Legitimizing Reconstruction: The Limits of Legalism

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Reason—cold, calculating, unimpassioned reason—
must furnish all the materials for our future
support and defence. Let those materials be moulded into
general intelligence, sound morality, and in particular,
a reverence for the Constitution and laws
and as truly as has been said of the only greater institution,
the gates of hell shall not prevail against it.¹

I. LEGALISM AND THE AMERICAN QUEST FOR POLITICAL LEGITIMACY

Far more than elites in most political communities, political and intellectual leaders of the United States have always faced special challenges in legitimating the American regime. From the nation's start, America's governors have presented their political community as self-consciously created by modern human beings. They could not simply claim that fidelity to the citizenry's ancestors required loyalty to the United States, because the nation was born in rebellion against claims of unqualified ancestral obligations. They also could not inspire devotion to the regime by presenting it as simply natural or handed down through history from time out of mind. The American revolutionaries overtly repudiated their historical political identities and explicitly created new ones (though some claimed to take guidance from natural law). All just governments, they insisted, derive their powers from the consent of the

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1. Abraham Lincoln, Address Before the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1837), in 1 *THE WRITINGS OF ABRAHAM LINCOLN* 148, 160 (Arthur Brooks Lapsley ed., 1923) [hereinafter *WRITINGS*]. Later editors of Lincoln's works correctly date this speech as January 27, 1838. *See, e.g.,* *ABRAHAM LINCOLN: SELECTED SPEECHES, MESSAGES, AND LETTERS* 5 (T. Harry Williams ed., 1957).

governed. But to what then could they appeal to inspire consent, especially to those not inclined to give it?²

As a twenty-nine year old lawyer in his second year of practice, Abraham Lincoln spoke the words quoted above in a speech to other ambitious young men. In that speech, he adopted one answer to the problem of legitimating the American regime that has long been a favorite of American lawyers. Lincoln believed that “the strongest bulwark of any government” was in fact popular consent, or as he put it, “the attachment of the people”³ to their regime. Yet he feared that by overly emphasizing consent, the majority of the moment would work its unbridled will, thereby spreading a “mobocratic spirit” that would destroy popular attachment to the regime over time.⁴ Therefore, Lincoln suggested maintaining loyalty to America by fostering not simply belief in popular sovereignty, not just devotion to country, but a more particular reverence for the Constitution and the rule of law. Refusal to “violate in the least particular, the laws of the country” should become “the political religion of the nation.”⁵ Devotion to the Constitution and to the rule of law would generate the enduring consent that the American regime needed to sustain it. Thus, the regime might realize its potential for “the advancement of the noblest of causes—that of establishing and maintaining civil and religious liberty.”⁶

There is much to commend the young Mr. Lincoln for stressing popular belief in American constitutionalism and legalism more generally as sources of political legitimacy, stability, and progress in America. A nation that has decided to forgo an established religion and embrace as citizens people of highly diverse origins probably needs a unifying centerpiece that expresses what binds the community. Many find it hard to see how anything other than the Constitution can play that role in the United States.⁷ It is also hard to see how any regime can sustain popular support or seem intrinsically legitimate if governors and citizens alike behave in arbitrary and capricious ways because they have neither honored nor achieved the rule of law.

Yet it is striking that Lincoln went on to become a President who disdained too much preoccupation with “forms of law.”⁸ He openly contended that violating certain “particulars” of the Constitution might be justified, asking “are all the laws but one to go unexecuted, and the

2. For an overview of the political and ideological challenges America's nation-builders faced, see ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 70-86 (1997).

3. Lincoln, *supra* note 1, at 153.

4. *Id.*

5. *Id.* at 154.

6. *Id.* at 159.

7. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

8. DAVID HERBERT DONALD, *LINCOLN* 485 (1995).

government itself go to pieces lest that one be violated?"⁹ He arguably went on to violate the Constitution more than any other President before or since.¹⁰ Lincoln's example suggests that although instilling reverence for the Constitution and the law may be a part of the political answer to generating stable support for the American regime, it cannot be the whole answer to the problem of legitimating the regime. Indeed, his wartime actions imply that such reverence may sometimes inhibit efforts needed to maintain the nation and to strengthen its legitimacy. If so, then young Mr. Lincoln was not literally right when he argued that cold, unimpassioned reason supported unqualified reverence for the law. Instead, too much reverence might hinder recognition of what reason truly reveals to be needed for the regime to be perceived as, and to be, legitimate.

This Essay considers how far achieving governmental legitimacy can be equated with maintaining the rule of law or popular sovereignty by assessing the treatment of Lincoln, Reconstruction, and the American regime in Bruce Ackerman's two *We the People* volumes. These volumes have been roughly two decades in the making. Ackerman was also a remarkably talented young lawyer of relatively humble origins when he conceived the basic arguments of his impressive work. Like Lincoln, Ackerman wants to bolster the legitimacy of the American regime (particularly its courts and lawyers) by showing that the United States has always fundamentally adhered to both the rule of law and government by consent. Ackerman's theory magnificently unearths and examines crucial problems with strictly legalistic defenses for the legitimacy of the American government. In doing so, he genuinely illuminates major historical episodes in American political development, including the great debates of Reconstruction, in ways other writers (including myself) have neglected or obscured. Because Ackerman arguably has best and most fully defined the American political system and defended its legitimacy in legalistic terms, examining his work significantly helps in reflecting on the strengths and limits of American constitutionalism and the rule of law.

But upon such reflection, Ackerman's perspective proves limited. Like much law-centered scholarship and normative theory, his work excessively

9. Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), in 5 WRITINGS, *supra* note 1, at 327. Lincoln's apparent disregard for many constitutional restrictions was intensely controversial during his presidency. *See, e.g.*, DONALD, *supra* note 8, at 303-04, 382-83, 419-21, 441-43, 484-85, 489. The most influential scholarly case against the constitutionality of Lincoln's conduct during the Civil War was made by J.G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (rev. ed. 1951). The debate continues today. *See, e.g.*, HAROLD M. HYMAN & WILLIAM M. WIECK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 232-78 (1982); MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991).

10. To be sure, Lincoln always insisted that he did not believe "any law was violated" by his controversial acts, such as his suspension of habeas corpus. Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), in 5 WRITINGS, *supra* note 1, at 327.

focuses on legalistic legitimacy linked to government by consent. Even on his own terms, Ackerman more successfully proves that the United States has recurrently won legitimacy through popular consent than he proves his most prominent and distinctive contention: that the United States has fundamentally adhered to the rule of law. As he strives to fit various historical events into his theory of popularly approved legalistic legitimacy, Ackerman must minimize or marginalize arguments that were central to the actors at the time. The Republicans had distinctive constitutional reasons for privileging Congress in the American system and substantive reasons for challenging the Jacksonian Democratic vision of the nation in the first place. By minimizing these and other substantive claims in favor of legalistic process arguments, Ackerman slights the moral principles of the architects of Reconstruction and minimizes the moral costs of its demise.

In the end, Ackerman's legalism leads him to underemphasize what the nation's experience during the Civil War and Reconstruction teaches about the problem of political legitimacy. Although the rule of law and popular consent can and should serve as bulwarks that buttress loyalty to a regime, legitimacy must ultimately rest on whether the basic principles and practices of the regime are substantively good. If they are good, and if most people understand them to be good, then violations of the rule of law and popular consent will not matter so much insofar as they help establish those principles and practices. This lesson for political legitimacy is one that the young Lincoln's reasoning quietly implied and the older Lincoln's actions more loudly endorsed.

Most people accept the legitimacy of the Thirteenth and Fourteenth Amendments not because they think the amendments were enacted through legalistically appropriate "higher lawmaking" processes, nor even because the amendments had popular approval. Most of us—including, sometimes, Professor Ackerman—accept them because we believe that in substance they did what was good and right. They further established and extended liberty, the noblest cause government can serve. Ackerman's desire to minimize judgments of legitimacy that look to substance rather than process is both understandable and characteristic of much legal, political, and historical scholarship. Nevertheless, it leads to exaggerated efforts to shore up the legalistic validity of America's political history while obscuring the substantive issues on which legitimacy must ultimately turn.

In Part II, I document how Ackerman's approach is powerfully motivated by his desire to defend the American regime on essentially procedural rule of law grounds. In Part III, I review major insights that approach produces. Part IV lays out various historical distortions, minor and major, that the framework generates. Finally, Part V concludes that the most important elements of governmental legitimacy cannot be captured within the limits of legalistic legitimation.

II. ACKERMAN'S PATRIOTIC LEGALISM

It may seem strange to equate Ackerman's approach with one espoused in a patriotic public speech by an aspiring young politician. Professor Ackerman is, after all, a cosmopolitan and highly sophisticated scholar, not an ill-educated frontier office-seeker currying local favor. Still, Ackerman hopes that his book "partially repays my enormous debt to the institutions, and the country, that made it possible."¹¹ His work is born of a profound wish to serve the United States and its political institutions. That aspiration is not so different from that of Lincoln, who sought in his 1838 speech to identify what would most contribute to "the perpetuation of our political institutions."¹² Though commendable, this aspiration requires us to approach Ackerman's analysis with certain suspicions. Ackerman does not promise the truth, the whole truth, and nothing but the truth. Instead, he offers an analysis that will, if accepted, help the United States and its particular institutions.¹³ Although patriotism and the whole truth may sometimes be identical twins, more often they are not. We must be wary about whether the argument will fully acknowledge realities that might cast an irredeemably negative light on America and its institutions.

Ackerman wants to serve his country by reinvigorating the nation's political ideals and institutions. He fears they are now inadequately understood and appreciated. The "distinctive aspirations of the American republic" are in danger of becoming "lost in the fog of ancient history."¹⁴ That danger matters, because Ackerman believes it is in fact "our constitutional narrative" that "constitutes us as a people."¹⁵ He also believes that "America is a legalistic country" and that partisans who can present themselves as "guardians of legality" have enormous political advantages.¹⁶ If the wrong narrative or narratives dominate, then Americans will not be who they really should be, and the wrong partisan causes may prevail.¹⁷

11. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* at x (1998).

12. Lincoln, *supra* note 1, at 148.

13. Ackerman does say that he was determined to tell the "painful" truth that Reagan had led a successful conservative constitutional transformation in the 1980s, if events had warranted it. Doubtless he was; but this determination only expresses his desire to uphold his patriotic claim that the value of American constitutionalism is so great that it overrides partisan reversals. And as matters turned out, he believes he was able to reject that unpalatable conclusion after all. *See* 2 ACKERMAN, *supra* note 11, at 420.

14. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 57 (1991).

15. 1 *id.* at 36. Whether it is empirically true that the American people are constituted by their "constitutional narrative" is an important issue I do not examine here, though I think it merits more skeptical scrutiny than many legal scholars give it.

