within thirty-two months. Let us briefly review our sequences.

33. Walter Dean Burnham, *Political Immunization and Political Confessionalism: The United States and Weimar Germany*, 3 J. INTERDISC. HIST. 1-30 (1972). The “confessional” or milieu-oriented explanation offered there to account for the relative receptivity or resistance to the Nazi contagion among various segments of the German electorate is one of three modes analyzed and tested in a major German work on the subject. See JÜRGEN W. FALTER, *HITLERS WÄHLER* (1991).

Ackerman's Republics and American Political Eras: An Overview

"Republic" (Ackerman)	"System" ("Realignment Theory")	Notional Peak Year of Upheaval	Brief Commentary
I (Rural Republic)	1	1780	American revolution; search for characteristic national institutions (1787-88), and subsequent struggle over final terms of revolutionary settlement. Foreign policy of central important (politics of "dependent development") and, at home, establishment of specifically American national identity.
II (Industrializing America)	2	1818 (local) 1828 (USA)	Democratization revolution; overthrow of traditional elitist norms and organization patterns; basic change in the role of the Presidency (e.g., veto-power exercise); stepwise creation of true political parties as linkage and mobilization organizations. ("Jacksonian-era" politics).
II (Industrializing America)	3	1856	Civil-war realignment; destruction of Whig party, replaced by Republican party; Civil War; Reconstruction; intersectional peace settlement imposed by North, 1866-68, replaced by a very different settlement, 1874-77; from 1874, to 1894/6, no majority, and protracted partisan deadlock in Washington ("Civil War System").
III (Modern Times)	4	1894	"Industrialist-capitalist" realignment; the city beats the country; normal and very large Republican hegemony in the Metropole as against Southern and Western "colonies"; the Supreme Court's "golden age" as defender of the constitutional rights of property. Southern <i>apartheid</i> regime fully matured with 1894 Democratic repeal of most Reconstruction statutes and the Court's establishment of racial segregation as constitutional exercise of state legislative power (<i>Plessy v. Ferguson</i> , 1896). ("System of 1896 (-1932)").
III (Modern Times)	5	1932	Collapse of free-market economy (1929 and after), and thus objective socioeconomic base on which the previous political and constitutional order had rested. Popular repudiation in 1932, followed in stages by New Deal order led by "the modern presidency" (FDR onwards), and dominance of Democratic party. Appearance of the modern interventionist/regulatory or "big" federal government; constitutional conflict and Supreme Court's "switch in time," 1935-37 ("New Deal System").
III (Modern Times)	6	1970	Massively complex political upheaval of late 1960s; replacement of the traditional parties by organizations under the same names but very differently constituted; candidate/media domination of electoral politics and lapse of the old mobilization functions previously performed by parties; extensive policy drift, with major breakdown of coordination across separated-power institutional boundaries; divided government as normal state of affairs, reflecting absence of majority for any policy direction ("Interregnum State").

B. Sequences

In the massive crisis that produced independence and the Constitution, the armed-struggle phase lasted for six years (or eight, if we count to the final British evacuation of New York City in November 1783). The search for adequate constitutional structure and organization of the new nation as a nation took more years yet and was achieved over an opposition whose strength is very easy to forget after the passage of two centuries. Nor was the new institutional array more or less complete until John Marshall propelled the Supreme Court onto center stage as a genuinely coordinate branch of the federal government in 1803.

The next sequence was also an exceptionally protracted one, for here too primordial institution-building—in this case, a genuine mass-rooted and organized party system—was involved. As the historian Joel Silbey has pointed out, the democratizing revolution of the 1820s and 1830s was an “aligning realignment,” starting from the near political vacuum that was the Era of Good Feelings.³⁴ Given that there were no antecedent institutional channels through which transformation could flow, that this particular version was exceptionally protracted should not be particularly surprising. Nevertheless, Andrew Jackson’s election to the presidency in 1828 has always, and rightly, been considered a defining watershed moment in American political history. Moreover, quite significant constitutional change accompanied this transformation. This is obvious at the state level, for the 1818 to 1838 period is noteworthy for the extent and democratizing character of the many constitutions that modified or replaced older ones. Change occurred nationally as well. It may well be that in strictly judicial terms, the transition from the Marshall Court to the Taney Court had relatively limited doctrinal consequences. But if we expand the concept of “Constitution” somewhat beyond the lawyerly norm, we note what amounts to a recreation of the presidency and its relationships to Congress and the public; and, not least, we note the creation of those essential institutions of a democratized republic, political parties.

The crisis of the Civil War and Reconstruction divides quite plainly into several overlapping phases, each of which had its own peaks of intense activity, and each of which was the sine qua non for the next. It began with the abrupt smashup of the second party system with the passage of the Kansas-Nebraska Act in 1854. In the North at any rate, a new relative equilibrium was created on the electoral level no later than the election of

34. Joel H. Silbey, *Beyond Realignment and Realignment Theory: American Political Eras, 1789-1989*, in *THE END OF REALIGNMENT?: INTERPRETING AMERICAN ELECTORAL ERAS 3-23* (Byron E. Shafer ed., 1991).

Abraham Lincoln in 1860. But this election also amounted to a *casus belli* that precipitated the secession of the Deep South and led to the Civil War. This second stage lasted in military terms until 1865, with a crucial and for the time enormous landslide victory for the Republicans in 1864. The third phase was that of so-called “radical Reconstruction,” a subject that I will discuss more fully. Of course it overlapped heavily, indeed decisively, with the fallout from the war itself. Despite the fact that the 1866 congressional election was in electoral terms a maintaining election, restating the decision of 1864, Professor Ackerman is quite justified in referring to it as critical in the context of the third phase of this titanic upheaval.³⁵ On its outcome depended everything that was to happen next, precisely as he argues; contemporaries, including vast segments of the American public, were fully aware of this at the time.

The intense burst of punctuated change in the 1890s is not given much attention in the pages of *Transformations*. It represents the sole case on record in which organized popular forces demanding major change were *defeated* in their appeals to the national public. Nevertheless, in my view it was a significant moment of constitutional, as well as partisan, change. The latter transition was largely completed within the three years of 1893 to 1896, and there can be no doubt that the impact of America’s second worst economic depression on record qualified as one of Teggart’s intrusive and large-scale “events.” But this crisis is also noteworthy for the strongly proactive role taken by the Supreme Court, leading the way toward the future in its major decisions in the 1894-1895 Term. The “System of 1896” that followed was unique among all such equilibria for the metapolitical ascendancy, never seen before or since, that the Court assumed within the whole American political system.

