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From Democratic Dualism to Political Realism: Transforming the Constitution

KEITH E. WHITTINGTON kewhitt@princeton.edu
Dept. of Politics, Princeton University, Princeton, NJ 08544

Abstract. In the latest volume of Bruce Ackerman's *We the People*, he sets out to demonstrate that the Constitution has been legitimately amended by "unconventional" means, or by mechanisms other than the Article V amendment process. In making this argument, Ackerman offers a rich constitutional history of the Founding period, the Reconstruction era, and the New Deal. He successfully demonstrates that unconventional methods were used to alter accepted constitutional meaning and government practices during these periods. Unfortunately, Ackerman does not provide an adequate theory that can demonstrate the legal significance of these historical events for future constitutional practice. Moreover, his effort to legitimate the New Deal's constitutional revolution undermines his own normative theory of "dualist democracy" and seems to embrace a standard Legal Realist analysis that the Constitution simply is whatever powerful government officials declare it to mean.

I am an admirer of the "*We the People*" project in all its myriad forms, and my enthusiasm is not lessened by the appearance of this volume.[1] The project is creative and ambitious in scope and is a great achievement simply in its effort to provide a solution to so many intellectual and political problems. Even if Ackerman is not successful in the end, he has made an impressive try and he opens many lines of inquiry for others to follow. But with this work, Ackerman provides further justification for thinking that his theory of non-textual constitutional "amendments" simply legitimates the manipulation of the Constitution by those holding political power. In straining to legitimate the constitutional revolutions of the twentieth century, Ackerman blunts his theory of any critical edge.

For most of the postwar period, constitutional theory has been centrally concerned with overcoming what Alexander Bickel (1962:16) called the "countermajoritarian difficulty." In essence, it was difficult to legitimate active judicial review of acts of Congress given that democracy was the only political value that seemed to retain consensus support, and rights claims had been deeply politicized. Developing a theory that could legitimate judicial review, especially after the advent of the Warren Court, became the central task of constitutional theory.

Usually Bickel's dilemma is solved by devaluing one side of the issue or the other. Thus, some such as John Hart Ely (1980) and Cass Sunstein (1993) have argued that judicial review is only legitimate when the Court acts on behalf of democratic values. Others such as Ronald Dworkin (1978) and Richard Epstein (1985) have defended liberal rights that can trump democratic outcomes and that the Court is obligated to defend against majority preferences. As Bickel recognized, however, neither of those types of solutions is really adequate. The "Madisonian dilemma" is real precisely because we value both democracy and rights; judicial review is problematic precisely because there is no uncontroversial

response when those two values come into conflict. Ackerman's solution to the problem is similar to that of originalists such as Raoul Berger (1977) and Robert Bork (1990), and in fact Ackerman has been called a "liberal originalist" (Sherry 1992). But Ackerman offers a much more elaborated and sophisticated theory of democracy and judicial review than most traditional originalists do. Ackerman (1991) defends what he calls "dualist democracy," distinguishing between the democratic pedigree of the Constitution and the lesser authority of the normal majoritarian politics of daily electoral politics and legislative policymaking. In defending constitutional strictures against the encroachment of government officials, Ackerman contends that the Court simultaneously upholds individual rights and democratic government.

If this were the extent of Ackerman's contribution, then he could be easily placed within the context of established debates. What truly distinguishes Ackerman is his development theory of constitutional history, and it allows him to transcend the terms of the old debate. The constitutional history is more than an intellectual diversion, however; it plays a very specific role in his argument. Like most of his predecessors, Ackerman is an advocate. His theory is ingenuous not only because it offers a solution to Bickel's normative puzzle, but also because it covers all the bases of modern liberal constitutionalism. For lawyers, certain Supreme Court cases have to be taken as a given. The trick is to devise a coherent theory of constitutinal interpretation that can account for all the "good" cases and exlucde all the "bad" cases. Among modern liberals, there is substantial agreement as to which cases are good and bad. The key cases legitimating the New Deal and the major cases of the Warren and Burger Courts extending civil rights and civil liberties are good and must be rationalized. By contrast, an adequate theory must explain why such "bad" cases as *Dred Scott*, *Plessy* and *Lochner* were wrongly decided. The difficulty is in simultaneously rationalizing "correct" outcomes in all these decisions, while relying only on traditionally accepted legal materials, and without exacerbating the countermajoritarian difficulty. Ackerman's approach is notable in this regard. Although innovative, Ackerman relies on traditional legal tools such as precedent, text, and history to develop his case, eschewing reliance on "external" philosophical inquiries into fundamental rights or the requirements of democracy.