16. 2 ACKERMAN, *supra* note 11, at 12-13.

17. *See* 2 *id.* Like Ackerman on these pages, I here take "legalistic" legitimacy to mean legitimacy resting on conformity to authoritatively "established principles and procedures" for governmental action.

More specifically, Ackerman contends that the common stories about our political institutions harm the nation in several ways. In his first volume, he stresses that the various narratives he seeks to displace tend to distort and discredit the interpretive role of the Supreme Court, fostering “corrosive skepticism” about the legitimacy of many of its decisions, about the Court as an institution, about the lawyers who benefit from the judiciary’s power, and about the rule of law in America more generally. Ackerman there hopes to show instead that the Court has almost always made “good-faith” efforts at constitutional interpretation and has done “a pretty good job” in that endeavor. In so doing, he seeks to assist the Court’s work and also to restore faith in both the bench and the bar. He is clearly particularly concerned about generating confidence in the allegedly untethered reformist decisions that liberal judges and lawyers produced during the post-1937 New Deal and Warren Court eras. His most dramatic claim in that volume is that the post-1937 Supreme Court opinions completed an informal but legally legitimate process of constitutional amendment. He also, however, seeks to foster faith generally in the American constitutional system as “a rule of law.”¹⁸ In his second volume, this last goal is even more central. Ackerman there concentrates on defending his “larger understanding of the law of higher lawmaking,” one that shows why we can see not just the New Deal developments, but all our major constitutional transformations that appear to violate textual legal requirements for change and thus to be lawlessness, as nonetheless in conformity with the rule of law.¹⁹

Both volumes defend key aspects of the American constitutional system in order to vindicate their broader claim to legalistic legitimacy. Both rely, however, on Ackerman’s dualist account of American constitutionalism. This account bases the authority of constitutional texts or quasi-texts on their origins in particularly engaged, deliberative, and sustained processes of democratic decisionmaking on fundamental questions. Hence Ackerman argues not only for the legality of American institutions but for their grounding in popular sovereignty. For him, valid law must be grounded in some sort of popular consent. He thinks that prevailing constitutional narratives not only undermine the legitimacy of the United States as a rule of law regime but also obscure this popular consensual character of American government. Thus, they tend to “loosen the popular grasp on the democratic ideals animating our constitutional life,” weakening the

18. 1 ACKERMAN, *supra* note 14, at 131-62.

19. 2 ACKERMAN, *supra* note 11, at 72; *see also* 2 *id.* at 14, 70, 342-44.

regime's democratic legitimacy and increasing the vulnerability of its ideals to future crises.²⁰

To ward off these dangers, Ackerman wants to persuade us that Americans can view their system, rightly understood, as legitimate chiefly according to the two linked standards of legality and popular sovereignty. In these volumes (as in his earlier political theory²¹), he prefers to stress these criteria for legitimacy more than the question of whether the American constitutional system, or any system of government, is substantively good. Identifying himself as a reformer, not a simple defender of the status quo, Ackerman argues that his conception of American constitutionalism simply aids reflection on how good this system of government actually is.

Yet we should not be misled. Though reluctant to rest his case on claims of what is ultimately good, Ackerman also hopes to convince us that American constitutionalism, if recognized as the system of dualist democracy he defines, is the best system of government, at least for the American people. Somewhat ironically, it is so good in part because it is justified primarily in terms of legality and popular consent, not substantive goodness. With much wisdom, Ackerman believes that when political leaders feel they can disregard legalism and concern themselves only with the substance of their policies, they threaten to careen out of democratic control and become despotic. Hence there is danger in putting issues of substance center-stage in discussions of legitimacy.²²

Even so, the last chapter of his first volume—entitled “Why Dualism?”—defends the merits of the American system against various objections and alternatives, especially stressing how the system provides means for democratically and legalistically valid improvements. Ackerman acknowledges there that his case represents an effort by a “Yale law professor to see the bright side of the American constitutional achievement and to call his fellow Americans to live out its dream,”²³ but he suggests that this bright side is the right side to see. His second volume reaffirms that normative message, holding that dualistic government “is especially appropriate for a citizenry whose engagement with politics varies substantially from decade to decade,”²⁴ as is true of the American citizenry (and surely all citizenries). Even when disappointed by the shortcomings of

20. 1 ACKERMAN, *supra* note 14, at 4; *see also* 2 ACKERMAN, *supra* note 11, at 3-15, 30, 344, 418-20.

21. *See* BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 9-10, 17-24 (1980) (eschewing legitimation in terms of a theory of the good in favor of legitimation in terms of agreements reached via constrained dialogue, a form of consensual justification).

22. *See* 1 ACKERMAN, *supra* note 14, at 7, 319-22; 2 ACKERMAN, *supra* note 11, at 12, 175-76, 406-12, 419-20.

23. 1 ACKERMAN, *supra* note 14, at 314.

24. 2 ACKERMAN, *supra* note 11, at 6.

Reconstruction, Ackerman insists that the reactionary opposition of Andrew Johnson actually had its virtues, and that it would have been worse to have more sweeping changes imposed by vanguardism. Similarly, he presents his own reform proposals in both volumes as efforts to continue and to perfect American dualist democracy, at most as revolutionary reforms, not as efforts to transform or transcend the system in any totalistic way.²⁵

All of Ackerman's arguments amount to a rather staggering claim. America's constitutional system, rightly understood, turns out to be fundamentally legitimate according to the criteria of rule of law, popular consent, and intrinsic goodness, all at once. One might reasonably fear that conformity to law would at times have been in irresolvable tension with conforming to popular will and/or with achieving an intrinsically good system. Not so. Ackerman is a lucky man in a lucky country, it seems. If he can persuade us that this is genuinely so, he will have gone far toward inspiring reverence for American laws, repaying his country richly indeed.

Still, we must look before making such leaps of faith. Lawyers, after all, always try to convince us that what the law authorizes and what is good from their client's point of view are identical. When, as in the case of faithful judges as well as patriotic lawyer-scholars, their client is the U.S. political system itself, the psychological and political imperatives to persuade everyone, including themselves, that what is good and what is legal and what is popularly approved are really all basically the same become even greater. Who in such ranks would wish to convey a doleful message holding that American constitutionalism has been in part ineradicably evil, or that its most substantively estimable provisions were not legally enacted, or that they do not actually represent government by popular consent? Ackerman acknowledges that he is highly unwilling to reach such conclusions. He convincingly describes the Reconstruction amendments as "the greatest statements of moral principle ever pronounced in the name of the American people," and he indicates he would go to great lengths to avoid discrediting them. He even says that if their validity could be sustained only through "obscurantism," such a "noble lie" might be acceptable.²⁶ He seeks to show that no lie is necessary to defend the amendments' legality, but he concedes that they represent the sort of "unconventional adaptation" that "bends accepted legalisms to the breaking point."²⁷ Though Ackerman insists this point has never been reached, that such breakage "is not (quite) what happens" in American constitutional development, does he strain too much to tie upon

25. See, e.g., 1 ACKERMAN, *supra* note 14, at 295-322; 2 ACKERMAN, *supra* note 11, at 6-7, 12, 158-59, 172, 175-76, 182, 407-20.

26. 2 ACKERMAN, *supra* note 11, at 100.

27. 2 *id.* at 384.

Reconstruction the bow of legal legitimacy that he so passionately wants us all to see?²⁸

III. THE CONTRIBUTIONS OF ACKERMAN'S LEGALISM

Before turning to criticism, however, let us briefly recapitulate Ackerman's case for the legality of the Reconstruction amendments and take note of some substantial benefits that flow from adopting his perspective. Before offering his defense of America's historical compliance with the rule of law, Ackerman brings out a number of impressively daunting obstacles to that defense. He also shows that important historical actors worried and argued extensively over the apparent violations of legality Ackerman highlights. Many advocates of the Constitution knew they were vulnerable to charges that their ratification procedures seemed to violate the Articles of Confederation explicitly, and their opponents advanced those charges. Similarly, proponents of the Reconstruction amendments knew that their processes of proposing and ratifying their new constitutional articles could be accused of being insufficiently representative and unduly coercive, as their critics contended. Many changes during the New Deal era—including national power over the economy, the distribution of powers between the federal government and the states, and eventually treaty-making procedures—faced plausible accusations of unconstitutionality that were not clearly resolved by any amendments at all. Many of these vital problems of apparent fundamental illegality have been unconvincingly dismissed or ignored by other scholars. Ackerman is right to insist that they demand our attention.²⁹

Ackerman's own response is simple in concept but complex in elaboration and application. The Constitution's Framers, he accepts, did act in ways that were illegal when they created that document. The legitimacy of their deeds rested on the consent they managed to obtain from standing institutions and ultimately from the people themselves.³⁰ But in so doing, Ackerman contends, the Founders pioneered structures of higher lawmaking, functionally designed to elicit deliberative popular approval,

28. See 2 *id.* One can ask the same questions about how he treats the Founding and the New Deal. Efforts to claim legitimacy according to several standards at once often contort legal reasoning generally and constitutional reasoning in particular. See Rogers M. Smith, *The Inherent Deceptiveness of Constitutional Discourse: A Diagnosis and Prescription*, in NOMOS XL: INTEGRITY AND CONSCIENCE 218, 219, 223 (Ian Shapiro & Robert Adams eds., 1998).

29. See 1 ACKERMAN, *supra* note 14, at 41-44; 2 ACKERMAN, *supra* note 11, at 8-12, 34-39, 100-19, 258-61; Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 802, 845-51 (1995). The last essay is particularly compelling evidence of how Ackerman's framework helps highlight and illuminate important but neglected issues, in this case changing treaty ratification processes.

30. See 2 ACKERMAN, *supra* note 11, at 39-65.

that could thereafter serve as a “Founding Precedent” for legally valid procedures for changing the Constitution that would not conform to Article V.³¹ He insists that lawyers using common law methods can discern the bases for the legitimacy of the seemingly illegal constitutional transformations during Reconstruction and the New Deal. For centuries, lawyers have discerned legally authoritative patterns and analogies in past cases and practices. They have not just read statutes. Such common law methods, Ackerman claims, can help us first identify successful “constitutional moments” from the constitutional talk that goes on in even in intervening periods of normal politics, and second, show why these moments are legitimate as products of the law of higher lawmaking and not only as expressions of elite or popular will.³²

Ackerman finds that in American history each major period of “higher lawmaking,” when “normal politics” of interest bargaining gave way to focused attention on great constitutional issues, works through four stages: (1) “signaling,” when a political movement advocating important constitutional changes has won sufficient support to be able to claim to set the national agenda; (2) “proposal,” when the movement is politically compelled to offer operational specifics for the general changes it advocates; (3) “mobilized popular deliberation,” when institutional opposition arises and so popular support for the proposed specifics is tested repeatedly; and (4) “legal codification,” when a successful movement is recognized by various official actors including finally the courts, who pervasively synthesize these approved changes with prevailing doctrines throughout the law.

