

**Ackerman's Higher Lawmaking in Comparative Constitutional Perspective:**

**Constitutional Moments as Constitutional Failures?**

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## ABSTRACT

Bruce Ackerman speaks in two voices. He is one of the most prominent students of comparative constitutionalism. But Ackerman is far better known for his imaginative theory of American constitutional development, set out in *We the People*. Ackerman observes that notwithstanding a remarkable continuity in governing constitutions, American constitutional history can be sharply divided into distinct regimes. His contribution is his account of the process whereby the transitions between these different constitutional regimes have taken place: through a process of “higher lawmaking” which fails to comply with the written legal rules governing constitutional amendment in Article V.

Although Ackerman is one of the most widely-discussed constitutional theorists of his generation, what has never been observed is the underlying disagreement within his work about the relevance of comparative analysis for constitutional scholarship. While Ackerman the comparativist lambastes American constitutional scholars for their “emphatic provincialism”, Ackerman in *We the People* calls on American constitutional scholars issues a nationalist call to American constitutional scholars to ground their theories of the American constitution in domestic political practice and to ignore comparative experiences.

This article is the first attempt to reconcile the two strands of Ackerman’s work. It asks whether other constitutional systems experience constitutional moments, and what we can learn about constitutional moments from studying them both inside and outside the United States.

This comparative move is possible only if we accept a completely new account of what lies at the core of constitutional moments – an extra-legal constitutional change resorted to as a direct consequence of the failure of formal rules of constitutional amendment. Amending rules are designed to constitute and regulate constitutional politics without becoming part of it. To perform this function, rules for constitutional amendment must be regarded as standing outside the terrain of substantive constitutional politics, and as being indifferent among the competing constitutional positions at play. This attitude will become most difficult to sustain when those rules reflect one of the competing, substantive constitutional positions on the table. The Founding and the Reconstruction – two of Ackerman’s constitutional moments – may have been such occasions.

## A. Introduction: Ackerman's Two Voices

Will the real Bruce Ackerman stand up? Is there a real Bruce Ackerman—or only a bunch of multiple, if partial, identities that don't add up over time?<sup>1</sup>

Bruce Ackerman is a constitutional scholar who speaks in two voices. Over the last decade, he has emerged as one of the most prominent scholars of comparative constitutionalism in the American legal academy. His 1992 book, *The Future of Liberal Revolution*, made a passionate case for the viability of a constitutionalism that was liberal democratic to its core in the former communist countries of Eastern Europe, even though their concrete, lived experiences with liberal democracy were distant or non-existent, and their revolutionary political transitions were seemingly antithetical to the liberal constitutional ideal.<sup>2</sup> He continued in 1997, examining the proliferation of written constitutions and judicial review, which he termed “the rise of world constitutionalism”.<sup>3</sup> His research question was how the character of a constitutional founding – for example, the coming together of independent political units in a federation, or a “new beginning” marking a sharp and self-conscious break with a discredited past – might influence the subsequent direction and content of constitutional judicial review, and hence serve as guidance for prospective constitutional design. Most recently, he made an extended argument in the pages of the *Harvard Law Review* for the superiority of “constrained parliamentarism” over an American-style separation of powers as a method for the allocation of institutional power and fashioning relationships between the executive and legislative branches.<sup>4</sup>

But Bruce Ackerman is arguably far better known, even outside the United States, for his imaginative theory of American constitutional development, set out in a highly influential series of law review articles<sup>5</sup> and the first two volumes of an anticipated three-volume work, *We the*

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<sup>1</sup> Bruce Ackerman, *Rooted Cosmopolitanism*, 104 *Ethics* 516, 517 (1994).

<sup>2</sup> Bruce Ackerman, *The Future of Liberal Revolution* (Yale University Press 1992).

<sup>3</sup> Bruce Ackerman, *The Rise of World Constitutionalism*, 83 *Va. L. Rev.* 771, 772 (1997) [hereinafter *The Rise of World Constitutionalism*].

<sup>4</sup> Bruce Ackerman, *The New Separation of Powers*, 113 *Harv. L. Rev.* 663, 665 (2000) [hereinafter *The New Separation of Powers*].

<sup>5</sup> Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *Yale L.J.* 1013 (1984), Bruce Ackerman, *Transformative Appointments*, 101 *Harv. L. Rev.* 1164 (1988), Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *Yale L.J.* 453 (1989), Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 *U. Chi. L. Rev.* 475 (1995).

*People*.<sup>6</sup> Ackerman's theory has both descriptive and normative limbs. Descriptively, he argues that notwithstanding a remarkable continuity in governing constitutions, the American constitution has undergone tremendous change since the adoption of the Federalist constitution. American constitutional history can be sharply divided into distinct regimes, each defined by a unique "matrix of institutional relationships and fundamental values".<sup>7</sup> Ackerman's original contribution is his account of the process whereby the transitions between these different constitutional regimes have taken place: through a process of "higher lawmaking" involving intense and relatively brief periods of focused and public-spirited deliberation by the American people, a complex but determinate pattern of interaction between America's governing institutions recognized by those institutional actors and the public as being unique to transitions between constitutional regimes, and most arrestingly, the failure to comply with the written legal rules governing constitutional amendment. Normatively, he argues that the American story of constitutional change – "dualist democracy" – is a practical response to the limited capacity of citizens in a modern democracy to truly engage in democratic self-government, because it only expects them to engage in collective political choice relatively rarely. And since it is only at these "constitutional moments" that the American people have truly spoken, and because there are clear criteria to determine when such moments have occurred, dualist democracy also offers a path out of the thicket of the counter-majoritarian objection to judicial review. No doubt because of its scope and ambition, Ackerman's theory has led one scholar to suggest that Ackerman "undoubtedly" belongs to the "pantheon of constitutional theorists".<sup>8</sup>

Although Ackerman's constitutional scholarship has been widely discussed, what has escaped observation is that the two strands of his work are deeply in tension. The differences are not simply those of subject-matter (American vs. non-American constitutionalism), potential audience (American constitutional theorists vs. scholars of comparative constitutionalism), and the balance between depth and breadth (in-depth discussion of the American constitutional system vs. less detailed discussion of many). Rather, these readily apparent differences both reflect and mask a deeper, underlying disagreement within Ackerman's own work about the relevance of comparative analysis for constitutional scholarship.

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<sup>6</sup> Bruce Ackerman, *We the People: Foundations*, vol. 1 (Harvard University Press 1995) [hereinafter *Foundations*] and Bruce Ackerman, *We the People: Transformations*, vol. 2 (Harvard University Press 2001) [hereinafter *Transformations*]. The third volume will be *We the People: Interpretations*.

<sup>7</sup> *Foundations*, *supra* note 6, at 59.

<sup>8</sup> James Fleming, *We the Unconventional American People*, 65 U. Chi. L. Rev. 1513, 1515 (1998).