The New Deal upheaval, arising out of the social and economic wreckage produced by the Great Depression, had electoral and other dynamics specific to itself. These included a very substantial reverse swing to the Republicans outside the South in 1938 and a final equilibrium that gave Democrats control of the presidency until 1952, but eliminated any prospects for further New Deal advances for the next quarter century. Nevertheless, this transformation was largely completed by 1938-1940, six or eight years after the Democrats surged into majority status. No one doubts that along the way, a revolution in constitutional doctrine occurred,

35. 2 ACKERMAN, *supra* note 2, at 178-83, 186-88. The actual word that Ackerman uses here is “triggering” rather than “critical,” as he refers to 1868 as a “consolidating” election. But whichever term one uses, 1866 was of decisive constitution-remaking significance. In the north and west (the former free states), turnout in 1866 reached an all-time high (75.5%) as it did nationally (70.4%). Its only near rivals occurred in 1838 and 1894—also in the midst of substantial transitional crises.

as cases such as *United States v. Darby*³⁶ and *Wickard v. Filburn*³⁷ conclusively demonstrate. The transformation was, to say the least, quite incomplete at the national level, since President Roosevelt and the national Democratic leadership left the South's apartheid regime alone, as did the Supreme Court—at least until its outlawing of the white primary in *Smith v. Allwright*.³⁸ But not until 1954 was the cornerstone of the Old Court's jurisprudence, *Plessy v. Ferguson*, finally overruled and racial segregation declared in violation of the Equal Protection Clause of the Fourteenth Amendment.³⁹ A variety of logjams burst in the 1950s and especially the 1960s, with the Warren Court playing a leading role in bursting them. And thus it could be said that there were two New Deal transformations rather than one—the primordial shift of the 1930s and a second one in the 1960s, just before the demise of this regime order.

The crisis of the later 1960s is, of course, much too complex to be reviewed in the space allotted here. It can perhaps be summarized as involving very widespread repudiation of important and ancient verities, followed by spreading backlash from the very substantial parts of the public who saw this repudiation as a mortal threat to their way of life. Milestones along the way—starting, perhaps, with the 1963 assassination of President Kennedy—included Barry Goldwater's nomination by the Republicans in 1964; President Johnson's decision to intervene in Vietnam in 1965; the student and countercultural “revolution” linked to the burgeoning antiwar movement later in the decade; the civil rights struggles in the South; massive urban riots in 1967 and 1968; and, capping things off, the assassinations of Martin Luther King, Jr., and Robert F. Kennedy in 1968, followed shortly by the riotous and disastrous Democratic convention in Chicago. One could carry the story still further, down through the large-scale rules changes governing the presidential nomination process in 1971-72, the Democrats' nomination of George McGovern in 1972, the Watergate burglary in the same year organized by President Nixon's henchmen, and, in due course, Nixon's resignation one step ahead of impeachment and conviction in August 1974. Nor did the decisions of the Warren Court escape the maelstrom, as conservatives demanded the impeachment of the Chief Justice or at least (as Nixon promised in his 1968 campaign) a halting or reversal of these decisions by the appointment of conservative Justices.

36. 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act with a Commerce Clause justification and ending the place of dual federalism in the Court's jurisprudence).

37. 317 U.S. 111 (1942) (upholding the Agricultural Adjustment Act by rejecting a farmer's claim that his raising of wheat for personal consumption did not affect interstate commerce).

38. 321 U.S. 649 (1944) (voiding a racially discriminatory Democratic primary law on the grounds that the party is a state agency).

39. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

Traditional ways of doing business in Washington and the country as a whole were transformed by this power deflation. The old eastern foreign policy establishment disintegrated. Eventually, the draft was abolished and a volunteer armed force created. In academia, a genuine and sometimes even radical intelligentsia was created for the first time. Meanwhile, the foundations of the electoral order were transformed. New organizations arose on the ruins of the old. The traditional coalitions ultimately dating back to the New Deal era were shattered and new ones put in their place. The South, for example, now began its giant strides from its position as bulwark of the Democratic coalition to its position today as a bastion of very conservative Republicanism. And turnout began to plummet toward the record low levels reached by the 1990s.

As political scientists John Aldrich and Richard Niemi have now conclusively demonstrated, the political crisis of the late 1960s entailed a genuine realignment.⁴⁰ At the level of electoral politics and party structure, the flipover phase was concentrated in the years 1964 to 1972—again a span of eight years. A new kind of party system was created out of the wreckage of the late-1960s crisis, and a new, usually fragmented, institutional partisan-control pattern emerged as a dominant feature of the succeeding equilibrium. Fragmentation, selective demobilization of the electorate, and the breakup of traditional linkage structures were significant aspects of this new order (or, as some might call it, disorder). Basic to the “interregnum state” that supplanted the New Deal order were two divergent modes of public opinion about big government: on the ideological plane, a mode of hostility in principle, and on the operational or service-delivery plane, strong support for programs from which many of this same public benefited and that only big government could deliver. In discussing the 1992 congressional election, political scientist Gary C. Jacobson pointed to a similar paradox. Sixth-era divided government was created when the public found that it could vote Democratic for Congress to keep the programs coming and Republican for President so that it would not have to pay for them.⁴¹

I must provide a caveat at this point. Political scientists are likely to find themselves uncomfortable with arguments that speak of “the people” or “the public” as a monolithic entity, or that claim that in every case of transformation, huge levels of mass mobilization occur as part of the process. It seems clear that outcomes in such sequences are produced by politically decisive minorities of the adult-citizen (or even voting)

40. See John Aldrich & Richard G. Niemi, *The Sixth American Party System: Electoral Change, 1952-1992*, in *BROKEN CONTRACT: CHANGING RELATIONSHIPS BETWEEN AMERICANS AND THEIR GOVERNMENT* 87-109 (Stephen C. Craig ed., 1996).

41. See Gary C. Jacobson, *Congress: Unusual Year, Unusual Election*, in *THE ELECTIONS OF 1992*, at 153, 155-58 (Michael Nelson ed., 1993).

population rather than by action of the whole. The questions then become: “Which minorities?” and “How do the movements of these minorities affect the global balance of power in our representative institutions as a whole?” It thus is worth noting that if 1866 were indeed a “critical” election, it is difficult to explain why forty-five percent of the Northern electorate voted for the Democratic (and Johnsonian) opposition.

In the current era, on the other hand, one may well be concerned about the extent to which the class-skewed slump in turnout over the past four decades creates opportunities for sometimes rather small minorities to seize control of nominations in electoral politics and, once elected, work their will. The “new” parties that Aldrich describes have different kinds of activists than the older, more patronage-oriented ones did. These activists are much better educated than their earlier counterparts, but unlike most of them, they are propelled into politics by their commitments to causes rather than to individual leaders or party organizations that receive their loyalty. Given that the new cadres not infrequently get elected to Congress, the net effect is to produce the ever-mounting polarization between partisans in Washington that we see today, coupled with a mass public turnoff from the endless mutual bashing that now goes on there.

The smaller the share of the citizenry that actually votes, the more likely it is that concentrated and passionate strategic minorities can achieve success. So the question of *which* minorities, when and under what situational contexts, remains a central problem of politics—including, one would think, constitutional politics. Perhaps a touchstone of this may be found in the recent presidential impeachment drama. Rarely if ever in our history has a political party pursued matters to trial in the Senate in the teeth of very strong, consistent, and adverse public opinion. This is the precise negation of the political situation surrounding the impeachment of Andrew Johnson that Professor Ackerman describes so well. This distinction between elite action and the preferences of the electorate is, or should be, profoundly disturbing.