But matters are more complex yet. The third stage, “mobilized popular deliberation,” must itself be broken down into five stages:³³ (1) a constitutional impasse when different governmental actors disagree over the new operational proposals; (2) a decisive election producing an initial popular mandate for the specific changes; (3) an attack by the freshly bolstered reformers on those segments of government that still resist their innovations; (4) a “switch in time,” when the more conservative governmental segments partly or wholly capitulate and endorse the changes;³⁴ and (5) a “consolidating election” when the people confirm that they are indeed happy with all that has occurred.³⁵ Only then does it fall to the courts and others to engage in legal consolidation.³⁶

31. 2 *id.* at 66-70.

32. See 1 ACKERMAN, *supra* note 14, at 269-72; 2 ACKERMAN, *supra* note 11, at 4-5, 11, 14, 28, 70, 91-95, 116, 232, 246.

33. 1 ACKERMAN, *supra* note 14, at 266.

34. 2 ACKERMAN, *supra* note 11, at 20.

35. 2 *id.* at 25.

36. See 1 ACKERMAN, *supra* note 14, at 267.

Finally, Ackerman urges us to remember that although every major constitutional transformation thus far can be mapped onto this involved (actually eight-stage) process, each successive transformative constitutional movement has also transformed the specifics through which it fulfilled these generalized stages. The particular institutional actors who have signaled and proposed changes, offered resistance, and provided popular mandates have all varied over time: constitutional conventions, Presidents, Congress, the courts, state ratifying conventions, state legislatures, presidential elections, and off-year congressional elections have all played significant and shifting roles, sometimes signaling and proposing, sometimes resisting or ratifying, sometimes helping to consolidate, in different periods.³⁷ And future constitutional movements can and probably should seek to fulfill the multi-stage process in yet other new and different ways.³⁸

This is a breathtakingly complex system that, when put to work, yields a rich trove of historical insights. Yet, when applied to particular periods such as Reconstruction, the system immediately becomes even more complicated.³⁹ Ackerman sees Lincoln's election in 1860 as a "signaling" event indicating that major constitutional issues were now center stage, and he sees Lincoln as later creating a novel presidential-leadership model of constitutional change that produced the Thirteenth Amendment. But even before it was ratified, Lincoln was shot, and Andrew Johnson pushed for the amendment but then tried to lead change in a different direction. Next, the Republican-dominated Congress initiated still another new version of higher lawmaking, this time congressionally-led, which eventually produced the Fourteenth and the (less procedurally problematic) Fifteenth Amendment. Thus, by Ackerman's lights the Civil War/Reconstruction era exhibited not one but two variations of the higher lawmaking process, the second one building on but in major ways departing from the first. (Or perhaps there were two and a half processes, depending on how one classifies Johnson's activities.)⁴⁰

Does this elaborate framework capture what happened? It certainly spotlights some tremendously important things that did happen. His lawyerly focus on processes of constitutional amendment first prompts Ackerman to produce his marvelous summary of the dilemmas for legal formalism posed by the Reconstruction Amendments: Assemblies held in states excluded from representation in Congress, as well as structured and pressured by Andrew Johnson, ratified the Thirteenth Amendment; that

37. See ACKERMAN, *supra* note 11, at 279-358.

38. See 2 *id.* at 406-16.

39. The New Deal story has even more stages than Reconstruction. For a schematic summary, see 2 *id.* at 359.

40. See 2 *id.* at 122-26.

same “rump” Congress then proposed the Fourteenth Amendment; then Congress made ratification by the Southern states a rather coercive condition for their regaining congressional representation.⁴¹

More importantly, this emphasis enables Ackerman to bring out compellingly the ways this era actually centered on *constitutional* conflicts. Throughout these years, elites and voters alike saw great constitutional issues at stake and debated them with unusual intensity. They also argued extensively over whether the constitution-making processes being pursued were legal. Ackerman is right to suggest that leaders in both North and South perceived Lincoln’s election in 1860 on a platform opposed to extending slavery as signaling, first and foremost, a threat to the dominance of constitutional views that deliberately protected slavery.⁴² Indeed, the next step taken by many leaders, and endorsed by Lincoln, was explicitly to propose constitutional changes, partly reassuring the South by promising non-interference with slavery where it stood, though partly confirming Southern fears by refusing to support its extension.⁴³ Similarly, it is also plausible to see the Emancipation Proclamation as providing a more specific proposal for the direction constitutional change should take, to interpret Lincoln’s insistence on an 1864 platform calling for a constitutional amendment banning slavery as a continuation of this mounting constitutional dialogue, and to contend that the Republicans’ 1864 electoral victories persuaded many War Democrats to switch to support for the amendment.⁴⁴ Ackerman convincingly notes that Lincoln was then anxious over whether a ratification process that excluded the Southern states would seem legitimate.⁴⁵ Moreover, he forcefully argues that Andrew Johnson, with a much less reformist agenda, used an “unconventional” but “strategic mix of legal and extralegal elements” to

41. 2 *id.* at 102-16.

42. See 2 *id.* at 126-27. Ackerman aptly quotes Senator Ben Wade’s insistence that the election was waged on “the plainest and most palpable issue that ever was presented to the American people, and one that they understood the best,” the issue of extending slavery, 2 *id.* at 128, though Wade failed to give weight to the fact that 61% of the electorate voted for candidates who supported the extension of slavery in one way or another. SMITH, *supra* note 2, at 271.

43. See Abraham Lincoln, *First Inaugural Address* (Mar. 4, 1861), in 5 WRITINGS, *supra* note 1, at 253-66. In this speech, Lincoln insisted that the issue of whether slavery “is wrong, and ought not to be extended” is “the only substantial dispute” between the nation’s two sections. *Id.* at 262-63. He said that because he always believed the Constitution does not give the federal government the power to interfere with slavery in states where it already exists, he was willing to support a constitutional amendment stating so explicitly. *Id.* at 264-65. He also indicated that he preferred for amendments “to originate with the people themselves,” *id.* at 264, exemplifying the kind of attention to constitution-making processes that Ackerman persuasively presents as characteristic of this era.

44. Cf. DONALD, *supra* note 8, at 553-54 (discussing Lincoln’s efforts to obtain Democrat support for the Thirteenth Amendment after the 1864 election).

45. See 2 ACKERMAN, *supra* note 11, at 136-37.

craft a ratification process that included mildly, but not too extensively, coerced Southern states.⁴⁶

Though I will suggest problems in Ackerman's version of developments from 1860 to 1865, and though I think he goes further astray in his treatment of congressionally-led Reconstruction from 1866 on, he is certainly right that the Thirty-Ninth Congress saw itself as possessing a popular mandate to seize the leadership of a process of constitutional reformation that most in the Congress felt President Andrew Johnson was betraying.⁴⁷ Moreover, he correctly stresses that the vulnerability of the congressional reformers to the charge that they were not amending the Constitution through appropriate Article V processes was a key and much exploited asset of Andrew Johnson and his allies and a worry of "the first importance" to many who supported reform.⁴⁸ The election of 1866 did provide strong and needed popular support for the congressional Republicans' effort to answer liberally the "truly constitutive question" of whether the U.S. citizenry should be formed on a racially inclusive rather than all-white basis.⁴⁹ The subsequent First and Second Reconstruction Acts should be seen as elements in the Republicans' attempt to create a national structure that would legitimately ratify their new constitutional vision.⁵⁰ As Ackerman continues with the separation-of-powers struggles among Congress, the President, and the Supreme Court that culminated in both presidential impeachment and judicial jurisdiction-stripping, through the Fourteenth Amendment's ratification and the "consolidating election" of 1868, he repeatedly sustains his claim that these events cannot be grasped adequately without recognizing them as part of an ongoing process of self-conscious constitutional reform.⁵¹ By recovering these central dimensions of Reconstruction, Ackerman has done a real service to historians, political scientists, lawyers, and his country.

IV. DISTORTIONS OF PATRIOTIC LEGALISM

Nonetheless, the truth has only been partly served. Even on its face, Ackerman's account of Reconstruction does not really vindicate the claim that the United States has made major changes since its illegal founding while substantially conforming to the rule of law, rather than adhering to the sort of reliance on popular sovereignty that many far-from-legally correct regimes can and do claim. Furthermore, his discussion somewhat

46. 2 *id.* at 138.

47. See 2 *id.* at 166-73.

48. 2 *id.* at 102.

49. 2 *id.* at 181-82.

50. See 2 *id.* at 190, 202.

51. 2 *id.* at 211.

distorts the self-presentation of Lincoln and many congressional Republicans about their respective roles in processes of constitutional transformation. It is thus not clear how the people who supported those leaders can be said to have authorized the novel constitutional views and processes Ackerman describes, rather than the views and processes the leaders themselves described to their constituents. Finally, Ackerman's account also diverts attention from the substantive constitutional questions at stake in ways that miss much of what is most morally compelling in the events he narrates. This minimization of substance has more than rhetorical consequences. It leads Ackerman to seriously understate the severe damage that Jacksonian Democrats (and their last champion, Stephen Douglas), Andrew Johnson, and the Supreme Court (during what he calls the "consolidation" phase of Reconstruction, a period better labeled as Reconstruction's demolition) inflicted upon the moral legitimacy of the system. Correspondingly, Ackerman's legalistic focus makes him fail to give due expression and weight to what is in fact the greatest source of the legitimacy of the Reconstruction amendments, their monumental moral content.

A. Rule of Law or Popular Sovereignty?

Though Ackerman repeatedly tries to make American processes of constitutional transformation look as legally legitimate as possible, he in fact essentially concedes that these claims are unconvincing. In his more optimistic statements, he stresses that there is a plausible "sense in which the American Constitution remains continuous despite periods of unconventional activity."⁵² As I have noted, he argues that this sense is best captured by analyzing American history using common law methods that examine not only the formal rules and principles but also the deeper or deepest structures of the law of higher lawmaking at work in different eras. We can then discern so many analogies, recurring patterns, and deeper regularities⁵³ in the operation of those otherwise often unconventional structures that we reach a heartening conclusion. Since the Founding, American history has exhibited an ongoing tradition of higher lawmaking without any radical breaks into lawless force.⁵⁴ We are thus entitled to affirm all such unconventional transformations as aspects of the continuing rule of law. We can even see various New Deal opinions of the Supreme Court as "the functional equivalent of formal constitutional amendments,

52. 2 *id.* at 387.