Consider Ackerman the comparativist. In characteristically polemical fashion, Ackerman lambastes American constitutional scholars for their “emphatic provincialism” and their “astonishing indifference” toward constitutional developments abroad.<sup>9</sup> He derides American scholars for “grappling with the original understanding of the Constitution of 1787, the Bill of Rights, and the Reconstruction Amendments with new intensity”<sup>10</sup> at the expense of comparative scholarship. The intellectual agenda for American scholars should be to “learn to think about the American experience in a different way ... to look upon the American experience as a special case, not as the paradigmatic case”.<sup>11</sup> The benefit of situating the American constitutional system in comparative perspective, argues Ackerman, is that it “helps American constitutional lawyers place their own tradition in critical perspective” to enable to step back from the audacious claim that the American system is “an inspiring beacon for liberal democrats everywhere”.<sup>12</sup>

Now these criticisms surely apply to Ackerman’s own work on the American constitution, which focuses entirely on the United States, and methodologically is self-consciously grounded in the concrete details of American constitutional and political history with only scattered and brief comparative references. It is therefore striking that at the very outset of *Foundations*, Ackerman argues *against* the use of “European ... conceptual frameworks” in a well-known passage:<sup>13</sup>

To discover the Constitution, we must approach it without the assistance of some philosophical guide imported from another time and place. Neither Aristotle nor Cicero, Montesquieu nor Locke, Harrington nor Hume, Kant nor Weber, provides the key. Americans have borrowed much from such thinkers, but they have also built up a genuinely distinctive pattern of constitutional thought and practice.

Ackerman’s target is the reliance by normative constitutional theorists on European political thought. But by issuing a nationalist call to American scholars to ground their theories of the American constitution in indigenous political practice, his methodological choice also rules out the resort to comparative legal materials. As Ackerman goes on say, “we must look inward, not outward”<sup>14</sup> – advice which he follows in *Transformations*, notwithstanding its appearance after

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<sup>9</sup> *The Rise of World Constitutionalism*, *supra* note 3, at 772-73.

<sup>10</sup> *Id.* at 773.

<sup>11</sup> *Id.* at 774-75.

<sup>12</sup> *The New Separation of Powers*, *supra* note 4, at 642.

<sup>13</sup> *Foundations*, *supra* note 6, at 3.

<sup>14</sup> *Id.* at 33.

the comparative turn in his own scholarship. To be sure, Ackerman does make some comparative moves. In *Foundations*, he briefly compares the design of the American, English, and German constitutions, noting that the German is “foundationalist” because certain basic values are entrenched and placed beyond the reach of constitutional revision, the English is “monist” because Parliamentary supremacy means that no fundamental values legally restrain legislative decision-making, and the American is “dualist” because binding legal constraints on governments are open to democratic revision in their entirety.<sup>15</sup> But his usual approach is to emphasize the uniqueness of the American constitutional experience without the benefit of real comparison, if at all.<sup>16</sup> The comparative perspective is at best a superfluous after-thought that does no real work, a rhetorical footnote to a complex and extended argument.

Reconciling the two strands of Ackerman’s scholarly agenda would appear to be an unpromising project, given Ackerman’s firm anchoring of his theory of constitutional change in the particularities of American constitutional history. But I think such an exercise, if framed the right way, can prove to be fruitful. Indeed, Ackerman has already attempted to make such a link between his two research agendas, arguing that constrained parliamentarianism is a better constitutional model for dualist democracy than the American version of the separation of powers.<sup>17</sup> But surprisingly, he makes this connection between his comparative and American agendas without a sustained engagement with his argument in *We the People*. Sandy Levinson’s insightful discussion of *We the People* as a case-study of the broader phenomenon of transitional justice, drawing on a rich set of comparative examples, points the way to how this might be done.<sup>18</sup>

I want to establish a different potential point of contact between Ackerman the comparativist and Ackerman the theorist of the American constitution, by focussing on his descriptive, as opposed to his normative argument. Moreover, I want to probe that possible

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<sup>15</sup> *Id.* at 8-16.

<sup>16</sup> In *Transformations*, for example, he reiterates at the outset that “successful moments of mobilized popular renewal” are what “distinguishes the American Constitution from most others in the modern world”. *Transformations*, *supra* note 6, at 5.

<sup>17</sup> *The New Separation of Powers*, *supra* note 4, at 665-666.

<sup>18</sup> Sanford Levinson, *Transitions*, 108 Yale L.J. 2215 (1999). Other examples include Peter Lindseth, *Law, History and Memory: “Republican Moments” and the Legitimacy of Constitutional Review in France*, 3 Colum. J. Eur. L. 49 (1996/97); András Sajó, *Constitution Without The Constitutional Moment: A View From The New Member States*, 3 Int’l J. of Const. L. 243 (2005); M. Tushnet, *Misleading Metaphors in Comparative Constitutionalism: Moments and Enthusiasm*, 3 Int’l J. of Const. L. 262 (2005).

connection through a deeper engagement with the argument presented in *We the People* – in a way, to take Ackerman more seriously than Ackerman himself. I take Ackerman’s central contribution to the study of American constitutional change to be the idea of the constitutional moment. So how would taking to heart Ackerman’s insistence on the importance of comparative constitutional scholarship affect our understanding of constitutional moments? We can derive some guidance from Ackerman’s study of the impact of the character of constitutional framings on constitutional interpretation, where he poses the following general comparative question: “are there patterns that repeat themselves in the successful establishment of written constitutions?”<sup>19</sup> Adapted to constitutional moments, the question is the descriptive one of whether other constitutional systems experience constitutional moments, and what we can learn about constitutional moments from studying them both inside and outside the United States.

This comparative move is possible only if we first fundamentally recast our understanding of constitutional moments. The critical literature prompted by *We the People* has persuasively argued that Ackerman has failed to adduce sufficient evidence to demonstrate that political actors were self-consciously engaged in a process of higher law-making outside normal constitutional process which nonetheless they perceived to be legal. However, if shorn of this unsustainable empirical claim, at the core of constitutional moments is the following phenomenon – an extra-legal constitutional change resorted to as a direct consequence of the *failure* of formal rules of constitutional amendment designed to constitute and regulate constitutional politics without becoming part of it. Those rules fail in situations where they cannot perform their central function, which is to channel debates over constitutional change through procedures that yield institutional decisions which political actors accept as authoritative. To perform this function, rules for constitutional amendment must be regarded as standing outside the terrain of substantive constitutional politics, and as being indifferent among the competing constitutional positions at play. But constitution decision-procedures are far from substantively neutral themselves, and reflect competing conceptions of the very sorts of values that are the gist of constitutional politics. Constitutionalism depends, then, on the *suspension* of political judgment with respect to rules governing constitutional amendment to purchase political settlement. This attitude will become most difficult to sustain when those rules reflect one of the competing, substantive constitutional positions on the table – at special moments of *constitutive constitutional politics*. At that point, because of the absence of accepted rules governing constitutional amendment, the constitutional system may come tumbling down.

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<sup>19</sup> *The Rise of World Constitutionalism*, *supra* note 3, at 775.

At least two of Ackerman's constitutional moments -- the Founding and the Reconstruction -- may have been such cases, because the rules governing constitutional amendment in the Articles of Confederation and Article V reflected one of the substantive visions of the American political community which was at play in those episodes, and therefore were not capable of regulating the process of constitutional change. So some of Ackerman's constitutional moments are in reality moments of constitutive constitutional politics, the very character of which lead to constitutional failure and breakdown. As a consequence, Ackerman should be read not as a theorist of constitutional change proceeding through mass democratic mobilization. Rather, Ackerman should be read as a theorist of constitutional crisis.