By the same token, if one considers participation by the adult citizenry as an essential attribute of extended deliberation, it has to be concluded that in the Founding era this deliberation was not manifested in any very large-scale participation by voters either in choosing delegates to state ratifying conventions or in the first few congressional elections under the new order. In the former case, the mean turnout seems to have been little more than one-fifth of the estimated adult white male population, with hotly-contested New York’s participation rate somewhat in excess of one third.⁴² As to the earliest congressional elections, the national turnout was an estimated 18%

42. For the fascinating data, see ROBERT J. DINKIN, *VOTING IN REVOLUTIONARY AMERICA* (1982), which I have reworked with my own potential-electorate database.

in 1788-1789, 22% in 1790-1791, 24% in 1792-93 and 25% in 1794-1795. This discussion, it should be added, is by no means intended as an attack on Professor Ackerman's argument. For one thing, the immediately preceding period was one in which very considerable mass action was devoted to armed struggle against the British enemy; not even primitive partisan (or many other) institutions for mobilization yet existed. Finally, one deals here with the radically different deferential-participant political world of the late eighteenth century.⁴³ Given the whole context, then, one need not be uncomfortable with the extended-deliberation side of Ackerman's argument, but it is occasionally useful to underscore how important that context is for empirical analysis.

Another characteristic of each of these sequences since the first in the series is the centrality of the Supreme Court and its decisions to the political struggles of the time. The first serious effort to curb the Court's appellate jurisdiction seems to have been directed against Chief Justice John Marshall and his colleagues in 1827 by Richard M. Johnson, a Jacksonian Senator from Kentucky and later vice president under Martin Van Buren.⁴⁴ Chief Justice Taney's opinion for the Court in *Dred Scott v. Sandford*, declaring the Missouri Compromise of 1820 unconstitutional on substantive due process grounds under the Fifth Amendment, also implicitly declared the 1856 Republican platform plank on the subject unconstitutional. This decision is widely regarded as an important triggering event in escalating the sectional crisis of the 1850s. Needless to say, Republicans were disinclined to disband, or to omit the core of their message at the behest of the Court; they instead vigorously attacked it as a tool of the Slave Power. It is also noteworthy that during the epic struggle over Reconstruction, Congress repealed a section of the Habeas Corpus Act on the basis of which a suit that challenged the constitutionality of the Reconstruction Acts of 1867 had been brought, fearing that the Court might rule against them. The

43. The connection between the persistence or absence of party and turnout levels comes out very clearly by comparing Union and Confederate congressional-election data before and after secession:

YEAR	UNION
1858/1859	71.5
1860/1861	81.9
1862/1866	65.1
1864/1866	71.4

YEAR	CONFEDERACY
1858/1859	59.9
1861 CSA	35.6
1863 CSA	24.1
1865/1866*	31.6

(* Postwar elections under presidential reconstruction).

44. See ALFRED H. KELLY & WINFRED A. HARBISON, *THE AMERICAN CONSTITUTION* 298 (3d ed. 1963). Johnson's proposal was to constitute in the Senate a court of last resort in all cases that involved the constitutionality of state laws, or to which a state should be a party. See *id.*

Court acquiesced in this revocation of its appellate jurisdiction in *Ex parte McCardle*.⁴⁵

In his 1896 election campaign, Democrat William Jennings Bryan launched major attacks on the Supreme Court's decisions, including those handed down during its 1894-1895 Term.⁴⁶ The next two punctuated-change "moments" in this series also square fully with this pattern. The 1930s crisis is an obvious case in point, of which Professor Ackerman has provided us with a rich analysis. Were one inclined, one could find a bit of fault with the argument, since at no time during the election campaign of 1936 did Franklin Roosevelt give any hint that the Court was a central issue or that he might launch an ambitious program to pack it. But if 1936 was no "mandate" in this area, it surely was in virtually all others. But there are important means-ends issues here, as there had been back in 1866 when the Republican campaign breathed no hint that Congress was interested in revoking the appellate jurisdiction of the Supreme Court.

The later 1960s, finally, were noteworthy for a very substantial attack on the Warren Court that was also a centerpiece in Richard Nixon's successful presidential campaign. Those of us living and active at the time may readily recall the "Impeach Earl Warren" billboards that spread across the country. Within Congress, the prime focus of proposed activity again was curbs on the Court's appellate jurisdiction. But Nixon won the 1968 election, Chief Justice Earl Warren retired shortly thereafter, and with the unusually speedy transition to the Burger Court, most of this pressure rapidly dissipated. In summary, this quite consistent pattern forms a good qualitative indicator of punctuated-change stress and change. Considering what is involved and what is perceived to be at stake at such moments, polar conflict involving the Supreme Court is a "logical" part of the whole process.

III. ACKERMAN'S ANALYSIS: IS ANYTHING WRONG WITH THIS PICTURE?

How, if at all, do these two narratives fit together? What does the preceding analysis suggest as it relates to Professor Ackerman's argument?

There is certainly agreement as to the timing and intensity of the constitutional moment pivots on which very much of our history turns. Ackerman has also done us the great favor of specifying the most important processes that occur at such times: signaling by those seeking basic change,

45. 74 U.S. 506 (1869) (holding that an act of Congress withdrawing the Supreme Court's appellate jurisdiction in certain habeas corpus cases voided the basis on which the Court could proceed in the case).

46. Bryan's famous acceptance speech at the 1896 Democratic convention is an example. For the text of the speech, see DOCUMENTS OF AMERICAN HISTORY 174-78 (Henry Steele Commager ed., 5th ed. 1949).

extended deliberation that engages the public's attention and focuses that attention, victory for the forces of change in more than one election, switch in time on the part of the institution resisting change, and a subsequent and quite different constitutional order. This is surely right in ideal-typical terms, and it has such empirical support as an often messy reality provides. In particular, there is by now abundant empirical support for Ackerman's argument about the fundamental differences in the role and activities of the citizenry in periods of "normal" and of "higher" lawmaking, at least throughout most of our history. But they also have occurred at every moment that other punctuated-change flipovers have swept through the American political system.

To my mind, it is clear that quite considerable constitution-modifying goes on in these other moments, even if they do not perhaps rise to the full sweep achieved in each of the "big three." In both sets of cases since the Supreme Court's existence was established and fully institutionalized, major conflicts over it and proposals to somehow "curb" or transform it have erupted as part of the overall process. Conflating the two sets, as suggested in Table 1, gives us the prospect that these regularly-recurring destructions and reconstructions of equilibria may also contain a major-minor-major pattern of recurrence as well, with the second jump shift in the course of each "Republic" falling into the minor (or perhaps less-major) category. A fuller exploration of this possibility will be left for another occasion.

Bruce Ackerman, as a constitutional scholar, is chiefly concerned with "moments" at which formal constitutional change occurs, whether through Article V or a coming into agreement between the Supreme Court and the political branches of the federal government. These "moments" in fact occur toward the end of a more protracted upheaval sequence. They are the points at which a revolutionary settlement is fashioned in legally and juridically specific terms. This settlement spells out many of the parameters of action that are undertaken as the next equilibrium phase emerges and becomes consolidated. "Switching in time" is very close to the last step in this incipient restabilization process, though I think it is much easier to make a compelling case for this in the New Deal sequence than in the events of 1868.