53. See 2 *id.* at 60.

54. See 2 *id.* at 116, 120.

providing a solid foundation for activist intervention” by courts⁵⁵ without threatening unbroken adherence to constitutionalism. It has survived in strange ways, but it has survived throughout.⁵⁶

But these patterns, we have already seen, are highly complex. They seem to have been unearthed only recently and to be grasped fully only by Professor Ackerman himself. Even in his capable hands, it is hard to keep track of them. (Just how many stages *were* there to Reconstruction higher lawmaking?) It seems unlikely that many people have consciously regarded the “unconventional” constitutional changes he describes as legitimate because, even though they violated law read formalistically, they displayed continuities and regularities with past modes of unconventional higher lawmaking. Ackerman is driven instead to the rather weak claim that his unconventional constitutional transformers can be seen as perpetuating the rule of law because they never *wholly* repudiated existing legal processes.⁵⁷ Instead they conformed to them when they could. It is not their strict constitutionalism but rather their mixture of “legalistic and extralegal elements” that is the “hallmark of unconventional adaptation.”⁵⁸

These points do not make a terribly convincing defense of America’s continuous legalism. At bottom, they assert proudly that Americans have never broken more laws than they thought they had to break in order to get what they wanted. That claim could be made for many bank robbers. Why should reformers’ partial willingness to employ existing legal forms justify a claim of fundamental legal continuity any more than their willingness to employ extralegal or illegal forms justifies a claim of fundamental disruption of the rule of law? Both claims appear at least equally persuasive. Saying a process is only partly illegal is a bit like saying a woman is only partly pregnant. Arguably, that part is definitive.

In fact, on closer inspection Ackerman concedes that the deepest source of legitimacy for these unconventional processes of higher lawmaking is not their conformity to law, however defined. It is that we can see in these processes convincing evidence of informed and sustained popular authorization of the changes in question. That is why it is important that there be enough electoral success to be able to claim reformers have legitimately played a signaling role; that there then be an election after specific proposals have been made that empowers the reformers to attack more conservative governmental actors; and that there be a confirming election when the conservatives have capitulated. The key demand throughout is that processes of change win popular approval. That is why,

55. 2 *id.* at 26.

56. See 2 *id.* at 14-15, 68, 70, 91-95, 232.

57. See 2 *id.* at 12-13.

58. 2 *id.* at 12, 114, 121.

time and time again, Ackerman emphasizes that the processes he describes are legitimate because they show "that the People really do rule in America," that change achieves "*legitimation through a deepening institutional dialogue between political elites and ordinary citizens*" in which "legitimacy is established by mobilized acts of consent,"⁵⁹ that these higher lawmaking structures are thus "structures of popular sovereignty,"⁶⁰ that they represent ways reformers electorally "*earn* constitutional authority to speak in the name of We the People,"⁶¹ that the Thirteenth Amendment can be "*legitimately* understood as a valid expression of We the People of the *United States*,"⁶² that it was similarly "*the People themselves*" who made the decisions validating the Fourteenth Amendment,⁶³ and that institutions promoting constitutional transformation often rest their "perceived legitimacy" *not* on their "established legality" but primarily on their "appeal to the ideal of popular sovereignty."⁶⁴

Ackerman's deeper structures of constitutional governance really are defined not by what history reveals to be in some sense settled American constitutional law, so much as by whatever seems to be a pragmatic or functional requirement for the exercise of popular sovereignty in particular circumstances.⁶⁵ That, after all, is how the structures of higher lawmaking were initially devised and legitimated at the Founding.⁶⁶ This criterion of legitimacy is so crucial to Ackerman that he suggests the Thirteenth Amendment would not have seemed legitimate without some show of Southern consent. Casting off his anti-formalist debunking mode, he urges us to accept even the decisions made by the Southern states under the lash of Andrew Johnson's coercive tactics as "still very real."⁶⁷ Even more than Lincoln in 1838, Ackerman thus ultimately bases not only the stability but the very legitimacy of government on popular consent, popular approval, popular sovereignty, not on the rule of law *per se*. He appeals to legalistic legitimacy passionately, as Lincoln did, yet only as a means to help prompt the popular approval that does the real legitimating work in Ackerman's account.

To be sure, popular consent does have powerful claims to be the ultimate source of political legitimacy. Both as a political reality and as a matter of normative judgment, it is tremendously important, perhaps necessary, for major changes to receive popular approval if they are to be

59. 2 *id.* at 85, 94.

60. 2 *id.* at 116.

61. 2 *id.* at 121.

62. 2 *id.* at 123.

63. 2 *id.* at 162.

64. 2 *id.* at 168.

65. See 2 *id.* at 124.

66. See 2 *id.* at 66-67, 124.

67. 2 *id.* at 147-48.

viewed as valid. Still, there are very grave problems with trying to legitimate the U.S. government via popular consent. For at least two-thirds of American history, the majority of the adult population was legally ineligible to vote. Even when most class and gender restrictions were ended, creating near-universal white suffrage after 1920, many non-whites remained effectively disfranchised until 1965.⁶⁸ Ackerman stresses that, throughout its history, the U.S. government has usually been able to claim more regular and more extensive expressions of popular support through elections than most contemporaneous regimes and that its electorate has grown more and more inclusive over time.⁶⁹ Still, this frailty in relying on consent to legitimate the American regime must be borne in mind, for it is one reason to keep other criteria for legitimacy in view.

Yet Ackerman's reliance on popular consent dramatically undercuts his emphasis on America's legalistic legitimacy, its continuous conformity to constitutionalism and the rule of law. Ackerman admits that major transformations have occurred in violation of existing formal legal processes. He exhorts us to call them legally continuous, not so much because they conformed to established "deeper" procedures of higher lawmaking but chiefly because, in quite various ways, the people approved them—for that is what his patterns of higher lawmaking really amount to in the end.

If this characterization of Ackerman's position is right, then it is hard to see how his view provides the American political system with justifiable claims to any distinctively "legalistic" legitimacy in comparison with any other regime that regularly holds national elections. Indeed, even insisting on national elections may be too much. Because Ackerman says modes of popular ratification can and probably should vary, any political system that has had major changes enacted and sustained while it has employed shifting but not-too-irregular mechanisms for expression of popular support seems able to claim as much legitimacy, indeed as much "legalist" continuity, as the United States. From philosophical, historical, and comparative political perspectives, Ackerman plausibly contends that the government can claim significant continuing legitimation via relatively meaningful popular rule (*if* we define "the People" as the electorate and set aside momentarily the severe and unjust restrictions on suffrage that prevailed for so long). Ackerman does not, however, support his more distinctive claim that the United States merits legitimacy for its ongoing, if unconventional,

68. See SMITH, *supra* note 2, at 15, 511-12 n.6.

69. See 2 ACKERMAN, *supra* note 11, at 13-14, 88.

adherence to the rule of law, understood as something other than popular rule.⁷⁰

B. *Surplus Meanings*

It is not surprising that Ackerman's herculean effort to show that history does support the legalistic legitimacy of the American regime prompts him to neglect or distort some aspects of the historical record that cannot easily be fit into his framework. Any framework is likely to do the same in trying to bring salient order to the blooming, buzzing confusion of human experience. Hence I will discuss only two particularly pertinent distortions. In this Section, I address the manner in which Ackerman's effort to vindicate the procedural legitimacy of Reconstruction within his terms leads him to slight the understandings of American constitutional institutions and processes that many of the relevant actors publicly advanced at the time. In the next Section, I turn to the inadequate depictions of the substance of Reconstruction constitutional debates that give rise to my greatest concern.

The main procedural/institutional theme of Reconstruction actors that Ackerman minimizes is the Whig-derived belief that, in a healthy republic and under the United States Constitution, Congress was the true seat of republican policymaking, while the Chief Executive was to play a significantly subordinate role. This belief is inconvenient for Ackerman, because he wishes to portray the leaders in his processes of higher lawmaking as at least partly self-consciously remodeling those processes to fit their new constitutional vision, even as they transform the Constitution itself.⁷¹ In the case of the Fourteenth Amendment, he contends it was appropriate for the President, followed by Congress, to propose and to direct to a considerable degree the amending processes, because both institutions were acting on the very same understanding animating the substance of the amendment—the novel view that “We the People, speaking through national institutions, may rightfully intervene” to secure freedom and to “safeguard the exercise of equal citizenship in the states.”⁷² Indeed, Ackerman is never more excited than when he can “glimpse the unity integrating higher lawmaking process with substance.”⁷³

70. This failure does not vitiate, but it does imperil, Ackerman's important subordinate claims, featured in his first volume, that the New Deal generated legitimate constitutional amendments and that the Court engaged in valid, conscientious efforts at synthetic constitutional interpretation. These positions now need to be based more exclusively on appeal to popular consent or on some other rationale. See 1 ACKERMAN, *supra* note 14, at 65-67, 113-62.

71. See 2 ACKERMAN, *supra* note 11, at 157, 200.

72. 2 *id.* at 204.

73. 2 *id.*

To be sure, this unity need not be wholly self-conscious in the minds of the participants. It can emerge as they seek to make necessary changes and as they define and justify the processes for doing so in terms of their new constitutional vision. But the argument that Ackerman's framework of higher lawmaking procedures is visibly at work is stronger if his transforming protagonists eventually claim to be transforming constitutional processes as well as substance in something like the ways his approach suggests. For if they do not claim to be doing so, if they instead describe their actions very differently, it is hard to see how the sovereign people can be said to have deliberated upon proposed new constitutional procedures and approved them.

Trouble is, by and large both Lincoln and the later Republicans defended what they were doing predominantly in terms of the older constitutional notions favored by the Whigs. Their actions *can* be read as conforming to an ongoing discovery of new processes that fit their challenges and their vision, as Ackerman suggests, but doing so loses sight of how they actually depicted themselves. Ackerman deals with that difficulty largely by not talking about their self-presentations. He does note briefly that the Constitution's Framers did not envision a President who would be "a popular tribune," and he observes that Jefferson and Jackson's presidencies began to transform the institution in just that direction.⁷⁴ He then suggests Lincoln not only continued but dramatically accelerated that evolution.⁷⁵

What Ackerman omits, however, is that the anti-Jacksonian Whigs bitterly but consistently criticized these populist transformations of the presidency, and that Lincoln championed the alternative Whig conception as vocally as anyone. The Whigs, moreover, did not merely carry forward the Founders' worries about demagoguery, though they certainly did that.⁷⁶ They argued more generally that in a large national republic, basic governmental policies and legislation could stem only from the Congress, the forum in which the great variety of interests within the nation could be explicitly represented, resonantly debated, and rationally deliberated upon in ways that checked "mobocratic" excesses, then compromised and synthesized with a view to the greater common good. The President was not thought properly to be a major player in this process. The job of the Chief Executive was to execute, not make, the laws.⁷⁷ Thus, as a Whig Congressman, Lincoln strongly favored "making Presidential elections, and the legislation of the country, distinct matters," and he successfully urged

74. 2 *id.* at 126-27.