Thus re-interpreted, constitutional moments raise a new and interesting avenue for comparative inquiry that Ackerman himself does not pursue. I tackle this line of inquiry through an examination of the decision of the Supreme Court of Canada in the *Secession Reference*<sup>20</sup> – a judgment reported the day after it was handed down on page A3 of the *New York Times*, reflecting the considerable international interest in the case. The Court was asked a narrow question on the constitutionality of unilateral secession by a province from the Canadian federation, in the context of a highly charged disagreement between the Quebec and federal governments over the answer to that question, and indeed, on the role of the law itself in governing regime change. In a highly unusual judgment, the Court gave a narrow and unsurprising ruling that declared unilateral secession to be unconstitutional, and in addition, established a new constitutional procedure for secession which imposed a duty on the federal government to negotiate the terms of secession in good faith in the event of a referendum vote by a clear majority of Quebecers in favour of a clear question on secession.

Although framed as constitutional interpretation, I argue that the Court actually amended the Canadian constitution, without recourse to the formal procedures for constitutional amendment. Viewing the *Secession Reference* as the judicial component of a constitutional moment – understood as a constitutional failure – offers a completely new understanding of that episode. The impasse between the Canadian and Quebec governments over the secession of Quebec thrust the rules for constitutional amendment under the Canadian constitution – the constitutional framework within which secession would occur – into constitutional politics. Those rules failed because they reflected a conception of the Canadian political community which the Quebec sovereignty movement challenged. Instead of providing a stable and uncontested framework for constitutional politics, those rules were drawn into constitutional politics, and were

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<sup>20</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217.



unable to perform their basic function. This deep and profound constitutional failure offers a new explanation for the Court's otherwise puzzling move to amend the Canadian constitution extra-legally under the guise of constitutional interpretation – a move fuelled because of the political impossibility of formal constitutional amendment to craft an acceptable procedure to govern the secession of a province.

In sum, the reinterpretation of constitutional moments as extra-legal responses to constitutional failure serves a number of intellectual projects. It assists us in better understanding what is at the core of Ackerman's account of extra-legal changes to the American constitutional order. It defines the comparative constitutional research agenda of identifying and better understanding similar episodes of extra-legal change in other legal systems. It brings the two halves of Ackerman's constitutional scholarship together, potentially yielding further dividends for the understanding of American constitutional development through comparative constitutional scholarship. Finally, it extends Ackerman's work on constitutional design to encompass rules for constitutional amendment, and suggests that such rules may have a limited ability to constrain moments of constitutive constitutional politics which raise questions going to the very identity of a political community.

## **B. Understanding Constitutional Moments**

### **1. Ackerman's Higher Lawmaking System**

As Terrance Sandalow has written, “[t]he fulcrum of Ackerman's thesis is the problem of constitutional change.”<sup>21</sup> Ackerman begins by describing what he calls the “bicentennial myth”,<sup>22</sup> whose key claim is one of American constitutional continuity. Ackerman makes this point comparatively, contrasting how for “Europeans, the past two centuries are full of dramatic breaks and false starts”.<sup>23</sup> According to the bicentennial myth, the American constitutional experience has been different. Although Americans, like Europeans, “have had ... [their] share of bitter conflict and profound transformation”, these have occurred within a constitutional framework that has remained constant since the adoption of the Federalist Constitution in 1787.<sup>24</sup> As Ackerman

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<sup>21</sup> Terrance Sandalow, *Abstract Democracy: A Review of Ackerman's We the People*, 9 Const. Comment 309, 310 (1992).

<sup>22</sup> Foundations, *supra* note 6, at 34-57.

<sup>23</sup> *Id.* at 34.

<sup>24</sup> *Id.*

says, “[w]hile the French have run through five republics since 1789, we have lived in only one”.<sup>25</sup>

The problem with the bicentennial myth is that it does not fit the facts of American constitutional development, which has been one of dramatic constitutional change. Ackerman suggests that notwithstanding the myth of constitutional continuity, legal professionals organize their descriptions of their constitutional past around three pivotal moments – the Founding, the Reconstruction, and the New Deal – which “stand out from the rest”.<sup>26</sup> Ackerman suggests that each of these momentous events launched a distinct constitutional regime, differing with regard to constitutional structures and “fundamental values that are usually taken as the constitutional baseline in normal political life”<sup>27</sup> from the regimes both preceding it and following it. The Founding launched the Early Republic, which was characterized by a weak Presidency, a national government with limited jurisdiction, and minimal protection for fundamental rights. Reconstruction marked the starting point of the Middle Republic, the core commitments of which included national citizenship based on equal rights of contract and property, restricted national power except to protect those rights of national citizenship, and Congressional leadership within the national government. Finally, the New Deal constitutional settlement expanded national power to encompass plenary jurisdiction over economic regulation, brought an end to the aggressive judicial protection of rights of contract and property, and marked the rise of Presidential leadership in the national government.

Now as Ackerman fully acknowledges, the fact of dramatic constitutional change over time does not represent a challenge to the bicentennial myth *per se*, because the 1787 Constitution itself contemplates the possibility of constitutional modification through Article V, which creates a set of procedures that enables constitutional change to occur. The precise details of Article V are not important. What is important is the idea underlying Article V – that proposed constitutional amendments must satisfy one of the decision-rules spelled out therein to become part of the Constitution and legally enforceable. The twenty-six amendments to the U.S. Constitution bear vivid testimony to the fact that Article V can be and has been used successfully. Although Article V does not explicitly indicate that it is the exclusive mechanism for constitutional amendment, one could plausibly argue, with Larry Tribe, that it flows from the

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 40.

<sup>27</sup> *Id.* at 59.

logic of a written constitution that it should be read in this way.<sup>28</sup> If one accepts that a principal goal of a written constitution is to provide a set of clear restraints on the exercise of public power, dispensing with the rules governing constitutional amendment can subvert the goals of constitutionalism itself, and lead to tyranny. Indeed, Ackerman recognizes this, describing one argument for amendment outside Part V as “dangerous”.<sup>29</sup> The implication is that amendments which fail to satisfy Article V do not become part of the Constitution, at least in that way. The fact that constitutional interpretation may eventually change constitutional meaning to accord with failed amendments does not retroactively change the legal significance of the failure to formally amend the constitution.

But as Ackerman acutely observes, this “legalist” explanation of constitutional change cannot account for the transitions between the three constitutional regimes. It was widely understood at the time that the adoption of the 1787 Constitution did not comply with the procedure for constitutional amendment under the Articles of Confederation in several respects -- its requirement of *unanimous* ratification by state *legislatures* obviously not being satisfied by the approval of *nine* state *conventions*. There were other potential illegalities as well.<sup>30</sup> Now the illegality of the Founding is hardly a novel point; indeed, it was a central concern of political actors at the time, as Ackerman vividly illustrates.<sup>31</sup> But Ackerman argues that the birth of the Middle Republic, especially the adoption of the Fourteenth Amendment, was also illegal under Article V. Once Congress proposed the Fourteenth Amendment, Article V required ratification by two-thirds of the then thirty-seven states – granting twelve states a veto. Ten former members of the Confederacy rejected the amendment, seemingly assuring that it would fail. To secure the passage of the amendment, Congress refused to seat members of Congress from each southern state until that state had ratified the amendment *and* the amendment had received a sufficient number of ratifications to come into force. These conditions appear to contravene Article V, which permits Congress to propose amendments to states for ratification, but not to coerce states into accepting them. Again, as Ackerman documents, the historical record reveals that there was an acute awareness among political actors of the problematic legality of the Fourteenth

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<sup>28</sup> Lawrence Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1240-44 (1995).