In essence, Ackerman offers an "originalist" defense of the New Deal and Warren Courts, while simultaneously closing the door on a conservative judicial conter-revolution. The traditional "professional legal narrative" holds that the *Lochner* era was a mistake and that the New Deal Court's expansion of national government power over the economy marked a return to Chief Justice John Marshall and the Founder's Constitution (Ackerman 1998:7–10). Beyond resting on a very shaky historical foundation, such an account of the legitimacy of the New Deal does little to salvage Warren era judicial activism on behalf of new individual liberties. By contrast, Ackerman (p. 270) argues that the New Deal should be understood as a kind of unconventional constitutional "amendment-analogue" that was recognized by the Court in its 1937 "switch in time." Moreover, he contends that the model for recognizing this New Deal constitutional innovation can be found in the extraordinary efforts used to draft and secure ratification of the Reconstruction amendments after the Civil War. This is a deft move because no respectable constitutional lawyer is willing to challenge the legitimacy of the Fourteenth Amendment, yet, as Ackerman shows, the victorious

Republicans played fast and loose with the Constitution's Article V amendment process. The "unconventional" Fourteenth Amendment becomes a precedent for the unconventional constitutional revolution of 1937.

Recognizing the New Deal as a substantive constitutional change, and not just a restoration of Marshall's Constitution, clears the way for a more expansive reading of its implications. If the New Deal created a new constitutional regime defined by positive government, then it does not require a very creative lawyer to come up with justifications for the civil rights and civil liberties "revolution" of the late 1950s, 1960s and early 1970s.[2] Ackerman also gets a nice side-benefit from the argument: If the New Deal is an "amendment," and the Warren Court correctly interpreted that amendment, then modern conservatives cannot legitimately overturn those decisions now that they have gained political power. Earlier liberal judicial activism was constitutionally required; current and future conservative judicial activism is constitutionally illegitimate. Conservatives will have to pass their own constitutional amendment before they can challenge postwar precedents, and Ackerman is not persuaded that anything like the Franklin Roosevelt's democratic legitimacy has been vested on such would-be revolutionaries as Ronald Reagan or Newt Gingrich.[3]

Ackerman is able to embrace one of the traditionally most persuasive resolutions to the Madisonian dilemma, popular sovereignty, without being locked into the rigidities of traditional originalist constitutional interpretation. He can be an originalist without suffering from the "dead-hand" problem, since his Constitution is continually updated by democratic means. He saves the New Deal without sacrificing historical fidelity. He saves liberal judicial activism without authorizing contemporary conservative judicial activism. He introduces a historicist sensibility into a notoriously present-minded and instrumental legal profession. And he integrates insights from political science into a coherent narrative of American constitutional development that does not center exclusively on the Supreme Court. Even if Ackerman is not entirely successful in the end, the project is a significant achievement.

Unfortunately, the pieces do not quite all fit together. As Ackerman explains the New Deal, the reader too often sees the author's hand manipulating the story. Historical actors become oddly prescient. The justices of the Hughes Court, for example, are portrayed as if they were conscious Ackermanian theorists, merely seeking to prod Franklin Roosevelt to clarify his electoral mandate with their vetoes of New Deal legislation (e.g., 1998:295, 304). The book is also filled with "alternative histories" that imagine the course of constitutional history if critical events had gone differently. Although sometimes thought-provoking, they are often too speculative to be particularly persuasive or add much to the theory.

Most importantly, the core analogy between the unconventional constitutional reforms of the Founding, Reconstruction, and the New Deal is interesting and well argued, but in the end not compelling. I went into the work already convinced of the "unconventional" quality of these three periods of constitutional reform. The book provides a good account of why this is the case, but what it really needs to provide, and does not, is a persuasive theory about the constitutional significance of those historical events. The three events are just too different from one another to see the earlier ones as legal precedents for the later ones.