75. See 2 *id.* at 132-36.

76. See DANIEL WALKER HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS* 27-30 (1979).

77. See *id.* at 90-91.

his party's candidate to state, "Were I president, I should desire the legislation of the country to rest with Congress, uninfluenced by the executive in it's [sic] origin or progress, and undisturbed by the veto unless in very special and clear cases."⁷⁸

As David Donald has long argued, Lincoln never admitted to changing that view very substantially. He continued to assert that it was "better that congress should originate, as well as perfect its measures, without external bias," and he generally acted accordingly.⁷⁹ His presidency was a time when Congress passed enormous amounts of monumental legislation. In fact, James McPherson has argued that "[b]y its legislation to finance the war, emancipate the slaves, and invest public land in future growth, the 37th Congress [1861-1862] did more than any other in history to change the course of national life."⁸⁰ Lincoln, however, was not openly involved in most of that work, partly due to his war responsibilities, partly due to his lack of expertise on some issues,⁸¹ and partly because his Whig "political education"⁸² convinced him he should show Congress "appropriate Whig deference."⁸³ His allegiance to this restricted executive role can be obscured because Lincoln also believed that as Commander-in-Chief during a time of armed conflict, he had broad war powers to do everything necessary to gain victory, restore peace, and reestablish relations with the rebel states reconstructed according to what he took to be the true spirit of the Constitution, one dedicated to ending slavery. The pursuit of those great purposes led him to take quite sweeping actions that probably crossed the line into illegality, and he defended his prerogatives as the nation's wartime leader quite strenuously. It also led him to advocate constitutional change, most notably the eventual Thirteenth Amendment. But he justified those actions, as noted earlier, as prerequisites for saving the Union (though only on the right substantive basis).⁸⁴ He did not hint at any vision of the President as a populist leader in ordinary times. Admittedly, Lincoln also believed strongly in the Whig vision of internal improvements, and he did work quietly for such measures as the National Banking Act and openly on behalf of a Department of Agriculture. Yet he often expressed reluctance to speak even when he felt impelled to take or urge positions on what he saw

78. DONALD, *supra* note 8, at 127.

79. *Id.* at 129.

80. See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 452 (1988). See generally *id.* at 442-53 (describing the central legislative initiatives of the 37th Congress).

81. See DONALD, *supra* note 8, at 320, 346; MCPHERSON, *supra* note 80, at 444.

82. See *id.* at 331.

83. HOWE, *supra* note 76, at 274.

84. See DONALD, *supra* note 8, at 470-74, 553-54, 563.

as legislative matters, and he usually indicated his willingness to defer if Congress decided otherwise.⁸⁵

In his very efforts on behalf of the constitutional transformations that ended slavery, Lincoln's aversion to endorsing presidential leadership as a routine process is evident. In his first inaugural address, he stated that he would "make no recommendation of amendments," though he then did so.⁸⁶ When he proposed his "10% Plan" for reconstructing Louisiana, he indicated his willingness to accept Congress's decision regarding whether to seat representatives of the governments so formed, and he stressed that he was open to other modes of reconstruction Congress might prefer.⁸⁷ And in his last annual message to Congress, he still spoke deferentially when he said "I venture to recommend" the passage of the amendment abolishing slavery, although he did stress the pertinence of the "voice of the people" on the issue expressed in the 1864 election.⁸⁸

In all likelihood, then, neither Lincoln nor anyone else perceived him as inaugurating or conducting an unconventional, presidentially-led new model of higher lawmaking in the manner Ackerman describes, though he can be seen retrospectively as having played that role. Lincoln knew he was taking extraordinary actions during the war. He did play a strong leadership role in constitutional change. He did seek to legitimate his role by appeal to popular approval. But he presented himself as doing what was necessary under extraordinary conditions, not as advocating or culminating any more permanently "plebiscitarian" role of the President, any enduring transformation of national constitution-making processes, or even any major shift in what he understood to be the balance of power between the nation and the states, except in regard to the momentous and far-reaching issue of slavery. (We should, however, remember that he had long been a nationalistic Whig, not a states'-rights Jacksonian Democrat.) Ackerman sees Lincoln's actions as culminating in a "formal symbol" of the Civil War and Reconstruction changes, including adoption of "a different model of the Presidency": He stresses that Lincoln broke precedent by signing the Thirteenth Amendment when Congress sent it to him, apparently inadvertently.⁸⁹ Yet it seems wishful thinking to attach great significance to

85. *See id.* at 129, 424.

86. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 5 WRITINGS, *supra* note 1, at 264.

87. Abraham Lincoln, Proclamation of Amnesty and Reconstruction (Dec. 8, 1863), in 7 *id.* at 32.

88. Abraham Lincoln, Annual Message to Congress (Dec. 6, 1864), in 7 *id.* at 261.

89. 2 ACKERMAN, *supra* note 11, at 135-36. In fact, however, James Buchanan had previously signed the "Corwin Amendment" in 1861, which would have protected slavery in the states. It was never ratified. *See* EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE GREAT REBELLION 58-64, 108 (3d ed. 1876). My thanks to Philip Klinkner and Akhil Amar for reminding me of this fact.

this act. Although Lincoln signed the amendment gladly, he did not think it made much difference whether he did so.⁹⁰

But though Ackerman's narrative assigns to Lincoln a view of the presidency somewhat at variance with Lincoln's own account, it remains apt enough for most of Lincoln's actions. A more serious distortion occurs when he turns to the later phase of Reconstruction led by what Ackerman dubs the "Convention/Congress" that began challenging Andrew Johnson in 1866.⁹¹ Ackerman uses this term to emphasize his perception that this Republican-led Congress acted like previous constitution-making conventions. It deliberately formulated constitutional proposals that it sought to have legitimated, not via the "established legality" of existing legal forms, but via appeals to "popular sovereignty." Even before Republican successes in the election of 1866, according to Ackerman, Republican spokesmen claimed that at this point in the nation's history, they and only they spoke for the country; but they knew they needed "confirmation" of this claim from other officials and ultimately from the people at the polls.⁹²

Again, what Ackerman leaves out here and throughout his ensuing discussion is that most Republicans were simply asserting that, despite the exclusion of those who had shown themselves not to be "friends" of the Republic,⁹³ the Congress remained the basic repository of republican political authority in the United States. In 1864, *before* the "Convention/Congress" of 1866, Wade and Davis had protested Lincoln's pocket veto of their Reconstruction bill in exactly the same terms that Ackerman presents as a novel assertion two years later. They contended that Lincoln's action was a "a blow . . . at the principles of republican government" because "the authority of Congress is paramount and must be respected . . . he must confine himself to his executive duties—to obey and execute, not make the laws."⁹⁴ That, of course, was the traditional Whig view of the separation of powers under the Constitution and in an uncorrupted republican system. And it was this view of their own *permanent* institutional prerogatives, rather than any special role adopted to pursue higher lawmaking processes, that congressional Republicans most often invoked when they went on to attack Andrew Johnson.⁹⁵

The Republicans recognized that executive power had expanded under pressure of war, but like Lincoln, they saw this as a matter of temporary

90. See DONALD, *supra* note 8, at 554.

91. 2 ACKERMAN, *supra* note 11, at 162.

92. 2 *id.* at 168-69.

93. 2 *id.* at 169.

94. DONALD, *supra* note 8, at 524.

95. See KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 116, 132-35, 427-33 (unpublished manuscript, on file with author). Whittington may disagree with my use of his evidence in some particulars.

exigencies, and they claimed the right after war's end to restore what they saw as the correct institutional ordering. Thaddeus Stevens and the House managers of the impeachment process repeatedly argued that the "sovereign power in this republic is the Congress of the United States," that this branch "in the government is made superior to the others," that it was the representative of the people entitled to "controlling influence . . . even to regulating the executive and the judiciary." Because the executive was properly "subordinate to the legislative power," Johnson was supposed to "follow and enforce the legislative will" without exercising any "discretion unless it is conceded to him by express enactment" of Congress.⁹⁶ In so arguing, and in impeaching Johnson because he refused to comply, Congress was not claiming any "unconventional authority as a tribune of the People," as Ackerman contends, but rather reasserting its legally established and politically proper role, according to these Republican leaders.⁹⁷

Ackerman's neglect of the congressional Republicans' self-descriptions is more serious than his mild exaggeration of Lincoln's embrace of presidential leadership in constitutional lawmaking, in part because it makes it hard to understand what happened next. As Ackerman briefly notes, even when the struggle with Andrew Johnson ended, even when the higher lawmaking efforts of the so-called "Convention/Congress" were completed, even when the nation returned to a "regime of normal politics," it was one of "Congressional government."⁹⁸ The Presidency would not truly be a co-equal branch of government again, Ackerman contends, until the 1930s.⁹⁹ But nothing in his account explains this rather fundamental constitutional ordering, which he presents as a Republican innovation. His "Convention/Congress," after all, was supposedly claiming special, convention-like authority to propose basic changes that would win popular approval, after which, presumably, it would return to being just plain, normal "Congress," no longer the preeminent "tribune of the People" engaged in higher lawmaking.

We might amend his account to include the Congress's demand for permanent supremacy as part of the new constitutional vision it was proposing. Yet the congressional leaders did not present this as a change, but rather as a restoration of what they took to be the correct constitutional and republican arrangement, one corrupted by past Democratic Presidents

96. 1 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 684, & 2 *id.* 27-28, 70, 91 (1868), *quoted in* WHITTINGTON, *supra* note 95, at 137-38; *see* 2 ACKERMAN, *supra* note 11, at 222-25.

97. 2 ACKERMAN, *supra* note 11, at 222.

98. 2 *id.* at 230.

99. *See* 2 *id.*

and, due to necessity, also damaged to some degree by Lincoln. Once we recognize that congressional leaders held that view of their proper constitutional place, then all the actions of the extraordinary "Convention/Congress" seem simply to be the work of the regular Congress as they understood it. Although this revision would enable us to understand better how and why the Republicans crafted the late nineteenth-century era of "Congressional government," restoring what they took to be the legitimate status quo ante, in this revised account there is not much left of Ackerman's unconventional higher lawmaking model.

But if Ackerman's framework has difficulties capturing the endurance of congressional power after the completion of its higher lawmaking stages, it is also flawed in the ways it describes what led to the constitutional conflicts during Reconstruction. Most seriously, it fails to convey what those changes meant substantively. Ackerman does not only omit the fact that Republicans had a rival vision of congressional/presidential powers that defined part of their opposition to the Jacksonian Democrats, conditioned the conduct of Lincoln, and shaped what congressional Republicans did during and after Reconstruction. His effort to show that history can be fitted into the confines of his unconventional but legally legitimate higher lawmaking structures also leads him to suppress more central dimensions of the constitutional conflicts that preceded, characterized, and led to the end of Reconstruction. These dimensions are the great substantive conflicts over slavery, race, and the rights of humanity that peek through occasionally in Ackerman's account, often movingly, but in ways that do not do full justice to their history or their moral significance.