A. *The "Grasp of War" and the Constitutional Politics of Reconstruction*

A perspective of the sort advanced here also generates queries about and some dissent with Professor Ackerman's account. I will deal briefly with two instances. One involves the author's account of the Reconstruction episode and the other with the 1890s. As to the former, I think that a serious problem lurks behind his rejection of a "war-powers" logic of justification

for post-1865 events. As to the latter, this engages the fascinating question posed by the Supreme Court's becoming the major change-inducing institution, paralleling its subsequent hegemony over the political system as a whole. And, thinking of both, one cannot omit thinking about what happens to the Fourteenth and Fifteenth Amendments and how important change-oriented creativity by political and judicial actors can take forms not really confronted here.

As to the path of Reconstruction, the anomalies are blazingly evident. They have been brilliantly analyzed in *Transformations* and will not be repeated here. It is no secret that war powers exist during extraordinary military emergencies. They are invoked by authority to claim the power to do things that could not pass constitutional muster in normal peacetime. One need only think of the greatest of all exercises of these war powers: President Lincoln's Emancipation Proclamation.⁴⁷

A basic issue in the whole Reconstruction drama is whether the exercise of war powers or their very near equivalent is constitutionally legitimate. Professor Ackerman is made most uncomfortable by any assertion of "the grasp of war" for legitimating what occurred for the years after the Civil War's end. Accepting such a view would, in his opinion, "place the Reconstruction amendments on a radically different, and much less attractive, constitutional foundation than all other parts of our Constitution."⁴⁸ It would thus in some way compromise the purity of the democratic-constitutional resolution of a "moment" crisis. Happily, he can raise this specter only to dismiss it, for such an approach is "bad history." As I read him, since actual hostilities had ceased in 1865, no further resort to war powers or "grasp of war" was constitutionally permissible.

To my mind, this is the careful lawyer talking. But in taking this position, Ackerman has also raised serious problems that one assumes he would rather avoid. And, it has to be said, the history involved is very good history indeed. In what follows, I rely heavily upon the account provided by the eminent historian Eric L. McKittrick on this subject.⁴⁹

47. The detachment of West Virginia from Virginia and its admission as a state in 1863 was, to say the least, full of procedural irregularities. These are canvassed in rich detail in RANDALL & DONALD, *supra* note 11, at 236-42. It is hard to fault their conclusion that "[t]he formation of West Virginia was the result of irregular and illegal processes." *Id.* at 236. In October 1862, President Lincoln penned a memorandum opinion on the subject and, at the end, was willing to go no further than to say that West Virginia's admission to the Union was "expedient." Abraham Lincoln, Opinion on Admission of West Virginia to the Union (Dec. 1862), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 421-23 (Don E. Fehrenbacher annotator, 1989). Thaddeus Stevens, for his part, had no doubts: "[W]e may admit West Virginia . . . under our absolute power which the laws of war give us in the circumstances in which we are placed. I shall vote for this bill upon that theory, and upon that alone; for I will not stultify myself by supposing that we have any warrant in the Constitution for this proceeding." RANDALL & DONALD, *supra* note 11, at 241 (quoting CONG. GLOBE, 37th Cong., 3d Sess. 50-51 (1862)).

48. 2 ACKERMAN, *supra* note 2, at 115.

49. See MCKITTRICK, *supra* note 24, at 15-41.

The core of the problem is that by taking this approach, Ackerman conceptually joins company with Andrew Johnson and Democratic opposition on this vital point. For it was precisely their constitutional view that as soon as hostilities had ended, or at least no later than the ratification of the Thirteenth Amendment in 1865 by the presidentially reconstructed Southern legislatures, full peacetime conditions existed and the old Constitution thus amended was fully back in place. The Democratic slogan throughout the war and later had been “the Union as it was and the Constitution as it is.”⁵⁰

This, or something very near it, was “my policy” for which Andrew Johnson fought in the 1866 election. Accordingly, in this view, there was no constitutional basis for Congress’s excluding, in December 1865, the twenty-two Democratic Senators and fifty-seven Democratic representatives (plus one Unionist) that these legislatures and the South’s voters had chosen in the summer and fall of that year. It made no difference that these would-be legislators were liberally salted with former Confederate officeholders, generals, and colonels. Excluding them meant, as Johnson insisted, that Congress from then on was a Congress of only part of the states and was thus to some indeterminate extent constitutionally illegitimate. To what extent does such a position differ from Ackerman’s? One switches on war powers when war begins, and one switches them off virtually the moment it ends, and there is nothing in between.

Here some broader comparative political analysis is needed. Total wars are bitter-end, life-and-death struggles engaging whole populations as well as elites and armies. The American Civil War has good claim to be the first modern example of these terrible events. If one turns, for example, to World War II and its aftermath, it is immediately obvious that the transition from full war to full peace was not more or less instantaneous. It was rather a quite protracted process, both operationally and legally. Allied military occupation of Japan did not end until 1951, and, in the case of West Germany, it continued until 1949 or even (some would say) 1955. In the

50. This was a grass-roots slogan designed to spread the core of the 1864 Democratic message to voters opposed to Republicans and the Lincoln Administration. It succinctly captures the two cardinal points at dispute between the parties. “The Union as it was” assumed that once Northern victory occurred, there would be immediate readmission of the former Confederate states to their seats in government as well as full power to conduct their own internal affairs. “The Constitution as is” implied no new amendments, as well as criticism of the Administration’s invasions of civil liberties in the North. This precise phrase cannot be found in the utterances of any Democratic leader of 1864 that I have been able to locate. The closest approximation is a speech by vice-presidential candidate George Pendleton in New York on October 22: “The Democratic party is pledged to an unswerving fidelity to the Union under the Constitution. It is pledged to the restoration of peace on the basis of the Federal Union of states.” EDWARD MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES DURING THE GREAT REBELLION* 422 (2d ed. 1865).

interim, what one could call a continuing radiation of war powers, the “grasp of war,” persisted as long as the victors thought it necessary.

Virtually all Republicans in 1865 accepted and were well aware of the fact that, in vital respects, the old Constitution had broken down as a result of secession and war. A variety of ideas passed through the political air to explain just what had happened. Was it state suicide? Did war powers extend to the point of permitting a reversion of the offending states to the status of “conquered provinces?” To be sure, speculations such as these made Abraham Lincoln and other practical men of affairs most uneasy. They wanted no part of what Lincoln called “a pernicious abstraction.”⁵¹ But he, along with everyone else, was at sea when confronted by this unprecedented perplexity. This bafflement is clearly evident as well in Chief Justice Chase’s opinion for the Court in *Texas v. White*.⁵² To be sure, Chase laid down primordial Unionist constitutional doctrine by asserting that “[t]he Constitution, in all its provisions, looks to an indestructible Union of indestructible States.”⁵³ But what next? He also observed, as he had to, that Texas and other former Confederate states were out of their proper relation with the Union. At least implicitly, this meant that Congress had powers over them that it could otherwise not possess. (It was no part of his task to challenge the constitutionality of the 1867 Reconstruction Acts, much less the constitutionality of the procedures employed to secure ratification of the Fourteenth Amendment.)

The Report of the Joint Committee on Reconstruction (1866) is a document of genuine and major constitutional significance.⁵⁴ Following extensive investigations into “conditions in the late rebel states,” it arrived at conclusions that were very simple and fully in accord with the war-powers-radiation thesis urged here. They also reflected overwhelming consensus among Republicans of nearly all ideological stripes. These conclusions can easily be summarized.