As Ackerman details, securing passage of the Fourteenth Amendment presented a bit of a constitutional problem for Reconstruction-era Republicans. On the Republican theory of

the war, secession was illegal and the Southern states had never left the Union. With the war over, the South was entitled to congressional representation, yet Republicans refused to seat Southern representatives. How could this rump Congress draft an authoritative constitutional amendment? Perhaps even more troubling, Southern state legislatures were not eager to ratify the proposed Fourteenth Amendment, so Congress imposed martial law, tinkered with state electoral rules, and made congressional representation conditional on state ratification of the amendment. Although a sufficient number of Southern and Northern legislatures eventually ratified the amendment to satisfy Article V's requirements, the politics of ratification clearly did not adhere to the spirit of the original Constitution. Ackerman suggests that we see the amendment as "unconventional," adopted through an alternative process not dependent on Article V. Thus, we "know" Article V is not the exclusive means of amending the Constitution, because the Reconstruction-era Republicans did not rely on it and yet we accept their amendment as legitimate.

The standard accounts of the Fourteenth Amendment tend to ignore this problem entirely. But there is a conventional response to this kind of problem, and it was articulated by the Court in the case of *Coleman v. Miller* (307 U.S. 433) in 1939. In *Coleman*, the Court held ratification to be a "political question." It was up to the elective branches to decide when and whether an amendment had been ratified, and the Court would not investigate the process by which text was added to the Constitution. All kinds of dirty tricks might lie behind election returns, and in cases such as *Fletcher v. Peck* (10 U.S. 87) and *Luther v. Borden* (48 U.S. 1) the Court has refused to set itself up as the arbiter of the legitimacy of state governments. If the other branches can make a plausible claim that Article V has been satisfied, then the Court will not look behind those claims. Ackerman (p. 264) finds it significant that the Court in *Coleman* did not itself declare that the Fourteenth Amendment met Article V requirements. When the Court deferred to the "historical precedent" of Republican acceptance of the Fourteenth Amendment, Ackerman argues that it somehow was implying that Article V was no longer binding. In doing so, Ackerman obscures a basic feature of Fourteenth Amendment politics that the *Coleman* Court did recognize: the Republicans claimed to have followed Article V. Certainly, the Republicans thought that they were living in extraordinary times and had high constitutional obligations. Moreover, Congressional Republicans believed in their own democratic credentials and in the flexibility of the Constitution (Whittington 1999a:ch. 4). But they did not claim the right to ignore Article V or suggest that it was not the exclusive mechanism for amending the Constitution. The Constitution was severely tested during the Civil War and Reconstruction—from Lincoln's claimed war powers to the bifurcation of the state of Virginia—but the Reconstruction Republicans took pains to adhere to Article V. They may have acted unconventionally, but they did not admit it nor claim the authority to do so. Ackerman does not explain why we should look past what they clearly hoped would be their entirely conventional legacy of constitutional preservation to take as exemplary the political maneuvering that they hoped to keep in the background. In some ways, the Fourteenth Amendment is not unconventional enough to suit Ackerman's purposes. When push came to shove, the Radical Republicans were too conservative.

Even recognizing the unconventional quality of the Fourteenth Amendment—that is, if we treat the extraordinary ratification maneuvers as of enduring constitutional significance

and not just a matter of background politics—it is not clear why we should regard it as a useable precedent. The Civil War was an extraordinary time. Most observers would have thought that it raised unique difficulties rather than exemplars that we should seek to replicate. As both the North and the South recognized, the Reconstruction amendments were war measures. The South was under occupation, and the return to normalcy was conditional on the passage of the amendments. The amendments were imposed on the South at the point of a bayonet. They were voluntarily adopted only in the sense that negotiated peace treaties are voluntarily adopted. By the time the South reentered the Union, it was a new nation. The Southern states may have caused those constitutional transformations, but they did not author them. Ackerman (p. 115) finds this "grasp of war" approach to be "much less attractive" than his own scheme, but it does have the virtue of explicitly recognizing the coercive quality of Reconstruction and of containing such irregularities to the tragic case of civil war. The war was *sui generis*. Even so, Republicans sought to leave intact the basic constitutional framework by at least respecting the forms of constitutional change.

The New Deal creates a rather different kind of problem for Ackerman, for the Democrats did not pursue the path of explicit amendment at all. The New Deal period ushered in a radically different understanding of our constitutional government, but did not follow Article V procedures. The traditional legal explanation for this non-textual transformation is what Ackerman (p. 259) calls the "myth of rediscovery," that the New Deal was just realizing the implicit potential of the Federalist Constitution after the mistakes of the *Lochner* era. For many political scientists and historians, the New Deal was simply revolutionary (Gillman 1993; Leuchtenburg 1995:ch. 8). Ackerman hopes to preserve constitutional continuity and legal legitimacy for the New Deal, while recognizing that it broke from what were widely regarded as inherited constitutional truths.