C. *The Content of Constitutional Conflicts*

Ackerman's framework includes the claim that there have been only three major periods of higher lawmaking in U.S. history.¹⁰⁰ That contention is useful for his effort to legitimate constitutional interpretation by the Supreme Court. He contends that judges are "preservationists" who discern and apply laws created by We the People, not by the judges themselves, and thereby sustain both popular sovereignty and the rule of law. This contention may be endangered if history displays too many transformative "constitutional moments." For according to Ackerman's view, latter-day courts are not only entitled but required to "synthesize" earlier "moments" with later products of higher lawmaking; and there is inevitably significant

100. See 1 ACKERMAN, *supra* note 14, at 41; 2 ACKERMAN, *supra* note 11, at 7.

room for discretion in elaborating how older and newer broad, basic constitutional guarantees should fit together.¹⁰¹

Arguably, expanding the number of moments greatly expands that room. Just as a musician can create a greater variety of tunes if her instrument can play a greater number of notes, so the more moments of constitutional higher lawmaking there are for judges to invoke, the greater is the variety of possible constitutional philosophies they can compose, fitting the moments together in vastly different ways. True, a judge, unlike a composer, may feel compelled to give every constitutional “note” its due, and this may seem restrictive. The judge still has, however, a great deal of discretion about which tones to stress. And the more judges have such discretion, the less they are constrained rather than empowered by law, and the less they can be seen as essentially organs of the expressed will of We the People. Not only the legitimacy of the bench and bar but also American claims to govern by the rule of law and the consent of the people are again thrown into doubt. As a patriotic defender of the legalistic legitimacy of American institutions, Ackerman may therefore be well advised to resist conceding that there have been more than three major constitutional moments. One purpose of his multi-stage framework is to winnow out false candidates for that legally potent status. He argues, for example, that Michael McConnell’s claim that the mid-1870s represent a constitutional moment authorizing a “Jim Crow Republic” fails to meet the test.¹⁰²

But though Ackerman argues skillfully in that exchange, his criteria still seem to turn up more moments than he might like. He acknowledges that constitutional talk is always a feature of American politics, even if not always a highly prominent feature, so that any period is likely to see some activity that can be interpreted as a would-be constitutional movement.¹⁰³ Because his criteria permit almost infinite variations in signaling, proposing, and resisting, any political movement that survives repeated elections can probably be interpreted as having advanced constitutional proposals that were duly resisted and ratified. If Ackerman resists McConnell’s infelicitous nomination of the Gilded Age Democrats (who did not win many elections) as successful constitutional transformers, he concedes that the Jacksonian Democrats do meet his procedural tests.¹⁰⁴ Therefore, to deny the Age of Jackson entry into the panoply of full-fledged constitutional moments, he minimizes the substance of the changes the Jacksonians enacted. Ackerman contends the Jacksonians did not seek or achieve “the *sweeping* transformation I associate with the great regime

101. See *infra* Part III.

102. 2 ACKERMAN, *supra* note 11, at 471-74 n.126.

103. See 1 ACKERMAN, *supra* note 14, at 269-72, 293-94.

104. See 1 *id.* at 76-77. A stronger argument than McConnell’s is that late nineteenth-century Republicans and Democrats both agreed to subvert the meaning of the postwar amendments.

changes in American history.” Their constitutional revisioning did not go “deep” enough and so their acts were insufficiently “transformative.”¹⁰⁵

What was the relatively minor novel substance of the Jacksonian vision? The Founders had left important matters ambiguous, including the balance of power between nations and states, the constitutional status of slavery, and the issue of racial criteria for citizenship. On these issues, many Federalists had tended in more nationalistic, more “free labor,” or even more racially inclusive directions. Even more than the Jeffersonians, the Jacksonians stood emphatically for the converse positions. Theirs was “a vision that insisted on the supremacy of the white man over the black and red races” and on America as a “decentralized democracy by white men.”¹⁰⁶ Justice Roger Taney’s opinion in *Dred Scott*, Ackerman correctly contends, was the culminating effort of the Court to cement or “codify” this vision’s place in, or better as the heart of, American constitutionalism.¹⁰⁷

Within Ackerman’s framework, then, Taney’s opinion was an effort to complete a heretofore successful constitutional moment that was *legitimate* by the criteria of higher-lawmaking structures and popular sovereignty. Ackerman concedes that this fact provides a sobering revelation of the moral limitations of dualistic democracy. His theory identifies the Jacksonians’ chief problem not as the moral evils of their racism but rather as the tactical inconveniences of their view of federalism. They were states’ rights “decentralizers,” and this feature of their philosophy prevented them from using national institutions to implement their vision fully. Although Taney’s effort to use the Court for that purpose worked in strictly legalistic terms, because *Dred Scott* operated as the law of the land, it did not work for long. *Dred Scott* failed politically, sparking extensive popular controversy that realigned the party system and precipitated civil war.¹⁰⁸ The Jacksonians’ chief opponents, the Whigs, tended like the Federalists, to be more anti-slavery. But Southern Whigs disagreed, and the party disintegrated in the 1850s as the slavery issue became more and more central in American life. In their place rose Lincoln’s Republicans. Aided by northern opposition to *Dred Scott*, they were bound together by a commitment to “arrest the further spread of slavery” by prohibiting it in the territories, a policy Lincoln saw as one that would allow the public mind to “rest in the belief” that slavery was “in the course of ultimate

105. 1 *id.* at 76-77.

106. 1 *id.* at 79.

107. *Id.* at 77-79; 2 ACKERMAN, *supra* note 11, at 270. For a more detailed description of the Jacksonian era and the Taney Court in fundamentally similar terms, see SMITH, *supra* note 2, at 196-242.

108. See 1 ACKERMAN, *supra* note 14, at 77-80.

extinction.”¹⁰⁹ This represented one of the two “constitutional countervisions” elaborated in the great 1858 Lincoln-Douglas debates.¹¹⁰ There Lincoln condemned slavery as a hateful, “monstrous injustice.”¹¹¹ Stephen Douglas, however, presented a modified Jacksonian Democratic ideology that stressed “popular sovereignty,” whether or not it resulted in slavery, while steadfastly opposing conferring citizenship “upon negroes, Indians, and other inferior races.”¹¹²

At this point, we can begin to see the costly ways in which Ackerman’s framework for legitimating the American regime minimizes moral substance. According to his telescoped but accurate retelling, the Jacksonian era was a thirty-year period when the nation through popular elections frequently endorsed, and the courts consolidated, a vision of the United States as a state-centered, racist white “democracy” in ways that went far beyond the settled constitutional understandings of the Founding era. One might well regard this as a rather monumental transformation. Ackerman is himself vividly aware of its tremendous moral significance. Enough Americans at the time saw it as a critical change that it generated further, undeniably major constitutional struggles.

But Ackerman’s theory cannot help us grasp or defend either their moral objections to Jacksonian outlooks or his own. For in his account, legitimacy is a matter of maintaining the rule of law, at least at some deep structural level, and even more of popular sovereignty wielded by the existing electorate. The Jacksonians do well on these counts. We might be tempted to say that their restriction of the franchise to white men denies them legitimacy in terms of popular sovereignty. We might even say that legitimation via popular sovereignty counsels in favor of expanding the franchise rather than heightening racial restrictions on it.

Ackerman, however, cannot make these moves. If he did, then the regime would not be legitimated by popular consent, his highest touchstone, through most of history. After all, most adult residents did not vote in the United States until 1920, and although the electorate has been made more inclusive over time, both the late antebellum period and the late nineteenth century saw the spread of new suffrage exclusions. Ackerman could and probably should say instead that the Jacksonian age was a successful “constitutional moment” that was effaced in all its major elements by the subsequent moment of Reconstruction. That account would, however, stress

109. 3 WRITINGS, *supra* note 1, at 212.

110. 1 ACKERMAN, *supra* note 14, at 79.

111. Abraham Lincoln, Reply, First Joint Debate, at Ottawa (Aug. 21, 1858), in 3 WRITINGS, *supra* note 1, at 206.

112. Stephen Douglas, Speech, First Joint Debate, at Ottawa (Aug. 21, 1858), in 3 *id.* at 202, 198; see SMITH, *supra* note 2, at 249-51 (contrasting the Douglas and Lincoln positions on slavery and equality).

the discontinuous, disruptive character of Reconstruction and of American constitutional development more than Ackerman wishes to do.

Hence Ackerman has two reasons to treat the Jacksonian era in the dismissive fashion he does. First, his legalistic legitimating efforts may be undercut by the discovery of too many constitutional moments. Thus, he minimizes the changes of the Jacksonian era—the now-unqualified embrace of slavery and of America as the land of white supremacy—as not “deep” or “transformative” enough to count. Second, the way his theory minimizes substantive standards of legitimacy in favor of legalistic and consensual criteria also leaves him with few if any resources to condemn this Jacksonian championing of slavery and racism as illegitimate, even though he clearly believes they are. Better, then, to move quickly past the period, suggesting it did not really amount to much.

That suggestion is both normatively and empirically unconvincing. Morally, the Jacksonians’ successes in entrenching racist, proslavery visions of America were, as Lincoln said, “monstrous” evils. It is disturbing to see such changes termed insufficiently significant to count as major transformations. Moreover, Ackerman’s account also leaves us empirically less equipped to explain how the Democrats’ efforts generated the Lincolnian counter-vision, and hence the next constitutional moment. Many factors contributed to the Republican challenges. We cannot, however, understand the passionate opposition to *Dred Scott* and slavery’s spread that fueled Lincoln’s 1858 and 1860 campaigns unless we grasp why many Americans saw the Jacksonian proslavery innovations as profoundly illegitimate, whatever their bona fides in terms of higher-lawmaking structures and electoral successes. But that position expresses standards of legitimacy that are barely visible in Ackerman’s theory, although they were central to the constitutional developments he describes.

Even as Ackerman’s framework prods him to exaggerate the concern of Lincoln and later the congressional Republicans to remodel American constitutional lawmaking processes, it steers him away from seriously exploring the substantive constitutional visions of all the actors who contributed to the rise and fall of Reconstruction. Ackerman pays relatively little sustained attention to the Jacksonians’ rationales for a decentralized slaveholding republic, Stephen Douglas’s defenses of a whites-only regime of “popular sovereignty,” and Lincoln’s articulations of antislavery constitutionalism and the Reconstruction Republicans’ eventual call for racially inclusive equal citizenship. That neglect is not essentially a matter of space limitations. Examining their substantive visions is by Ackerman’s lights not necessary for the task of legitimating Reconstruction and the American regime more broadly.