<sup>29</sup> Transformations, *supra* note 6, at 12.

<sup>30</sup> For these details, see Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. Chi. L. Rev. 475 (1995).

<sup>31</sup> Ackerman & Katyal, *id.*, is rich with detail.

Amendment.<sup>32</sup> Finally, and most controversially, Ackerman argues that the “transformative opinions”<sup>33</sup> of the New Deal, which severely circumscribed constitutional protection for rights of property and contract and dramatically expanded the scope of national jurisdiction to regulate the economy, were such a dramatic and sudden break with existing jurisprudence that they amounted to constitutional amendments. To distinguish the Fourteenth Amendment and the transformative opinions of the New Deal from Article V amendments, Ackerman deploys special terminology. The Fourteenth Amendment is an “amendment-simulacrum”, because it is identical in form to a formal constitutional amendment, whereas the transformative opinions of the New Deal are “amendment-analogues”, which despite their lack of textual embodiment, are functionally equivalent to Article V amendments.<sup>34</sup>

In sum, at the heart of Ackerman’s theory is the following problem: America’s constitutional development contains many examples of fundamental, dramatic constitutional change that appear to have occurred outside the textually-prescribed procedures for constitutional amendment. Technically speaking, those constitutional changes are legally invalid. And to the extent that these changes have marked the beginning of new constitutional regimes, Ackerman frames the central problem of American constitutional law as coming to terms with illegal regime change, or as Commonwealth constitutional theorists would say, revolutionary legality. Now the easy solution to this difficulty is to say that there is not really a problem at all. If one works within a positivist understanding of the nature of a legal system, claims of extra-legal constitutional change do limited work after a point. According to positivist jurisprudence, a constitutional order consists of legal rules whose validity can be traced to a constitution (written or unwritten), whose validity in turn is determined by an ultimate rule of recognition.<sup>35</sup> But when we get to the rule of recognition, the chain of validity runs out. The rule of recognition can be neither valid nor invalid, because validity is a property of rules within a legal order that requires reference to a higher rule, which is not possible with respect to the rule of recognition itself. Although Kelsen argued that the validity of the rule of recognition (his *grundnorm*) is presupposed, Hart rightly pointed out that validity is an internal statement about the relationship

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<sup>32</sup> Transformations, *supra* note 6, at 99 to 185.

<sup>33</sup> *Id.* at 270.

<sup>34</sup> *Id.*

<sup>35</sup> For a helpful explanation of how the constitution of a legal-political order is not its rule of recognition see Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in *Constitutionalism: Philosophical Foundations* 152 at 160 to 162 (Larry Alexander, ed., Cambridge University Press 1998).

of rules within a legal system and the rule of recognition. The better view is that the rule of recognition merely exists, as a matter of sociological fact – defined by Hart as acceptance by the officials who govern themselves by it.<sup>36</sup>

This perspective on the ultimate root or title of a constitutional order raises a host of interesting issues that we must bracket for the moment. These include whose acceptance and what kind of acceptance must be met for a rule of recognition to “exist”, and what the political, historical, economic and cultural reasons for such an acceptance might be. The point that matters here, as Fred Schauer has explained, is that just as a constitution *in its entirety* can be displaced by a new constitution which becomes legally effective regardless of the failure to comply with the formal legal rules for constitutional change of the previous constitutional order, because it has *secured* the requisite degree of official acceptance under a new rule of recognition, so too can partial modifications to the American constitution – whether in the form of amendment-analogues (e.g. the Fourteenth Amendment) or amendment-simulacra (such as the New Deal decisions) – become legally effective notwithstanding the failure to comply with formalities for constitutional change spelled out by Article V.<sup>37</sup> This is true either because the rule of recognition permitted amendment outside the formal legal order prior to those changes occurring, or (more likely) because that rule was modified to accept such changes. Crucially, such changes to the rule of recognition itself, in the positivist view, albeit of legal consequence, are analytically distinct from and prior to law. They are conditioned by a range of political, moral, and other factors that are best described as non-legal in character. In the American case, Ackerman’s focus on the federal government suggests that the requisite degree of acceptance might entail acquiescence by the principal institutions of the federal government – Congress, the Presidency, and the Supreme Court for a range of non-legal reasons. In sum, although constitutions purport to be entirely self-validating and to regulate constitutional change through law, that is a rhetorical, not a legal statement that mis-describes and obscures a political practice of acquiescence, not only for constitutions themselves but also for constitutional modifications that are functionally equivalent to formal amendments but which do not comply with constitutional formalities.<sup>38</sup>

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<sup>36</sup> H.L.A. Hart, *Concept of Law* 105-7 (Oxford University Press 1961).

<sup>37</sup> Fred Schauer, *Amending the Presuppositions of a Constitution*, in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 145 (Sandy Levinson, ed., University of Chicago Press 1995).

<sup>38</sup> Also see Fred Schauer, *Deliberating About Deliberation*, 90 Mich. L. Rev. 1187 (1992). Compare Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 Mich. L. Rev. 621 (1987).

Whatever the merits of the argument from revolutionary legality, Ackerman rejects it. To understand why, consider his rejection of a reading of Article V that would make it the exclusive means of constitutional amendment. Ackerman asks “[w]hy, then, read such a demand into the text at the cost of delegitimizing the Fourteenth Amendment?”<sup>39</sup> Ackerman’s worry appears to be that accepting the revolutionary and extra-legal nature of the regime changes wrought by the Reconstruction and New Deal would somehow undermine the legitimacy of those changes. In other words, to Ackerman, legality is at least a sufficient criterion for legitimacy, such that constitutional change brought about without recourse to legal procedure would be illegitimate. And to the extent that these moments of gross illegality launched entire constitutional regimes, those regimes themselves would be illegitimate as well – a problem Ackerman terms “the problem of revolutionary legitimacy”.<sup>40</sup>

Ackerman resolves the dilemma for political legitimacy posed by revolutionary legality by describing a legal process whereby these apparently extra-legal changes have occurred, his system of so-called higher lawmaking -- “a third way”<sup>41</sup> that rejects the “dichotomy between legalistic perfection and lawless force”,<sup>42</sup> which shows that “law-breaking does not necessarily imply lawlessness,”<sup>43</sup> and indeed, produces constitutional “amendment”.<sup>44</sup> This parallel process exists alongside Article V, and is thus an alternative but equally effective mechanism for constitutional change. So what does higher lawmaking look like? Ackerman describes a highly stylized and complicated set of interactions involving both popular mobilization in favour of constitutional change and “institutional jujitsu”<sup>45</sup> between the branches of the federal government. First, there is “signalling”, whereby a movement “earns the constitutional authority to claim that ... its reform agenda should be placed at the center of sustained public scrutiny”.<sup>46</sup> This is followed by the “proposal”, during which the popular movement must translate its calls for

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<sup>39</sup> Transformations, *supra* note 6, at 16.