Unfortunately, Ackerman's theory of dualist democracy collapses under the stress of his effort to legitimate the New Deal. The "dualist" framework emphasizes the distinction between the actions of the sovereign people and the actions of government officials. In his analysis of the New Deal, however, Ackerman leaves little left of the distinction. The New Deal transformation occurs entirely through the normal operation of existent government institutions. The New Dealers neither followed the special institutional procedures of Article V nor stepped outside government institutions to appeal directly to "the people out-of-doors," as the Founding generation did (Wood 1969:319). For the Founders, the device of the constitutional convention was an important check on government officials. Mechanisms like conventions and multi-state amendment ratification imposed a firewall between elected officials and the constitutional text. In order to change the Constitution, politicians would have to appeal beyond the normal authority of their electoral investiture (Whittington 1999b:ch. 5). Article V's dual track of national proposal and state ratification not only reflects the assumptions of federalism as Ackerman (pp. 16–17, 23) emphasizes; it also reflects the Founders' belief that no single government could be trusted with the constitutional text. This is a principle that Ackerman emphasized in the first volume of *We the People*, when he hoped to distinguish himself from majoritarian democrats such as John Hart Ely, but one that does not survive his embrace of the New Deal. When a politician who wishes to violate historical constitutional standards need merely point out that he was

elected, more than once, and has the votes to make his policy stick, then the line between dualism and monism becomes very thin indeed.

Ackerman's discussion of the New Deal also belies his stated goal of looking beyond the Court to constitutional politics. "We the People" speak with the Chief Justice's voice. Of course, Ackerman has been a significant figure in pushing constitutional theory beyond its obsession with constitutional law. Presidents, Congressional and party leaders, and ordinary citizens become important constitutional actors in Ackerman's narrative, and that is an important step forward. But Ackerman's normative theory of constitutional politics is specifically tied to democratic politics. Self-government is preserved because when politicians put forward novel constitutional proposals, the people-at-large rise up to give authority to those proposals. Traditionally, we know that the people have spoken because a new constitutional amendment is adopted. By contrast, when Ackerman gets to the New Deal the Court takes charge of telling us when the people have spoken and what they have said. Ackerman (p. 361) proposes that the canonical opinions of the New Deal Court be regarded as "functional equivalents of Article Five amendments," not in the Legal Realist sense that the Court is a "continuing constitutional convention" that is always "amending" the text but in the legal formalist sense that the New Deal precedents *are* the "missing" New Deal amendments.

The New Deal model of constitutional change effectively undermines a central element of constitutionalism, its commitment to formality. Constitutionalism requires adhering to legal forms rather than directly pursuing a given goal, whether those forms require respecting the boundaries of the separation of powers, the technicalities of a fair trial, or the categories of the rule of law (Mansfield 1991). By contrast, Ackerman is most impressed with FDR's pragmatism, his willingness to make use of any means to accomplish his goals. In his analysis of presidential leadership, Stephen Skowronek (1993) has emphasized pragmatism as a politically contingent virtue. The few presidents who are uniquely situated to remake the American regime are celebrated for their pragmatism. Others are castigated for their apostasy and perfidy. Ackerman would make pragmatism a more permanent feature of American constitutionalism. Politicians and judges are no longer to be disciplined by a text.

The problem is highlighted by Ackerman's discussion (pp. 333–42) of the reasons why no constitutional amendments were seriously pursued during the New Deal era. As Ackerman notes, a number of different amendments were proposed in Congress during the period. Moreover, he very usefully points out that the Court's switch effectively derailed any Article V movement by eliminating the obstacle that had made an amendment necessary. Why go through the difficulty of drafting and ratifying a specific amendment when the Court has already accepted your policies? But Ackerman does not seriously explore the debates behind Roosevelt's Court-packing plan, and in particular the administration's thinking about whether to pursue an Article V process to amend the Constitution to authorize the types of powers the President wanted to exercise. There was an active debate over how to respond to the Court's challenge to the New Deal. Some within the administration simply thought that the correctly interpreted Constitution was on the President's side, and thus the partisan Court was the proper target of reform efforts. As FDR's attorney general advised, "I tell you, Mr. President, they mean to destroy us," and Roosevelt clearly shared his