This element of his approach is particularly unfortunate for the Civil War/Reconstruction era, because destructive mischaracterizations and

minimizations of the Lincoln Republicans' moral commitments remain all too common today. Even the most celebrated recent biography of Lincoln does more to perpetuate than to correct these interpretive tendencies. Though he sees Lincoln as driven by "unquenchable ambition"¹¹³ and as working "indefatigably,"¹¹⁴ David Donald initially stresses what he terms "the essential passivity"¹¹⁵ of Lincoln's nature, his "reluctance to take the initiative and make bold plans,"¹¹⁶ and his "pragmatic"¹¹⁷ rather than ideological approach to the problems he did work strenuously to solve. From this, it is easy to form a picture of Lincoln as a man without a larger vision or motivating principles. Many features of Donald's subsequent account reinforce that view. Rather than seeing Lincoln as consistently supporting reform, Donald dismisses the young Lincoln's advocacy of suffrage for qualified women as a "joke."¹¹⁸ He suggests that Lincoln opposed the Mexican-American War purely for tactical, partisan reasons and that, for a long time, Lincoln was not too much alarmed by the extension of slavery, though he opposed it.¹¹⁹ He stresses that Lincoln was "circumspect" in his public "position on nativism."¹²⁰ He also suggests that Lincoln and Douglas's 1858 disputes over the Declaration of Independence had "little practical relevance"¹²¹ to the issues of the day, and that, above all, "Lincoln's commitment to maintaining the Union was absolute,"¹²² rather than Lincoln's commitment to fulfilling the Declaration's principles as he understood them. Donald then interprets the powerful evidence to the contrary—Lincoln's repeated and intense refusals to contemplate saving the Union by permitting slavery to spread—as arising from concerns to avoid disruption of the Republican Party and from being just plain "stubborn."¹²³

All these points reinforce longstanding themes in American historiography and popular discourse influenced by Southern apologists: that Lincoln and his party really stood for no substantial moral principles; that bungled statesmanship, the wrangling of power-hungry politicians, northern economic interests, or Northerners' desires to dominate the South actually caused the Civil War. Similarly, by advancing a framework that minimizes attention to the substantive constitutional views of Taney,

113. DONALD, *supra* note 8, at 14.

114. *Id.* at 15.

115. *Id.* at 14.

116. *Id.* at 15.

117. *Id.*

118. *Id.* at 59.

119. *See id.* at 122-24, 134-35.

120. *Id.* at 170.

121. *Id.* at 226.

122. *Id.* at 269.

123. *Id.* at 270.

Lincoln, Douglas, Andrew Johnson, the Congressional Republicans, and the post-war Supreme Court on these issues, Ackerman offers a “constitutional narrative” that leaves largely unchallenged the many claims that moral principle had little to do with the events of these years. To be sure, neither Donald nor Ackerman is at heart a Southern apologist. Both do greater justice to Lincoln and the other protagonists than this summary suggests. Even so, I fear, they still convey this minimizing message.

It is also the wrong message, particularly with regard to Lincoln. True, he usually distanced himself from radical positions until the movement of popular opinion offered some hope that they could be constructively pursued. But when it came to human rights and liberties, he frequently took bold stances that threatened to end his political viability and that indeed produced many defeats. Whatever one makes of his 1836 endorsement of a qualified female franchise (a position he took in a published letter that in other ways supported a broader franchise than most Whigs would accept¹²⁴), he was utterly serious in 1857 when he endorsed gender as well as racial equality that went far beyond the laws of his day. He contended then that in terms of the rights of free labor, it is the “natural right” of a “black woman” to “eat the bread she earns with her own hands, without asking leave of any one else, she is my equal and the equal of all others”¹²⁵—a striking passage Donald does not cite. Donald also does not mention that Lincoln sought to inspire audiences with the vision of a nation, indeed a world, free of slavery as early as 1842,¹²⁶ nor does he give weight to how Lincoln later worked openly to prevent Republicans from endorsing nativist policies. Hence, his minimizations of the impassioned moral terms in which Lincoln denounced the Mexican-American War are less than convincing.

Moreover, while it is true that in 1854 Lincoln was willing to contemplate extending slavery “rather than see the Union dissolved, just as I would consent to any great evil to avoid a greater one,”¹²⁷ he was already arguing that no such strategy would work. By 1856, he had come to the view that preserving the Union meant preserving it “*in the purity of its principles as well as in the integrity of its territorial parts.*”¹²⁸ That meant insisting that the principles of the Declaration of Independence be pursued by placing slavery on the path to extinction, rather than permitting its expansion and nationalization—the very relevant practical issues facing the

124. See Lincoln, To the Editor (June 13, 1836), in 1 WRITINGS, *supra* note 1, at 131.

125. Abraham Lincoln, Speech in Springfield, Illinois (June 26, 1857), in 2 WRITINGS, *supra* note 1, at 299.

126. Abraham Lincoln, Address Before the Springfield Washingtonian Temperance Society (Feb. 22, 1842), in 1 WRITINGS, *supra* note 1, at 274.

127. Abraham Lincoln, Speech at Peoria (Oct. 16, 1854), in 2 WRITINGS, *supra* note 1, at 215-16.

128. DONALD, *supra* note 8, at 192.

Congress that would be elected in 1858. From 1856 on, Lincoln never wavered. He said in February 1861 that he “would rather be assassinated”¹²⁹ than to save the union on any other basis. Soon thereafter, he accepted civil war rather than compromise over extending slavery, and he eventually led in its abolition once the circumstances of the Civil War gave the national government the power, and, as he saw it, the legal as well as the preexisting moral right to do so. He also began advocating for a limited franchise for blacks by 1864.¹³⁰ His endorsement of that position in his last speech finally spurred John Wilkes Booth to enact the assassination Lincoln had imagined.¹³¹

Though he did not ponder religion, morality, and justice as Lincoln did, Stephen Douglas probably believed with equal sincerity that adhering to his policy of popular sovereignty for white men only would enable the United States to “go forward increasing in territory, in power, in strength, and in glory until the Republic of America shall be the North Star that shall guide the friends of freedom throughout the civilized world.”¹³² The clash between Douglas and Lincoln was indeed “a choice between two fundamentally opposed views of the meaning of the American experience.”¹³³ Ackerman recognizes that fact. That is why he treats the election of 1860 as a signaling election, even though it did not produce a mandate for any particular constitutional course, because the vote of the proslavery majority of the electorate was divided among three candidates.¹³⁴ But, according to his theory, if the Democrats had united around a successful Stephen Douglas or some other proslavery candidate, the choice of that constitutional vision would have been impeccably legitimate.¹³⁵ This is not a satisfactory understanding of constitutional legitimacy. The more one reflects on the starkly opposed substantive visions then at stake, one championing basic rights for all humanity, the other, a republic of perpetual racism, the more unacceptable this slighting of their intrinsic moral merits becomes.

The costs of this morally narrow understanding of legitimacy only increase as Ackerman proceeds. In a compelling passage, Ackerman claims that he cannot read the “brilliant speeches” of the Congressional Radical Republicans envisioning a massive political, social, and economic transformation of the South to make genuine racial equality possible

129. Abraham Lincoln, Address in the Hall of Independence, Philadelphia (Feb. 22, 1861), in 5 WRITINGS, *supra* note 1, at 245-46.

130. See DONALD, *supra* note 8, at 202, 231, 268-70, 342-43, 368, 398, 487, 563.

131. See *id.* at 588.

132. Stephen Douglas, Speech, First Joint Debate, Ottawa, Illinois (Aug. 21, 1858), in 3 WRITINGS, *supra* note 1, at 203.

133. DONALD, *supra* note 8, at 227.

134. See 2 ACKERMAN, *supra* note 11, at 127.

135. See 2 *id.* at 126-27, 132.

“without physically experiencing a bitter sense of the moral opportunity lost by America when Andrew Johnson” obstructed their Reconstruction efforts.¹³⁶ Yet, Ackerman says he rejects “condemning” this “conservative use of Presidential power in the evolving higher lawmaking system.”¹³⁷ The majority of Americans, he thinks, were not ready to support the Radicals then, so that they could have succeeded only by transforming themselves into “dictators.”¹³⁸ He goes on to commend the “great merit” of Johnson’s “Presidential leadership in 1865”¹³⁹ for its role in clarifying Reconstruction alternatives for the people. Johnson, Ackerman says laudingly, “vastly increased the legitimacy of the decision by the People to embrace revolutionary reform.”¹⁴⁰ Were it not for him and his ferocious defense of America as a white man’s country, then “we might never have known that nineteenth-century Americans were prepared to set aside their racist prejudices long enough to support the Republican vision of a Union that made birth-right citizenship, and not skin color, the fundamental bond that sustains our identity as a People.”¹⁴¹

This sentiment reflects a triumph of legalistic attachment to legitimating processes over legitimate substance. In truth, from 1865 through 1867, Andrew Johnson wreaked havoc on the efforts of more liberal Freedman’s Bureau officials to secure physical protection, fair legal treatment, political rights, education, and economic resources for Southern blacks. He vetoed laws that would have gone far toward making those efforts successful by making land available to blacks and increasing the Bureau’s resources and life span. In so doing, Johnson greatly encouraged Southern whites to resist the attempted transformations of their entrenched systems of white supremacy far more vigorously, violently, and ultimately successfully than they had the will to do at the war’s end. The laws Johnson vetoed were passed by a Congress dominated by moderate, not radical, Republicans who could claim extensive popular support.¹⁴² Ackerman is right that few Americans were prepared to endorse the full radical agenda of Thaddeus Stevens in the mid-1860s.¹⁴³ Yet, if even a moderate Republican had succeeded Lincoln in the White House, it seems very likely that Reconstruction would have been far more successful in enabling freed

136. *Id.* at 158.

137. *Id.*

138. *Id.* at 159.

139. *Id.*

140. *Id.* at 164.

141. *Id.* at 182.

142. For accounts detailing the harms of Johnson’s policies, see W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA, 1860-1880* (Atheneum 1973) (1935); ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877* (1988); and SMITH, *supra* note 2, at 286-312.

143. See 2 ACKERMAN, *supra* note 11, at 158.

blacks to support themselves economically and to participate in inclusive and effective public schools, courts, legislatures, and other public offices where they lived. The fact that the nation missed that opportunity should morally sicken us. It is wrong to treat Johnson's actions as somehow justified nonetheless. When Ackerman responds with relatively unqualified applause to Johnson's massively racist and hugely destructive war against congressional attempts to secure equal rights for African Americans, he confirms that focusing too much on procedural legitimation leads one to miss the moral forest for some all too shady legal trees.