First, the victors in a total war have the right to specify terms to the vanquished. Second, they have the right to insist upon guarantees for the safety of a cause (the Union in this case) that had prevailed at so enormous a cost. Third, to ensure the existence and maintenance of these guarantees for the future safety of the Republic, Congress was duty-bound to employ whatever means of coercion through the forms of law that it deemed

51. Abraham Lincoln, Speech on Reconstruction (Apr. 11, 1865), in LINCOLN, *supra* note 47, at 699. This was Lincoln’s last known address.

52. 74 U.S. 700 (1869) (allowing the state of Texas to recover bonds paid out to individuals during the Civil War on the basis that Texas had never ceased to be a state, despite secession from the Union).

53. *Id.* at 725.

54. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION AT THE FIRST SESSION, 39TH CONGRESS (1866). This is a very bulky volume (817 pages), but the report itself is quite short (vii-xxii). It is an essential American state paper.

necessary. Fourth, testimony, supporting documents, and events (e.g., the New Orleans race/political riot of 1866) made it crystal clear that, in the main, white Southerners had refused to concede anything more to the Unionist victors than the bare fact that they had been defeated on the battlefield. An important subtext, evident even on a printed page, is clear here: Intense anger that no submission had been made by the ex-Confederates linked to acute alarm about the fate of Blacks and Southern Unionists if left to their tender mercies and, for that matter, a potent “republic-in-danger” belief. Essentially, the war continued, but no longer through outright armed hostilities. The war atmosphere continued too.

How else can one rationally account for what was going on from the time of the Reconstruction Acts of March 1867 until the Civil Rights Act of March 1875? To assert that the “grasp of war” should be deleted as a major causal factor in one’s explanations not only accepts Johnson’s constitutional position but, by the same token, does serious injustice to the Republican position. No mere partisan posturing of the sort commonplace in the normal-lawmaking phase of the constitutional cycle can explain the Republican refusal to seat the Southerners in December 1865.⁵⁵ It was not just tactically impossible to admit them, it was psychologically intolerable. On a perfectly reasonable view of the matter at the time, admitting the Southerners would be tantamount to permitting the Lost Cause to regain through politics what it had lost in war. The contending world-views about the Constitution could not be reconciled. In no small part, they pivoted on the question of when a total war really ends.

From this analysis, a straightforward conclusion emerges. The Fourteenth and Fifteenth Amendments were the terms of a peace settlement

55. This polarization extended to all levels of political action and was fundamental. By good fortune, we have a detailed report on the voting of each member of each state legislature and his party affiliation on the question of ratification of the Fifteenth Amendment in 1869-1870. See MCPHERSON, *supra* note 50, at 488-98, 557-62. Viewing only the 27 states not covered by the Reconstruction Acts of 1867, the polarized lineup is starkly evident:

VOTE ON AMENDMENT	SENATE			HOUSE		
	Dem	Rep	Total	Dem	Rep	Total
Yes	2	453	455	23	1693	1716
No	285	2	287	989	28	1017
Total	287	455	742	1022	1721	2733

A standard statistical tool of roll-call analysis is Yule’s Q, a measure that varies from zero (no party polarization) to 1.0 (total polarization). In the voting on the question of admitting blacks nationally to suffrage, Q for the Senate was .9999 and for the House was .9998. It is also worth noting that only 20 of these 27 states voted to ratify, which would have meant the Amendment’s defeat were it not for the reconstructed 10 Southern states, all of which voted for it.

Unfortunately, McPherson does not give such specific detail for state-level votes on ratifying the Fourteenth Amendment. But, using the yeas and nays by state and matching these to party numbers in these legislatures at the time (24 give available data) and employing standard regression analysis on the lower houses, we can estimate that 3% of Democrats voted for the amendment along with 99% of Republicans.

demanded by the victors of the vanquished. Viewing them in this light, the irregularities of procedure involved along the way obviously would be unacceptable in constitutionally normal peacetime. But they should be conceded to be part of the price of doing business in such extraordinary circumstances as those of 1865-1870. The men of the 1860s did not have our experiences of total wars and their afterglows in the twentieth century. Nor did they have a vocabulary of the sort today's social science might provide to explain to themselves what they were doing and why they felt it imperative to do it. But perhaps we of the latter day can do better.

Finally, there are very central features in Ackerman's model that are left unaffected. This is particularly the case if one accepts this constitutional upheaval—despite its unique features—as morphologically in the same genus as all other constitutional moments. Ackerman's whole argument underscores that such moments place heavy strain on the political system. They overthrow traditional political and constitutional syntheses, replacing them in due course with very different ones. Otherwise, one could hardly call them (bounded) revolutionary upheavals. As the author insists, many actors are involved in the constitution-(re-)making that goes on in such exceptional times, not just lawyers and courts. These actors include an energized people involved in extended deliberation and, as well, Presidents and Congresses playing central roles in the dialectic of resolution. In the Reconstruction case, an energized public *did* engage in extended deliberation, and the resultant critical (or affirming) election of 1866 *was* decisive in giving the necessary green light to one of the parties to the controversy. The actions of the President and Congress afterwards, given here in such fascinating detail, likewise form a leading part of the coherent story that Ackerman tells. The only missing ingredient in that tale is the persistence of a crypto- or semi-war-powers component as the vital context of human action in this drama.

B. *Periodization Problems: The 1890s*

The next point of departure from Ackerman's exposition turns on a periodization question, which also leads to reflections on other issues. The author's concentration on constitutional moments leads naturally enough to a claim that the whole period from 1868-1870 to 1933-1936 constitutes one era of "Republican-era jurisprudence."⁵⁶ This claim has many elements of truth in it, but it seems to obscure at least as much as it clarifies.

56. 1 ACKERMAN, *supra* note 1, at 87 ("This is a question that modern lawyers and judges fail to take seriously—since the modern myth of rediscovery requires them to look upon the long Republican jurisprudence between Reconstruction and the New Deal as some Dark Age obscuring the nationalistic truth revealed by the Marshall Court.").

Continuities obviously do exist across this period, for example, in the specific field of intergovernmental tax immunities.⁵⁷

Nevertheless, evidence seems exceptionally documented and persuasive that the 1890s crisis was by no means confined to electoral and policy realignment, but also included a very large transformation in judicial doctrine as well. The decisions of the 1894-1895 Term have often been given attention as a “moment” of such transformation. The doctrinal perspectives developed then and soon after subsequently expanded as legislative activities in new fields evoked legal challenge and judicial response. So far as rate-regulation is concerned, it is certainly worthy of note that the godfather of the Fuller Court, Justice Stephen Field, dissented in *Munn v. Illinois*,⁵⁸ while joining a majority that eviscerated *Munn*’s holding thirteen years later.⁵⁹

The first case, it seems, that explicitly considered Fourteenth Amendment substantive due process claims in the liberty-of-contract mode was *Holden v. Hardy*,⁶⁰ which sustained Utah’s eight-hour day in the mining industry. But even though the Court rejected those claims then, one source observes that “[i]n spite of the opinion’s recognition of state power, the real import of the decision lies with the implication that the court would assess the reasonableness of any regulatory statute.”⁶¹ This it duly did, in the famous (or notorious) *Lochner* case in 1905. If we do not encounter the Court’s reaction to minimum-wage laws until, say, *Adkins v. Children’s Hospital*,⁶² this reflects (as do cases in other fields such as *Hammer v. Dagenhart*⁶³) the fact that such legislation was not enacted until the Progressive era. When the Court was engaged, it produced a decision in the *Adkins* case (and as late as *Morehead v. New York ex rel. Tipaldo*⁶⁴) fully consistent with the rationale of *Lochner v. New York*.