concerns (Leuchtenburg 1995:92). Others doubted whether ratification for an amendment could be won, despite Roosevelt's electoral support, and thus other methods to secure Democratic policies would be necessary. Ackerman (pp. 328, 348) defends this position as well, questioning whether a handful of benighted states should be allowed to block nationally supported legislation. Roosevelt himself recalled how the initially popular Child Labor Amendment, opposed by the same "economic royalists" that the New Deal targeted, had gotten bogged down in the states (Leuchtenburg 1995:110). Significantly, still others doubted whether an adequate constitutional amendment could even be drafted. The Attorney General confided to the President that "no one has yet suggested an amendment that does not either do too much or too little, or which does not raise practical and political questions which it would be better to avoid" (Leuchtenburg 1995:100). Of course, forcing politicians to face up to such questions is the benefit of formality. Thinking constitutionally rather than pragmatically forces political actors to think beyond their immediate goals. How do you craft a rule that allows you to take the action you want but does not empower later presidents whose motives or politics you trust less than your own? A text focuses the debate on precisely such questions, as both the administration and Congress discovered to their chagrin. The Court's switch cut off that debate and instead gave the President a blank check to pursue his own currently popular policies without thinking about the future. Unsurprisingly, Ackerman, like Roosevelt, prefers to direct our attention to either the very abstract—the general concept of an activist government capable of addressing national economic emergencies—or the very concrete—the Social Security Act—where the questions were relatively easy and support for Roosevelt was wide and deep. The more difficult, constitutional questions of how you empower a government to do good while restraining it from doing wrong are left discretely unasked.

There is a serious tension between Ackerman's normative and descriptive theories. At the normative level, Ackerman is committed to an account of constitutional change that emphasizes popularly ratified, but unconventional, amendments. At the descriptive level, the New Deal emphasizes the possibility of constitutional change by judicial fiat. As a consequence of this tension, after lauding the unconventional character of the New Deal, Ackerman immediately proposes a new formal amendment process that repudiates the New Deal precedent. As Ackerman (pp. 403–18) seems to realize, devising a constitutional theory of non-Article V "amendments" can legitimate the New Deal but it legitimates a great deal more as well. His proposal for a "Popular Sovereignty Initiative" that would supplement Article V with a national referendum system effectively guts the historical interpretive dimension of his normative constitutional theory. Having spent the last fifteen years building a theory of unconventional amendments, Ackerman now proposes that we abandon them. Not only does this create an odd conclusion for the book, but it also leaves his theory in a very uncertain state. After all, if Ackerman is right about the New Deal (and the Founding and Reconstruction), then how can he hope to cabin the process of unconventional higher lawmaking? Surely future national politicians could circumvent his referendum mechanism as readily and as legitimately as they have circumvented Article V. Ackerman seems to realize far too late that his theory would legitimate judicial usurpation of constitutional authority, and his proposed fix seems to ignore the logic of his own analysis.

The end result of Ackerman's constitutional theory and his account of unconventional constitutional amendments is that the Constitution follows the Court. Rather than offer a theory of constitutional interpretation to guide how the judiciary should construe constitutional language, Ackerman offers a theory of constitutional amendment to guide the judiciary in what it should regard as "this Constitution" (Fleming 1998). Unfortunately, the primary implication of this theory is that constitutional amendments need not be textual. In this framework, an effort to "amend" the Constitution is complete and successful when the Court changes its doctrine. "Constitutional politics" primarily becomes a matter of capturing the Court. As Ackerman notes, capturing the Court is not easy, given the vagaries of presidential elections and Senate majorities. But without a theory of interpretation, Ackerman makes capturing the Court much easier. He directs the justices to look to politics for their rulings, rather than to the Constitution. If the justices find themselves chaffing under the existing constitutional text and judicial precedents, then perhaps it is a sign that their appointments were transformative and they need merely rewrite the law. Ackerman's account of recent constitutional politics and law depends on the sitting justices not accepting his theory of constitutional change.