<sup>40</sup> Foundations, *supra* note 6, at 171.

<sup>41</sup> Transformations, *supra* note 6, at 33.

<sup>42</sup> *Id.* at 116.

<sup>43</sup> *Id.* at 14.

<sup>44</sup> *Id.* at 270.

<sup>45</sup> *Id.* at 13.

<sup>46</sup> Foundations, *supra* note 6, at 266.

change “into a series of more or less operational proposals for constitutional reform”.<sup>47</sup> Next comes “mobilized deliberation”, which itself consists of a series of sub-stages: a “constitutional impasse” between different branches of the federal government, reflecting resistance by conservative branches to the proposed constitutional changes; a “decisive electoral mandate” for the institutional proponents of revolutionary constitutional change; an “unconventional assault” by proponents on the conservative institutions; a “switch in time” by dissenting institutions to endorse the constitutional change; and a “consolidating election” in which the public ratifies this inter-institutional settlement.<sup>48</sup> The final stage is “legal codification”, where the Supreme Court translates the constitutional reform into constitutional doctrine.

According to Ackerman, the requirements of this higher law-making system were met by the Founding, the Reconstruction and the New Deal, solving his dilemma by providing a legal basis of legitimation for each of these episodes. This is true even though at various times, different institutions played different roles (e.g. Congressional leadership during the Reconstruction, and Presidential leadership during the New Deal), and different instruments of constitutional change were used (e.g. amendment-analogues in the Reconstruction vs. amendment-simulacra in the New Deal), which Ackerman explains as procedural innovations and acts of higher law-making in their own right that occurred alongside the substantive changes made during each constitutional moment to the American constitution.

## 2. Higher Lawmaking: Historical Fact or Legal Fiction?

Ackerman’s model has attracted a large literature, most of it highly critical both of its normative desirability and descriptive accuracy.<sup>49</sup> I want to focus on a central component of his

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<sup>47</sup> *Id.*

<sup>48</sup> Transformations, *supra* note 6, at 18-20.

<sup>49</sup> See, for e.g., Terrance Sandalow, *Abstract Democracy: A Review of Ackerman’s We the People*, 9 Const. Comment 309, (1992); Fred Schauer, *Deliberating About Deliberation*, 90 Mich. L. Rev. 1187, (1992); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 Harv. L. Rev. 918, (1992); Michael Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments*, 44 Stan. L. Rev. 759, (1992); William Fisher III, *The Defects of Dualism*, 59 U. Chi. L. Rev. 955, (1992); Jonathan Simon, *Columbus in the Twilight Zone: Bruce Ackerman’s ‘Discovery’ of the Constitution*, 17 Law & Soc. Inquiry 501, (1992); Jennifer Nedelsky, *The Puzzle and Demands of Modern Constitutionalism*, 104 Ethics 500, (1994); Kent Greenawalt, *Dualism and Its Status*, 104 Ethics 480, (1994); Don Herzog, *Democratic Credentials*, 104 Ethics 467, (1994); James Fleming, *We the Exceptional American People*, 11 Const. Comment. 355, (1994); Michael McConnell, *The Forgotten Constitutional Moment*, 11 Const. Comment. 115, (1994); Larry Kramer, *What’s a Constitution For Anyway? Of History and Theory, Bruce Ackerman and the New Deal*, 46 Case W. Res. L. Rev. 885, (1996); Frank Michelman, *Constitutional Fidelity/Democratic Agency*, 65 Fordham L. Rev. 1537, (1997); Lawrence Sager, *The Betrayal of Judgment*, 65 Fordham L. Rev. 1545, (1997); Mark Tushnet, *Constituting We the People*, 65

descriptive claim – that the system of higher lawmaking was self-consciously understood as a process for constitutional amendment by citizens and various institutional actors during the three constitutional moments Ackerman identifies. In particular, Ackerman argues that the relevant actors in each episode (a) were aware of the existence and particular features of a system of higher law-making outside the formal procedures for constitutional amendment; (b) purposely deployed this system in preference to proceeding through the textually-prescribed procedures for constitutional amendment; (c) interpreted the actions of other actors through the lens of this system; (d) viewed earlier constitutional moments as instances of higher lawmaking, and understood themselves as following those “precedents” by engaging in the same constitutional ritual; and (e) viewed any differences between their behaviour and that of political actors in previous episodes as modifications or elaborations of the system and as departures from constitutional precedent.

These are strong claims, but Ackerman is clear in making them. Consider a few examples. At the outset of setting out his “revisionary narrative”<sup>50</sup> in *Foundations*, Ackerman describes how during the Reconstruction and the New Deal political actors self-consciously worked within and developed the higher lawmaking process. According to Ackerman, the “sources.... reveal both Reconstruction Republicans and New Deal Democrats engaging in self-conscious acts of constitutional creation”.<sup>51</sup> He continues, “[r]ather than meekly following the marching orders of the Federalists, both Republicans and Democrats were constitutionally creative procedurally no less than substantively – and they knew it”.<sup>52</sup> In defending the application of his higher lawmaking system to the adoption of the Thirteenth Amendment, Ackerman emphasizes the subjective understandings of the American people in deciding whether to support a constitutional proposal: “[w]hile this framework may seem overly formulaic ... the American people could hardly be said to exercise their popular sovereignty without a credible

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Fordham L. Rev. 1557, (1997); C. Gordon, *Rethinking the New Deal*, 98 Colum. L. Rev. 2029, (1998); L.A. Powe, Jr., *Ackermania or Uncomfortable Truths?*, 15 Const. Comment. 547, (1998); James Fleming, *We the Unconventional American People*, 65 U. Chi. L. Rev. 1513, (1998); William Forbath, *Caste, Class, and Equal Citizenship*, 98 Mich. L. Rev. 1, (1999); Daniel Hulsebosch, *Tales of Popular Sovereignty Civics 2000: Process Constitutionalism at Yale*, 97 Mich. L. Rev. 1520, (1999); Michael Gerhardt, *Ackermania: The Quest for a Common Law of Higher Lawmaking*, 40 Wm. & Mary L. Rev. 1731, (1999); and Symposium, *Moments of Change: Transformation in American Constitutionalism*, 108 Yale L.J. 1917, (1999).