It seems clear that *Munn* falls in an earlier era of jurisprudence than that which we associate with *Lochner* and other decisions handed down by the

57. See, e.g., *Collector v. Day*, 78 U.S. 113 (1871), *overruled by Graves v. New York ex rel. O’Keefe*, 306 U.S. 466 (1935).

58. 94 U.S. 113 (1877) (holding that the Illinois “Granger” law of 1871 regulating rates of grain elevators was a constitutional exercise of state legislative power).

59. See *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418 (1890) (invalidating a railroad regulation as unreasonable).

60. 169 U.S. 366 (1898).

61. Walter F. Pratt, Jr., *Holden v. Hardy*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 405 (James W. Ely, Jr. et al. eds., 1992). For one piece of documentation among many concerning the judicial realignment of the mid-1890s, see ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895* (1960).

62. 261 U.S. 525 (1923) (holding a federal law establishing minimum wages for women and children unconstitutional as an arbitrary infringement of the freedom of contract under the Fourteenth Amendment).

63. 247 U.S. 251 (1918).

64. 298 U.S. 587 (1936).

Fuller Court onwards. When the tournant of the mid-1890s happened, it occurred with remarkable speed; but, very much as with other such turning points, the ground had been thoroughly prepared over the years earlier. Claims for major change had been advanced by Charles H. Cooley and other legal intellectuals,⁶⁵ as well as through the dissents of Justice Field. One reason for doubting that *Munn*-era jurisprudence could have produced decisions like *Holden*, *Lochner*, or *Morehead* is that the Court had not established, so far as the states were concerned, the proper constitutional tool for doing so until 1886. In *Santa Clara County v. Southern Pacific Railway*,⁶⁶ it accepted Roscoe Conkling's very dubious argument that the Framers of the Fourteenth Amendment had intended to include business corporations as "persons" whose life, liberty, and property could not be deprived without due process of law. Thus was the background laid for the pivotal changes of the 1890s in constitutional doctrine. But the changes themselves were in my view clearly an integral part of a flipover affecting the entire political order and producing a subsequent equilibrium in which the Supreme Court enjoyed a particular kind of hegemony never seen before or since.

One of the most striking aspects of this punctuated change of the 1890s is that the institution that led the way to the new equilibrium, which was change-forcing, was the Supreme Court. While it in no way fits into the architecture of Professor Ackerman's model, it is worthy of note that, if change-demanding popular-based forces uniquely lost their bid, there were other very potent forces demanding change as well; and these forces clearly won, particularly within an institution that never faces an electorate. Progress, by latter-day standards, was not promoted by the 1890s upheaval. But I believe that to be beside the point.

C. *Where Does the Warren Court Fit into the Model?*

This brings us to the case—a strange case in terms of Ackerman's general model—of the Warren Court. It is trite but true to say that the New Deal judicial realignment was overwhelmingly about economics, not about civil liberties, civil rights, and other issues that came to be the centerpiece of the Court's role in the polity after the 1930s. In the 1954-1969 period, the Court's majority blazed many new trails in the law. One of these involved the wholesale incorporation of the Bill of Rights as against actions of the states via the Fourteenth Amendment. At the very moment when the 1937 "switch in time" was going on, Justice Benjamin N. Cardozo, writing

65. See, e.g., CLYDE E. JACOBS, *LAW WRITERS AND THE COURTS* (1954).

66. 118 U.S. 394 (1886).

for the Court in *Palko v. Connecticut*, explicitly rejected such an incorporationist view.⁶⁷

Naturally, time marches on. One can see a logic behind incorporating the guarantees of the Bill of Rights against state action and approving the result in *Brown v. Board of Education*⁶⁸ and subsequent civil-rights cases of the Warren period. Agreement with the results, however, should not blind us to the fact that the Warren Court aggressively created a lot of new law. Not surprisingly, this activism has produced decisions triggering backlash and controversy that endures to this day. Law and order conservatives have never liked *Miranda v. Arizona*.⁶⁹ The Warren Court's prohibition on prayer remains bitterly controversial several decades later.⁷⁰ In *Griswold v. Connecticut*, the Court constitutionalized an unenumerated right, the right to privacy.⁷¹ After *Griswold*, it was logical that the right to privacy would be central to declaring state anti-abortion laws unconstitutional in *Roe v. Wade*.⁷²

This essay does not seek to engage in the acrimonious debate between right-to-lifers and right-to-choosers that has ensued for the past quarter-century. For my purposes, it is enough to underscore the basic analytical problems that these and other areas of 1960s judicial activism present. There is no sign that this extensive Constitution refashioning ever engaged any part of Professor Ackerman's model. Except in lawsuits perhaps, there was no "signaling," no extended deliberation directly involving the citizenry-at-large. There were no sustained victories for change-oriented forces in successive elections. If the Fuller Court's activism also led the parade in the 1890s, at least it can be said that its new directions very rapidly achieved legitimization and support by a favorable electoral realignment and its consequences. By comparison, the Court's higher lawmaking in and even after the Warren period developed in a vacuum so far as Ackerman's model is concerned. So the question arises: Where, if at all, do the Warren Court and its many transformations fit into this model?

67. See 302 U.S. 319, 325 (1937) (holding that the Fourteenth Amendment incorporated only those amendments of the Bill of Rights that are "of the very essence of a scheme of ordered liberty"). In due course, this decision, with an opinion written by one of the towering giants of jurisprudence in his day, was overruled in part by *Benton v. Maryland*, 395 U.S. 784 (1969). Earlier, the Warren Court had extended Fourth Amendment protections to state criminal cases. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

68. 347 U.S. 483 (1954).

69. 384 U.S. 436 (1966).

70. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

71. See 381 U.S. 479 (1965).

72. 410 U.S. 113 (1973).

D. *Amending the Civil War Amendments: What Happened Next*

This brings me to the strange case of the post-1870 fate of the Fourteenth and Fifteenth Amendments. More than implicit in Ackerman's discussion is a powerful belief in liberal progress, a kind of neo-Whig interpretation of American constitutional history. Certainly such progress has occurred, and, if one takes a sufficiently long-term perspective, one could even conclude that it has been a dominant theme in that history. But there have been significant occasions in which the movie has run backwards for considerable periods of time. There may be something to be said for the old revolutionaries' idea that progress is not linear but a case of two steps forward and (at least) one step back. But if contemplation of the 1877-1965 fate of these two amendments may raise those issues, the case is even worse for those who argue for "hypertextualism" and reliance on Article V as the sole legitimate vehicle for amending the Constitution.