The problems of Ackerman's approach do not end there. Once the congressional Republicans' constitutional transformation produced the Fourteenth Amendment, their changes had to be, under Ackerman's theory, consolidated or legally codified by the Supreme Court. The "last great step in their consolidation," Ackerman tells us, was the Supreme Court opinion of Justice Samuel Miller in the famed *Slaughter-House Cases* of 1873.¹⁴⁴ From the standpoint of his theory and its focus on "not substance but process," what Ackerman finds most significant about the case is that Miller and the rest of the Court all "unconditionally accept" the "validity" of both the Thirteenth and Fourteenth Amendments, though they disagree about their "meaning."¹⁴⁵ Justice Miller presents the amendments as having been added "by the voice of the people,"¹⁴⁶ without regard to whether the people's actions conformed to the formal amending processes of Article V. For Ackerman, this represents a court acting "consistently with common law norms" by treating as legally valid actions that have become widely accepted, even if they do not appear to conform to requirements of older legal texts.¹⁴⁷

In his first volume, *Foundations*, Ackerman did briefly concern himself with the substance of the *Slaughter-House* decision, but only as part of his effort to vindicate the Court's record of engaging in credible, good-faith constitutional interpretation consistent with maintaining the rule of law.¹⁴⁸ Ackerman claimed there that the Court's decision represented an effort to synthesize the recent Reconstruction amendments with the original Constitution via a "particularizing"¹⁴⁹ strategy that read the innovations relatively narrowly, as concerned chiefly with "the freedom of the slave race."¹⁵⁰ Hence, the white butchers invoking the amendments lost their case. Over time, Ackerman indicated, the Court understandably became

144. 2 *id.* at 245; see *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

145. 2 ACKERMAN, *supra* note 11, at 245.

146. *Slaughter-House Cases*, 83 U.S. at 67.

147. 2 ACKERMAN, *supra* note 11, at 246.

148. See 1 ACKERMAN, *supra* note 14, at 94-98.

149. 1 *id.* at 95.

150. 1 *id.* (quoting *Slaughter-House Cases*, 83 U.S. at 71).

more willing to recognize the breadth of the changes the amendments had wrought, so later synthesizing decisions gave them more weight. Still, we are left to feel that the *Slaughter-House* Court did what was appropriate, certainly what was legitimate, for its time.

If we attend to the substantive constitutional conflicts of the Reconstruction era, however, the *Slaughter-House* ruling looks very different. Far from the last step in the consolidation of the post-war amendments, its denial of claims for economic liberties based on the amendments appears to be the first step in what soon became a concerted judicial and political effort to undercut them, especially when invoked by African Americans. In *Slaughter-House*, Justice Miller chose to read the Fourteenth Amendment, especially the Privileges and Immunities Clause, extraordinarily narrowly, out of a professed fear that to do otherwise would "fetter and degrade the state governments."¹⁵¹ Yet, in other contexts, Miller was often willing to find broad-ranging rights of national citizenship implicit in the Constitution no matter how much they intruded on state laws. In no other case, moreover, would Miller ever insist again, or indeed even accept, that the amendment was chiefly confined to assisting "the slave race."¹⁵² His pattern henceforth was to instead support restrictive readings chiefly when black litigants were involved.

At the time the Court decided *Slaughter-House*, it was flooded with litigation involving claims of African Americans under the amendments, while the defenders of Reconstruction faced mounting, often overtly racist political opposition. Though the Court did not possess certiorari jurisdiction at this time, it did exercise discretion about the timing of its decisions. For example, it withheld handing down its ruling in *Bradwell v. Illinois*,¹⁵³ which was fully argued before *Slaughter-House*, until after it had rendered the latter decision. It could similarly have held *Slaughter-House* back until it construed the Fourteenth Amendment in a case involving blacks. Instead, Miller and his majority selected a politic venue, a case involving whites, not one of the many involving blacks, as their first Fourteenth Amendment case to launch a judicial retreat from using the Reconstruction amendments to protect blacks. That retreat would, by and large, only increase for the remainder of the century.¹⁵⁴

Although this interpretation of *Slaughter-House* is controversial, Ackerman does not even consider whether *Slaughter-House* actually represented a judicial attack on the substance of the post-war amendments.

151. *Slaughter-House Cases*, 83 U.S. at 78.

152. *Id.* at 70.

153. 83 U.S. (16 Wall.) 130 (1873). Although *Bradwell* was argued on January 18, 1872, the decision was not announced until April 15, 1873. See SHELDON GOLDMAN, CONSTITUTIONAL LAW AND SUPREME COURT DECISION-MAKING 198 (1982).

154. See SMITH, *supra* note 2, at 330-42, 589-92, 589-90 nn.116-17, 591 nn.124-31.

His concern is not with the decision's substance, but with its support for the amendments' legal validity and with its credibility as an example of procedurally legitimate judicial decisionmaking. A framework that so dismisses substance that it does not even ask the question of whether a decision it deems a "consolidation" may in reality be an amendment's demolition is not an adequate guide for assessing the legitimacy of such governing decisions. Ackerman agrees that, after the end of Reconstruction, "American institutions increasingly failed to preserve the commitments previously made by the People to black Americans."¹⁵⁵ But he doubts that this occurred because the Supreme Court betrayed "its task of preserving constitutional commitments."¹⁵⁶ Instead, he hints that there was "something inherently defective in the approach to racial justice taken by the amendments—defects which doomed them to failure even if judges had done their best to redeem the People's commitments," and promises to elaborate that suggestion in his next volume.¹⁵⁷ It is already clear, however, that he wants to uphold above all else the legitimacy of the Court and of American higher lawmaking processes, rather than substantive constitutional positions that he believes those processes can be counted on to perfect.

V. CONCLUSION: THE LIMITS OF LEGALISTIC LEGITIMACY

In its quest to demonstrate the legitimacy of Reconstruction and the American regime by appealing to essentially procedural standards of the rule of law and popular approval, Ackerman's theory suffers from serious deficiencies. It produces some historical distortions of the self-understanding of political actors and leads him to minimize the substantive moral aims of the Lincoln Republicans. More seriously, Ackerman's posture renders him far too approving of those who opposed and, ultimately, sharply limited the scope of Reconstruction reforms, including both Andrew Johnson and the Supreme Court of the 1870s. Yet I do not dispute that basing the legitimacy of governmental institutions and policies on substantive moral grounds instead of conformity to the rule of law and the will of the people raises the dangers of enduring divisions as well as vanguardist despotism that rightly concern Ackerman. After all, who is entitled to decide what substantive moral principles are truly authoritative? Is it safe to assign that task to anyone other than the sovereign *demos*? The temptation to talk about legitimacy in terms of legal processes and popular sovereignty, without attention to substance, is eminently understandable.

155. 2 ACKERMAN, *supra* note 11, at 471 n.126, 474.

156. 2 *id.*

157. 2 *id.*

Ackerman's works show, however, that in the end we simply cannot really do so. In his first volume, Ackerman admits that the fact that his theory can legitimate *Dred Scott* is an example of its "moral limitations."¹⁵⁸ In a similar vein, he states in his recent work that "no sane American supposes that the country would be better off *without* the Fourteenth Amendment."¹⁵⁹ Ackerman also repeatedly rejoices in the fact that Reconstruction proves that "Americans *can* transcend their racist instincts in response to the ideal of equal citizenship."¹⁶⁰ What is the source of Ackerman's regret about the legalistically legitimate *Dred Scott* ruling and his joy about the anti-racist, but only controversially legally and popularly legitimate Fourteenth Amendment? Why does "no sane American" dispute his approval of the Amendment? It cannot be because of the procedural legitimacy or illegitimacy of the higher lawmaking structures involved. It surely is because most Americans today—including Ackerman—believe that *Dred Scott* was in substance morally reprehensible, that the Fourteenth Amendment is substantively admirable, and that consequently it is very good that the nation repudiated *Dred Scott* and adopted the Fourteenth Amendment, however it did so. Ackerman's comments make no sense if our key standards for legitimacy are simply conformity to the rule of law and popular approval. They appeal instead to our belief that the substance of what is done is crucial for the question of ultimate legitimation.

Even if it is correct that legalistic standards of legitimacy and popular sovereignty cannot entirely substitute for substantive judgments about what is morally good and right, that fact alone tells us little if anything about what substantive moral standards we should adopt. It simply means that every adequate analysis of legitimacy must give a highly prominent place to substantive moral values, thereby going well beyond what Ackerman attempts. Those values must be defended via arguments that consider not only the character of law but many other pertinent features of human experience, including accounts of basic human needs and various forms of human flourishing, as well as the lessons that history, science, philosophy and art all provide as to how they may best be realized. As I have previously contended in defense of my own substantive commitments, such arguments probably cannot ever show that particular moral positions are compelled by reason alone.¹⁶¹ Hence, ongoing disagreements over

158. 1 ACKERMAN, *supra* note 14, at 79.

159. 2 ACKERMAN, *supra* note 11, at 163.

160. 1 ACKERMAN, *supra* note 14, at 79; ACKERMAN, *supra* note 11, at 164 n.*. The phrase "racist instincts" is unfortunate. The notion that racism is somehow "instinctive" instead of learned was produced by late nineteenth-century racist scientific theories, theories invoked via a similar reference to "instincts" in *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896), which upheld segregation. See SMITH, *supra* note 2, at 377-79.

161. See ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 207 (1985).

substantive morality seem inevitable. Again, this is why it is alluring to try to evade the necessity of deciding on such matters in public life. But if we cannot evade that necessity, I believe we are well advised instead to explore controversial substantive issues as thoroughly and honestly as possible.

We must even be open to the possibility that Ackerman, like most law-centered analysts, implicitly rules out from the start: Governmental action taken in genuine violation of the rule of law or even the will of the people may still be legitimate in some circumstances.¹⁶² Hence, the Reconstruction amendments may have been ineradicably extralegal and coerced, yet still legitimate—a description that, given American suffrage limitations, may well be closer to the truth than Ackerman's account. We would also have the resources to judge whether governmental institutions and policies have been or are today fundamentally illegitimate for substantive moral reasons, whether or not they have legalistic and consensual legitimacy. Those are, admittedly, dangerous inquiries, as Ackerman protests.¹⁶³ But if we take as our clients both historical and moral truth, not simply the country that has served us and many—but not all—others extremely well, then these are inquiries we cannot rightly forgo. To engage in them, we must think about the legitimacy of Reconstruction, of the U.S. political system, and of government more broadly in ways that go beyond the essentially procedural standards on which Ackerman's elaborate and impressive structure of normative and historical analysis rests. As Lincoln suggested, we need to assess governing arrangements in terms of their substantive contributions to the noblest causes that human institutions can and therefore should be made to serve.

162. See Smith, *supra* note 28, at 221-23, 242-49.

163. See 2 ACKERMAN, *supra* note 11, at 175-76.