<sup>50</sup> *Foundations*, *supra* note 6, at 44.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*



*signal* that reformers were seriously planning a constitutional transformation, without learning the outlines of the *proposal*, and so on”.<sup>53</sup>

Ackerman makes his strongest empirical claims with respect to the New Deal. Thus, in describing the decision in *Schechter Poultry Corporation v. United States*,<sup>54</sup> Ackerman says that the Court’s “words ... challenged the President to run against the Court in the next election and seek to gain a mandate from the People in support of his corporatist initiative”, that the Court had struck down the federal legislation because “[o]n its view, the Democrats assembling on Capitol Hill in 1933 had not earned the popular authority to displace the tradition of Congressionally centered government with a corporatist regime based on Presidential leadership,” and that “the Court put Americans on notice that the New Deal was shaking the foundations – and it was not too late to withdraw their mandate.”<sup>55</sup> Summing up his analysis of the New Deal, Ackerman claims that ignoring the operation of the higher lawmaking system in that context would not be “doing justice to the protagonists’ own understanding of the period”.<sup>56</sup>

Now why does Ackerman make these empirical claims, and why does his entire argument depend on them? Imagine two different ways in which each of Ackerman’s constitutional moments may actually have unfolded. In the first scenario, constitutional actors seeking to effect legal change simply saw themselves as acting outside the law. Their opponents may have accused them of acting illegally, and may have insisted on the importance of proceeding through Article V, even if they agreed with the substance of the proposed constitutional change, or may have been opposed because they disagreed with the proposal on its merits. However, the claims of legality were not decisive to constitutional reformers, for a number of possible reasons. They may have been indifferent to legal forms entirely, focussing instead on the substantive legitimacy of the proposed constitutional changes. Alternatively, they may have taken the claims of formal legality seriously, but thought they were outweighed by the substantive legitimacy of their

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<sup>53</sup> Transformations, *supra* note 6, at 124 (emphasis added).

<sup>54</sup> 295 U.S. 495, (1935).

<sup>55</sup> Transformations, *supra* note 6, at 295-96, 303 (emphasis added).

<sup>56</sup> *Id.* at 382. And finally, Ackerman argues that an awareness of the higher lawmaking system was evident during the attempt of Reagan Republicans to make transformative appointments to the Supreme Court (e.g. Robert Bork). In describing the (contemporaneous) attempt of the Reagan Republicans to engage in constitutional politics, Ackerman suggests that the higher lawmaking system “is now at the very center of the constitutional consciousness of the American People”. Foundations, *supra* note 6, at 268. Looking back at the failed Bork appointment in *Transformations*, Ackerman reiterates that “[w]hen citizens of the modern republic made their own efforts to gain higher lawmaking authority, it offered them an established language and process within which to proceed”. Transformations, *supra* note 6, at 389.

constitutional proposals, which may have been unachievable through strict adherence to constitutional process. It may be that they were operating within the framework of popular sovereignty, holding that the people retain the inherent power to set aside the constitutional structures they had given themselves at the Founding. The attempt to implement constitutional change outside Article V – essentially a constitutional coup – produced inter-institutional struggles, if the reformers had gained an institutional beachhead. They may have used mechanisms available to them under existing constitutional arrangements – in the case of Congress, impeachment of the President, and changes to the membership, size, and jurisdiction of the Supreme Court – to exert pressure on dissenting institutions. Mass political mobilization, through elections, may have played a role in exerting political pressure. The dissenting institutions may have eventually acquiesced for a range of reasons: because they changed their minds on the substantive legitimacy of the constitutional reform, because they amended their views on the importance of formal legality, or because they concluded that the personal and institutional costs of resistance outweighed any concerns regarding the substance of the proposals and legal process. And because of their acquiescence, the American constitution changed, ultimately recognized in the courts – much in the manner that revolutionary constitutions have been recognized by courts across the world as being legally effective.

The second scenario, of course, is Ackerman’s system of higher lawmaking. To be sure, these two scenarios have important elements in common. In both, Article V was not complied with. Moreover, constitutional actors were fully aware of the fact of their non-compliance, and deliberately chose to proceed without formal constitutional amendment. Notwithstanding the choice to proceed outside textually recognized channels for constitutional change, the goal of constitutional actors was not to destroy the American constitutional system and precipitate a descent into lawlessness. Rather, their goal was to change the constitution in a way that would have concrete legal consequences in courts of law after such a change had taken place. Moreover, the externally observable patterns of political behaviour may be identical, as with much of the political discourse employed by the parties.

However, despite these commonalities, the two scenarios are fundamentally different in one respect. In the former, political actors believed that their behaviour would have legal effects, but did not regard themselves as operating within a legally recognized mechanism of constitutional change, whereas in the latter, they did. This is a critical distinction, because this kind of attitude toward legally constituted processes is what defines the legal mindset. As Hart famously explained, legal subjects have an “internal” attitude toward legal norms – what he termed the “internal point of view”. The internal point of view captures the idea that actors

within a legal order plan, structure, describe, explain and justify their own actions through the lens of what they believe the law permits or requires, and interpret, judge and publicly react to the actions of other actors in light of the law as well. Laws are guides to conduct, reasons for behaving in certain ways and not behaving in others, standards against which to assess deviations from the law, and justifications for demands for law-compliant behaviour and criticism for non-conformity. As Hart said in a famous passage, “officials, lawyers, or private persons ... use them, in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment ...”.<sup>57</sup> Constitutional actors engaging in a constitutional moment, accordingly, should understand whether certain conduct is part of a particular stage in the process of higher lawmaking – for example, “signalling” or an “unconventional assault” – and frame their responses according to the rules of this legal process.

If constitutional actors during constitutional moments did not regard Ackerman’s rules of higher lawmaking from an internal point of view, then Ackerman would not be able to demonstrate they were engaged in a legal procedure, as opposed to an extra-legal process that would have the effect of, and may have had the purpose of, producing legal change. So not surprisingly, Ackerman does make this empirical claim, because he has to.<sup>58</sup> How does Ackerman fare? It is in *Transformations* that Ackerman sets out detailed historical discussion of each of his constitutional moments.<sup>59</sup> It is therefore odd and highly surprising that at the end of

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<sup>57</sup> Hart, *supra* note 36, at 88.

<sup>58</sup> Ackerman’s critics agree that his argument stands or falls on the historical case he makes for higher lawmaking. As Stephen Griffin puts it, “[w]ithout self-conscious understanding, Ackerman ... has an [sic] historical narrative that greatly deepens our understanding of how constitutional change has occurred through essentially political means. But he does not have evidence of a *legal* process.” Stephen Griffin, *Constitutional Theory Transformed*, 108 Yale L.J. 2115, 2147 (1999).

<sup>59</sup> In *Foundations*, Ackerman limited himself to a discussion of Federalist No. 40, to argue that the framers of the 1787 Constitution intended there to be a non-Article V system of constitutional amendment. In No. 40, Madison discussed the illegal process for the adoption of the 1787 Constitution, and observed how “in all great changes of established governments, forms ought to give way to substance”, that “it is therefore essential that such changes be instituted by some *informal and unauthorized propositions*”, and that “as the plan to be framed and proposed was to be submitted to *the people themselves*, the disapprobation of this supreme authority would destroy it forever, its approbation blot out antecedent errors and irregularities.” (quoted by Ackerman in *Foundations*, *supra* note 6, at 173-74). Ackerman inferred that Madison had intended Article V to be non-exclusive. Most reviewers of *Foundations* were unconvinced, pointing out that Federalist No. 40 is hard to reconcile with other evidence of Madison’s views, which were quite fearful of mass democratic deliberation. (E.g. Suzanna Sherry, *The Ghost of Liberalism Past*, 105 Harv. L. Rev. 918, (1992)) Ackerman had promised to lay out his historical evidence in *Transformations*. Even before the publication of *Transformations*, though, there was considerable doubt that Ackerman would be able to pull this off. Kent Greenawalt, for example, stated “[a]waiting further clarification and evidence in subsequent volumes, I am now sceptical about such a view”. (Kent Greenawalt, *Dualism and Its Status*, 104 Ethics 480, 487 (1994)).