The record is too well-known to be extensively discussed here. The Fourteenth Amendment's Privileges and Immunities Clause was gutted by the Supreme Court in *The Slaughter-House Cases*,⁷³ reduced to little more than what had already been defined in *Crandall v. Nevada*.⁷⁴ As for the 1883 *Civil Rights Cases*, which invalidated the Civil Rights Act of 1875, one scholar has commented:

[T]he *Civil Rights Cases* fashioned a Fourteenth Amendment jurisprudence considerably less protective of individual rights than many of its framers had envisioned The decision largely mandated the withdrawal of the federal government from civil rights enforcement. That withdrawal would not be reversed until after World War II.⁷⁵

Shortly thereafter, as we have noted, the Court "discovered" that business corporations were individuals within the meaning of the amendment's Due Process Clause. The rest, as they say, is history. And it may occur to some observers that this judicial creativity, which essentially turned the Amendment inside out, rested on at least as dubious a process as that which had existed at the time the Amendment was ratified.

As for the Fifteenth Amendment, in the former Confederate States, it was simply nullified as soon as it became clear (with the death of the Lodge Force Bill of 1891 in the Senate) that there would be no further federally-

73. 83 U.S. (16 Wall.) 36 (1873).

74. 73 U.S. 35 (1868) (holding unconstitutional a Nevada law imposing a tax on all persons leaving the state on the grounds that the Fourteenth Amendment applies solely to state action and not to the actions of private individuals).

75. Robert J. Cottrol, *Civil Rights Cases*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES*, *supra* note 61, at 149.

imposed sanctions in the voting-rights area. The classic Southern apartheid regime, so thoroughly analyzed in V.O. Key's magisterial *Southern Politics* two generations later,⁷⁶ was created and solidified by a dense network of exclusionary laws, punctuated where need arose by orchestrated race riots and other violence. This ultimate solution to the "problem" of black suffrage in the former Confederate States spread state by state throughout the region between 1890 and 1904. Once created, this regional subsystem equilibrium was hyperstable. In the congressional election of 1942, for example, the region sent 103 Democrats and 2 Republicans (from East Tennessee) to the House of Representatives; of the 103 Democrats, 83 ran without Republican opposition. The regional turnout rate fell to 6.9% of the potential electorate, considerably below what it had been in 1789.⁷⁷ And, while *Plessy v. Ferguson* was not a voting-rights case, its legitimization of racial segregation was something of a judicial capstone of the whole process.

Obviously, none of these policies are permissible any longer. The progress in this area has been largely in the form of returning civil rights to the protected position intended by the Framers of 1868 and 1870. This progress (or restoration) was a very long-term affair indeed that significantly depended on changed mentalities, changed socioeconomic structure, and mass mobilization, which, in turn, frequently relied on direct action. It also depended on the revolution in world politics after 1945 that propelled the United States to a position of leadership in a largely nonwhite world. Perhaps the best interpretation of our cycles would concede the reality of reversal over a long generation or two, while superimposed on these stationary components is some kind of upward trend or "spiral." But as the great economist John Maynard Keynes once remarked, we do not live or eat in the long run, but in the short. For those who were politically disempowered by the "counterrevolution" that was consolidated in the 1890s, several generations of the South's apartheid regime were long enough. A final overview of these cases should remind us that where there was a will there was a way, the text of formal constitutional amendments to the contrary notwithstanding.

76. See V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* (1949).

77. Such figures are available in a number of easily accessible sources. See, e.g., *THE WORLD ALMANAC* 590-93 (E. Eastman Irvine ed., 1944). In all elections between 1932 and 1940, the Southern partisan balance in the House of Representatives was 100 Democrats, 2 Republicans; and from 1942 to 1950, 103 Democrats, 2 Republicans. Between 1901 and 1961, no Republican candidate was elected to any of the region's 22 Senate seats.

IV. CONCLUSION: TOWARD A FOURTH AMERICAN REPUBLIC?

This discussion leads me to some final reflections on contemporary American political developments and their possible constitutional implications. Here, one must express a certain astonishment that *Transformations*, with a copyright date of 1998, is able to dismiss the Reagan effort as a “failed constitutional moment,” and to assert that with George Bush (and Bill Clinton?) we have cheerfully returned to politics as usual.⁷⁸ We may agree that, in his time, Ronald Reagan did not accomplish his constitution-transforming purposes. But as to the view that subsequent developments reflect return to a stable equilibrium phase, nothing could be further from the truth. Ackerman’s discussion fails to deal with the 1994 electoral earthquake and its ratification in 1996, 1998, and, in all probability, subsequent elections. These elections, far more than the election of a Republican President in 1980, represent a real sea change in the contemporary history of American politics, and not merely because Republicans seized and then maintained control of Congress after a forty-year tour in the wilderness. If not a genuine realignment, 1994 looks very much like one, enabling the post-1968 fragmentation of the political order.⁷⁹

The objectives of those seeking change in the 1990s have been made very clear, even if their goals still remain far from complete realization. For many reasons that I cannot elaborate here, a variety of changes in the environment of American politics made 1994 possible, though again not predicted by scholars or professional politicians. These vectors of change included, at the least, ongoing development of the American economic system, the continuing spread of acute conflict over moral and religious issues (with *Roe v. Wade* remaining a major fulcrum of this conflict a quarter century after it was handed down), and the end both of the Cold War and the Soviet Union itself at the beginning of the decade. In Reagan’s time, the right-wing revolution was not so much defeated as postponed.

These changes demanded, as their parallels have in the past, a relatively coherent, ideologically focused package. They amount to a large-scale dismantling of the big federal government constructed in the 1930s that was then amplified and sustained by fifty years of war, hot and cold. We may recall that the traditional political/constitutional order—if we can regard the system of 1896-1932 as such—was one of modified congressional government, supervised by the Supreme Court, insofar as efforts at national regulation of property rights and relative autonomy of the states were concerned. These states were the prime focus of domestic governmental

78. 2 ACKERMAN, *supra* note 2, at 397-400.

79. See Walter Dean Burnham, *Realignment Lives: The 1994 Earthquake and Its Implications*, in THE CLINTON PRESIDENCY: FIRST APPRAISALS 363-95 (Colin Campbell & Bert A. Rockman eds., 1996).

activity, with about three-quarters of all taxes and expenditures for domestic purposes originating there; all government activity was deliberately limited in scope and reach, the federal government particularly so. Not accidentally, this era was one of de facto corporate-capitalist hegemony over politics and society as a whole. This era was also the age of the “pre-modern presidency,” such exceptional figures as Theodore Roosevelt and Woodrow Wilson notwithstanding. It is to this world that, as far as may be possible on the threshold of the twenty-first century, architects of proposed change like former Speaker Newt Gingrich intend to return the country.⁸⁰

As I and a great many others have noted, the movement away from the state and from Keynesian and social-democratic models of state-managed political economy is a major *leitmotiv* all around the developed world today.⁸¹ All known alternative models to the hegemony of the market in organizing and rationing resources within society seem to have become discredited or exhausted. If the right-turn thrust in the United States had already gone further than in most other western countries, this fact is rooted in the much weaker position and organization in this country of social, economic, and political forces still supportive of the welfare state. But we are not “exceptional;” rather, we anchor the extreme end of a global continuum.