As Ackerman moves through American history, he exchanges dualism for electoral mandates. Of course, electoral mandates are notoriously difficult to pin down. The problem is particularly acute for Ackerman. Like majoritarian democrats, Ackerman expects the Court to defer in the face of electoral mandates. Recognizing the quality and depth of the electoral support for any particular piece of legislation would seem to be a difficult task for anyone, let alone the judiciary. A constitutional system based on such mandates, however, may suggest that the Court should err on the side of caution and exercise restraint in exercising the power of judicial review.[4] But since electoral mandates create constitutional "amendments," they do not necessarily dissipate with the next election. The post-election "honeymoon" period with the Court never ends. Ackerman calls on the Court not only to defer to current mandates, but also to continue to enforce the terms of that mandate against subsequent elected officials. Unfortunately, Ackerman's historical examination of these three constitutional moments brings us no closer to understanding how the Court is to discover the enduring essence of long-past elections.

In thinking about American political history, Ackerman has been deeply influenced by the theory of electoral realignments. The relationship is acknowledged, but not developed (Ackerman 1991:329n1; Rosenberg 1999:214). For present purposes, it is worth noting one complication arising from those origins. Like other realignment theorists, Ackerman thinks significant political change occurs when one, relatively unified political party gains control of all three branches of government (Burnham 1970). At least under those circumstances, Ackerman's emphasis on electoral mandates makes some sense. But significant change is possible under other circumstances as well. David Mayhew (1991), for example, has emphasized how "public moods" can lead to significant policy changes without unified party control of government. Edward Carmines and James Stimson's (1989) analysis of "issue evolution" indicates how popular support for political action can shift gradually but decisively without the kind of punctuated transformations that Ackerman emphasizes. In these sorts of circumstances, Ackerman's explicit theoretical analysis would seem to be in conflict with the institutional logic of his imagined constitutional system. In many cases, "normal"

politics may produce legislative, executive and judicial action that is simultaneously popular and well considered and yet in conflict with earlier constitutional transformations. Although Ackerman's historical analysis emphasizes a very few celebrated cases of constitutional transformation, his break from textualism invites a more continuous constitutional drift.

As Ackerman's theory of unconventional constitutional amendments works itself out across American history, it is itself transformed from democratic dualism into political realism. The Constitution means what the Court says it means, unless and until the Court changes its mind. It is not popular sovereignty that distinguishes Ackerman's constitutional system from parliamentary sovereignty, but the separation of powers. Ackerman orchestrates a subtle shift from a Constitution as higher law to the Constitution as an institution. In doing so, he offers a sophisticated analysis of how and why constitutional law changes. Moreover, he is quite innovative in explaining how institutional and electoral competition can lead politicians to speak, think, and act in constitutional terms. As a descriptive analysis of constitutional politics, *Transformations* has much to offer. As a legal and normative theory, however, *Transformations* is quite problematic and has created even more puzzles for Ackerman's next volume to address.

Notes

1. Pieces of the "project" have appeared in many forms over fifteen years and it is not yet completed. The centerpiece of the effort is clearly the projected three volumes entitled *We the People*, of which *Transformations* is the second. The first volume, *Foundations*, appeared in 1991. Ackerman (1984) laid out a fairly comprehensive preview of the project in his 1983 Storrs lectures at Yale Law School. The argument is also significantly elaborated in Ackerman (1985); Ackerman (1988); Ackerman (1989); Ackerman (1992); Ackerman and Golove (1995); Ackerman and Katyal (1995); Ackerman (1997).
2. This is not to say that the task is a simple one, merely that the legal materials would have been furnished for explaining the judicial innovations of the Warren era. Ackerman saves most of this jurisprudential payoff for an expected third volume, *Interpretations*. One of the disappointments of *Transformations*, however, is that it does not shed much light on the substantive character of these constitutional moments and how they should be interpreted. Ackerman is focused on the narrow goal of demonstrating a non-Article V process of constitutional change.
3. Not content with relying on this interpretation of recent political events, Ackerman would prefer that a new formal procedure be adopted so that conservatives would be obliged to pursue a textual path to constitutional change. Like James Madison (1961:315) before him, Ackerman finds such unconventional modes of constitutional change to be "of too ticklish a nature to be unnecessarily multiplied" now that his favored policies are enshrined in constitutional law.
4. Ackerman hedges that conclusion, however, by recognizing the role of dissenting institutions in sharpening the dispute. The Court should still defer in the face of electoral mandates, but the mandates may not be immediately granted by the electorate.

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