*Transformations*, after having presented his historical evidence, Ackerman tries to back away from his descriptive claim, in his analysis of the transformative opinions of the New Deal. In a remarkable passage, he states that he wants to move away from “the old and tired debate about the subjective motivations of the two Justices – Hughes and Roberts – who engineered the switch by forming a solid bloc with the three so-called liberals, Brandeis, Cardozo, and Stone. Unsurprisingly, the evidence on this matter is equivocal. But even if Roberts and Hughes had been apolitical legalists of legendary proportion, I could not care less....”<sup>60</sup> Since Ackerman cannot make this argument, this passage signals that something is amiss.

What is wrong, according to leading students of the Founding, Reconstruction, and the New Deal, is that Ackerman largely fails to make his historical case.<sup>61</sup> To be sure, Ackerman offers ample evidence of awareness among constitutional actors, especially during the Founding and the Reconstruction, that constitutional change was being achieved illegally (although not all constitutional actors conceded this point). But this is not enough. Ackerman *also* needs to provide evidence that constitutional actors were aware that they were working the gears of an *alternative* system of constitutional change.<sup>62</sup> Otherwise, all the evidence shows that is that constitutional actors self-consciously engaged in a legal revolution which they hoped would be ultimately accepted by constitutional actors as being legally effective (for example, as the American revolution had).

Consider one set of examples – the judicial acceptance of a non-Article V amendment through a “consolidating judgment”. Since courts must justify their decisions through reasoned opinions, we should expect to see an explicit acknowledgment of the higher lawmaking process. However, the evidence Ackerman offers is very weak. The first case in which the U.S. Supreme Court interpreted the Fourteenth Amendment was the *Slaughterhouse Cases*.<sup>63</sup> Ackerman rightly notes that although the Court was divided over the interpretation of the amendment, it was unanimous in accepting its validity. But this begs the question of the basis upon which the Court

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<sup>60</sup> *Transformations*, *supra* note 6, at 343.

<sup>61</sup> See Jack Rakove, Michael Les Benedict, Rogers Smith, William E. Leuchtenburg, and Stephen Griffin’s contributions to Symposium, *Moments of Change: Transformation in American Constitutionalism*, 108 Yale L.J. 1917 (1999).

<sup>62</sup> Rogers Smith, for example, criticizes Ackerman because his “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”. Rogers Smith, *Legitimizing Reconstruction: The Limits of Legalism*, 108 Yale L.J. 2039, 2056 (1999).

<sup>63</sup> 83 U.S. 36, (1873).

regarded the Fourteenth Amendment as valid. Ackerman rests his case on a single phrase in the majority judgment that refers to the Reconstruction amendments – “within the last eight years three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument”.<sup>64</sup> Ackerman claims that the passage is proof of judicial awareness of higher lawmaking, because the Court “speaks the unmediated language of popular sovereignty without trying to establish the amendments’ legal pedigree under Article Five”.<sup>65</sup> Admittedly, the passage is consistent with that view. However, it is consistent with another view as well – that Article V had been followed, and that the requisite degree of state and federal consent, through institutions accountable to the electorate, amounted to the adoption of the amendments by “the people” (even though such a view may be mistaken). Turning to the “consolidating” judgments of the New Deal, by Ackerman’s own account, those decisions contain no language that is capable of being interpreted as judicial acknowledgment of non-Article V constitutional amendments.<sup>66</sup> Indeed, Ackerman argues that the judgments deliberately created “an impression of substantial doctrinal continuity” which masked the “disequilibrium between revolutionary holdings and traditional dicta”,<sup>67</sup> and were followed up by judgments that did acknowledge the doctrinal revolution that had taken place.<sup>68</sup> But again, those later judgments did not refer to Ackerman’s higher lawmaking process.

And if we turn to the two cases that Ackerman discusses in which the Court has addressed the mechanisms of constitutional change directly – *Coleman v. Miller*<sup>69</sup> (on Article V) and *Casey v. Planned Parenthood*<sup>70</sup> (on overruling precedents in constitutional cases) – he fares no better. Although *Coleman* does discuss the coercion of state governments by the Reconstruction Congress to secure passage of the Fourteenth Amendment, and goes on to state that “[t]his decision by the political departments of the Government as to the validity of the

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<sup>64</sup> 83 U.S. 36, 67 (1873).

<sup>65</sup> Transformations, *supra* note 6, at 245.

<sup>66</sup> *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *NLRB v. Jones & Laughlin Steel*, 301 U.S. 58 (1937).

<sup>67</sup> Transformations, *supra* note 6, at 360.

<sup>68</sup> E.g., *United States v. Carolene Products*, 304 U.S. 144, (1938); *Erie Railroad v. Tompkins*, 304 U.S. 64, (1938).

<sup>69</sup> 307 U.S. 433, (1939).

<sup>70</sup> 505 U.S. 833, (1992).

adoption of the Fourteenth Amendment has been accepted”,<sup>71</sup> this language may be read in a number of different ways. The process surrounding the ratification of the Fourteenth Amendment may be simply an example that supports the narrow proposition emerging from the case, which was raised by the facts – that under Article V “the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question ... with the ultimate control in the Congress”.<sup>72</sup> Or even if *Coleman* can be read as referring to constitutional change in contravention of Article V, it does not follow that the judgment endorses higher lawmaking. The judgment can be read as no different from that of a common law court that accepts an unconstitutional regime change, for a variety of strategic and pragmatic reasons that have nothing to do with popular sovereignty or adherence to an alternative process of constitutional amendment. *Casey* does not assist Ackerman either. The *Casey* plurality explains the New Deal decisions overruling *Lochner*-era jurisprudence as flowing from a judicial assessment that the factual premises of laissez-faire constitutionalism were mistaken.<sup>73</sup> Higher lawmaking does not enter into its analysis at all. Oddly enough, Ackerman does not even attempt to read *Casey* as endorsing his higher lawmaking system, if only implicitly.

### **3. Rescuing Ackerman: Reinterpreting Constitutional Moments as Constitutional Failures**

So where does this leave us? Although his historical argument for his higher lawmaking system is unsuccessful, Ackerman’s major contribution is to place illegal moments of regime change at the centre of constitutional theory, as opposed to bracketing them through a process of constitutional amnesia and focussing instead on the operation of established constitutional orders under law. The existence of these moments, and the tension between their very existence and America’s self-description as an ongoing and continuous constitutional enterprise committed to constitutional legality has considerable comparative purchase, because the United States is not alone in attempting to grapple with extra-legal change under the trappings of constitutional legalism. This phenomenon raises a question that can be asked not just of the United States but of other jurisdictions as well, which Ackerman does not himself pose. Why did political actors act outside of normal constitutional processes to effect constitutional change, given the formal availability of constitutional amendment?

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<sup>71</sup> 307 U.S. 433, 449-450 (1939).

<sup>72</sup> 307 U.S. 433, 450 (1939).

<sup>73</sup> 505 U.S. 833, - 861-2 (1992).