One constitutionally relevant implication of these fundamental contextual transformations and of the right-wing offensive still underway is already becoming plainly visible. The post-1933 order was one of presidential ascendancy. For at least the past decade, however, the relative weight of the President in the national policy system has undergone progressive erosion. Most recently, President Clinton’s personal troubles, their investigation by special prosecutor Kenneth Starr, and the defense strategies pursued by the White House have added a specifically legal dimension to this presidential shrinkage. Adverse judicial decisions on various executive privilege claims have placed new formal barriers to the exercise of certain elements of presidential power.⁸² The future seems very likely to include a continued shift of the power balance to Congress and to the states.⁸³

80. “As far as possible” means, among other things, that a return to the South’s racial apartheid regime will not occur and that it is nowhere to be found on the agenda.

81. My own contribution, “The Social-Democratic Model: Whatever Happened to It?” was presented in 1994 to a conference at the University of Göttingen, Germany. It has been published in the proceedings of that conference. See Walter Dean Burnham, *Woher kommt und wohin treibt die Sozialdemokratie?*, in *DAS SOZIALDEMOKRATISCHE MODELL* 33-38 (Jens Borchert ed., 1996).

82. See Dan Carney, *Clinton’s Legal Setbacks Tilt Balance of Power to Congress*, 56 CONG. Q. WKLY REP. 2224-28 (1998).

83. See David Broder, *GOP Must Capitalize on Governors’ Prowess*, AUSTIN-AMERICAN STATESMAN, Nov. 22, 1998, at H3. Broder was struck by the retirement of Idaho Republican Senator Dick Kempthorne after a single term to run for Governor of Idaho—this despite his

Let us imagine a scenario for the immediate future: Republicans hold onto control of Congress in 2000 and also elect a President. Given the intraparty balance of forces, such a President would be strongly conservative. While he would certainly have his own agendas—as all Presidents do—his most important functions domestically would be to sign whatever Congress put in front of him and to make only conservative appointments to the Supreme Court and other federal courts. In this event, we might very well find ourselves on the threshold of a real “constitutional moment” aimed at more formally repealing much or most of what has been created over the preceding two generations.

To be sure, such a “moment,” were it to materialize fully, would hardly fit important aspects of Professor Ackerman’s model. This is particularly true as far as the involvement of the electorate is concerned. The transformations arising out of the crisis sequence of the late 1960s have included two of particular importance. Between 1966 and 1976, an enormous sea change occurred in general levels of support for and trust in politicians in government—among the largest such opinion swings in the history of survey research. This swing was also hugely negative, producing what the political scientists Seymour M. Lipset and William Schneider have discussed and analyzed as “the confidence gap.”⁸⁴ Before the later 1960s, respondents in the majority gave trusting and supportive answers to such affect-tapping questions as “Do you think politicians care about people like you?” and “In your opinion, how much does the federal government waste money?” (“A lot,” “some,” “not very much,” and “don’t know” were the available choices.) Then came the enormous slide, and by the mid to late 1970s, there were very large majorities of negative and hostile answers, thus producing the “confidence gap.”

The second and undoubtedly related phenomenon is a steep post-1960s decline in voter participation, the magnitude of which is heavily concentrated toward the bottom of the class structure.⁸⁵ If turnout in the congressional election of 1994 rose slightly compared to earlier off-year elections, it still amounted to only 40% of the potential electorate in the non-southern states, a far cry from the 75.5% reached in 1866 or the 73.7% recorded in 1894, or even the 57.5% who came to the polls in 1938. Moreover, participation in 1996 fell heavily from the mediocre levels of 1992: Just one half of the non-southern electorate voted for members of the House, despite the fact that a higher number and proportion of

completely safe Senate seat. In response to his question, Kempthorne observed, “I truly do believe power is now irreversibly returning to the states, and that is where the important action will be.” *Id.*

84. SEYMOUR MARTIN LIPSET & WILLIAM SCHNEIDER, *THE CONFIDENCE GAP* (1983). This “gap,” only temporarily reversed under Ronald Reagan in the mid-1980s, is an essential background to the political turbulence of 1992-1994.

85. See 2 ACKERMAN, *supra* note 2, at 418-20.

congressional seats were contested than at any time since the election of 1900.

The point of all of this is simply to underscore that the American electoral system of today, developed across the lifetime of the “interregnum state,” works in fundamentally different ways than in any preceding *partisan* realignment, or thus in the last two of Ackerman’s three constitutional moments. Punctuated change can and does carve its channels in this environment too, but its political context has a larger component of *de facto* oligarchy than has been seen at any time in our national political order since the age of Jackson.

In his most recent essay, *The Broken Engine of Progressive Politics*, Bruce Ackerman strikes a much more urgent and less optimistic note than that with which *Transformations* concludes.⁸⁶ Beyond a short review of basic themes in *We the People*, Ackerman correctly perceives today’s Republican Party as the “movement party,” concludes (again correctly) that Bill Clinton has been a party killer, and that progressive forces lack their historical capacity for articulation and mass mobilization. This deeply alarms him, as it should alarm anyone (like myself) who shares his general value commitments. I have attempted in the preceding discussion to suggest some factors that have contributed to this breakage and to the emergence of a politics of semi-oligarchy in which energized minorities can most effectively work their will. Reconstruction of an effective opposition will depend, as in the past, on the force of intrusive events that are equilibrium-disrupting, on such leadership as can be generated, and on the building of organizations that can resume the immense task of mass mobilization. None of this, if it happens at all, will be the work of a day.

The battle for hegemony in politics is ultimately an intellectual one. As we have seen, the major upheavals of the past have been regularly preceded by the emergence of major intellectual forces whose adherents increasingly attack the normative and decisional foundations of the existing order. In today’s world, political science has been significantly transformed by an explosion of rational—or public—choice analysis based on neoclassical microeconomics. A good deal of this work forms a specific intellectual background for the Republican leadership. Not only do growing numbers of scholars and other intellectuals now begin thinking the previously unthinkable, but they become organized forces in their own right, forces with profound influence just before and during major transition periods. Here as elsewhere, a pattern deeply rooted in the past is manifest today. And they form a major part of the right’s “edge” to which Ackerman refers.

86. See Bruce Ackerman, *The Broken Engine of Progressive Politics*, THE AMERICAN PROSPECT, May-June 1998, at 34-43.

In conclusion, I wish once again to affirm my enthusiasm for what must be one of the most important treatises on American constitutional history to be produced in decades. Much or most of the criticism voiced in this essay is strictly friendly criticism and is aimed at promoting the dialogue among scholars that Bruce Ackerman has done so much to create. But while I should like to believe in a vision of upward liberal progress informing movements from normal to higher lawmaking and back again, it seems difficult to square this with the facts as one sees them. Thus, one thinks the formerly unthinkable: that the whole big-state enterprise of the sixty years following 1932 may itself be historically contingent and that its demise, as a possible "fourth republic" emerges, can hardly be dismissed as a near-term possibility. But one thing seems perfectly clear: Ackerman's program not only leaves room for cross-disciplinary work on convergent phenomena, it invites it. I think that in time this work will be forthcoming, and that it will enrich considerably the disciplines involved. For this contribution, Bruce Ackerman deserves our hearty thanks.