Those of Ackerman's critics who accept his argument that American constitutional history contains important moments of legal discontinuity do not really address the question of why Article V was not complied with. Ackerman does not fare much better. One of the most puzzling features of *We the People* is that Ackerman never provides a sustained explanation of what factors drove American political institutions to implement dramatic constitutional change off the Article V track. However, if we re-read Ackerman carefully with this question in mind, we will see that he has answers, although at times his responses are unclear. The closest Ackerman comes is when he suggests that during the Reconstruction and the New Deal, America faced a "crisis" which Article V was an impediment to resolving:

At two of the greatest crises in their history, Americans faced the very grave risk of a false negative. If they chose to play punctiliously by the rules of Article Five, Reconstruction Republicans and New Deal Democrats confronted the clear and present danger that their long and successful struggle to mobilize the People for fundamental change would be legalistic nit-picking.<sup>74</sup>

The key to Ackerman's argument is the existence of a crisis. But to make this argument successfully, Ackerman needs to offer us a definition of the kind of crisis that America faced, and why Article V was thought to be incapable of addressing it. Here is what he says about the Reconstruction:

Without this kind of unconventional creativity, it is hard to see how Americans could have democratically transformed themselves from a decentralized Union of white men to a Nation of all races and creeds whose government—on both federal and state levels—is actively engaged in assuring a better life for all citizens.<sup>75</sup>

So Ackerman's answer may be as follows. Prior to Reconstruction, the people of the United States defined themselves as a people of white citizens whose membership in the American political community proceeded through their political status as citizens of the states, and who expressed their consent to constitutional change through state legislatures. The substantive constitutional changes wrought by the Reconstruction amendments marked a fundamental challenge to that very premise. But since the rules of Article V also reflected this original conception of political community, the disagreement occasioned by the Reconstruction amendments operated on two levels. There was a substantive constitutional disagreement over racial equality and the federal government's power to protect it. Moreover, that substantive disagreement also led to the breakdown of the rules governing constitutional change, because the

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<sup>74</sup> Transformations, *supra* note 6, at 29.

<sup>75</sup> *Id.* at 389.

existing rules reflected one of the competing, substantive conceptions of American political community on the table which the Reconstruction amendments sought to displace.

Understood this way, the crisis of Reconstruction involved a serious and profound constitutional breakdown, but of a particular sort. A basic ambition of constitutionalism is to channel political conflict that would otherwise spill into the streets, into institutions that operate peacefully according to law and which reach decisions which members of a political community accept as authoritative. In order to function properly, constitutionally-created institutions must operate according to rules of procedure which specify how institutional decisions are made. And for institutional decisions to produce political settlement, those institutions and their decision-making procedures must be viewed by political actors as standing outside the terrain of politics, as constituting and regulating political life and not forming part of it, as being indifferent among the competing political positions on the table. Were this not to be true – that is, were the mechanisms by which political disagreement is managed *themselves* subject to ongoing and constant political contestation in the course of their operation – it would be difficult for institutional settlement to translate into political settlement. Particular institutional decisions could always be challenged by shifting the political battlefield to a higher level, and arguing that the decision was illegitimate because the procedure by which it was arrived at was itself the proper subject of politics.

The rules for constitutional amendment, and their relationship to constitutional politics, can be conceptualized in an analogous way. Constitutional drafters may agree that for a variety of reasons – the possibility of future changes in the factual assumptions underlying constitutional design, the possibility that the lived experience of constitutionally-created institutions may differ from their expected performance, the potential for political values and identities to evolve, or an awareness that questions of institutional design are properly the subject of politics but only on special occasions – that constitutions should allow for the possibility of amendment. Thus, in addition to creating the procedural framework for normal politics, constitutions also create the procedural framework for constitutional politics. And for the rules of constitutional amendment to operate effectively, they must also be accepted as standing outside the terrain of substantive constitutional politics, as constituting and regulating constitutional politics and not forming part of it, and as being indifferent among the competing constitutional positions at play.

Now the problem with this highly simplified picture is that constitutionally created procedures – both for normal and constitutional politics – are far from substantively neutral themselves.

Rather, as Jeremy Waldron has argued, political procedures reflect competing conceptions of the



very sorts of values that are the bread-and-butter of both normal and constitutional politics.<sup>76</sup> In particular, by determining which individuals and communities can participate in political decision-making, and what role those individuals and communities play, decision-rules reflect controversial judgments about the locus of political sovereignty, by an extension, the very identity of a political community. So the boundary between substantive political disputes and the procedural frameworks within which those disputes play out is highly artificial. Liberal democratic constitutionalism depends, then, on the *suspension* of political judgment with respect to institutions and institutional decision-making procedures to purchase the prospect of political settlement. The entrenchment of decision-making procedures in many constitutions should accordingly be understood as one strategy for facilitating the suspension of political judgment. By increasing the transaction costs of changing those procedures, constitutional entrenchment renders such debates less attractive.

The suspension of political judgment with respect to political procedures will become most difficult to sustain at those moments when the substantive dispute challenges the very conception of political community that underlies the decision-making framework within which that debate occurs. Call these moments of *constitutive politics*. With respect to the rules of normal politics, the inability to maintain the boundary between substantive politics and political procedures will be to shift the terrain of disagreement up one level, from normal politics to constitutional politics, which in turn is regulated by its own set of procedures, the rules governing constitutional amendment. But if it becomes impossible to suspend political judgment regarding the procedures for constitutional amendment – that is, at moments of *constitutive constitutional politics* – there is no higher level to which the dispute can be shifted. Even if one designed a constitution to create a special set of rules to regulate amendments to the rules for constitutional amendment, the same problem might arise with respect to those rules. It is impossible to continue this strategy *ad infinitum*. And in the absence of agreed to procedures for constitutional decision-making, institutional settlement cannot yield political settlement. The result may be that the constitutional system itself may come tumbling down.

As I read Ackerman, he believes that the Reconstruction may have been such a case. I suspect that Ackerman would tell a similar story about the Founding – i.e., that the Articles of Confederation reflected a conception of political community that the Federalist Constitution directly challenged. Ackerman says as much:

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<sup>76</sup> Jeremy Waldron, *Judicial Review and the Conditions of Democracy*, 6 J. Pol. Phil. 54 (1998).

Begin with the basic problem that led the Federalists to their revolutionary break with the rules. The Federalists were the first, but not the last, to assert that the pre-existing system gave the states too much power to veto constitutional initiatives emerging from the center. While it is a mistake to view them as embracing the more emphatic nationalisms of Reconstruction Republicans or New Deal Democrats, *Federalists were espousing a vision of the Union that was relatively nationalistic for its time and place—nationalistic enough to make it impossible to enact through a system that gave so much power to the states.*<sup>77</sup>

It may very well be that two of Ackerman's constitutional moments are really best understood as moments of constitutional paralysis and failure, resulting from the inability of rules governing constitutional amendment to constitute and regulate moments of constitutive constitutional politics. This is a description that carries quite a different flavour than Ackerman's favourable description of constitutional moments as high constitutional politics marked by highly focussed and public minded mass political deliberation.

#### **D. Do Constitutional Moments Travel? The *Secession Reference***

##### **1. Constitutional Moments Reinterpreted: A Comparative Example**

Ackerman's constitutional moments, on my reinterpretation, consist of an extra-legal constitutional change, resorted to as a consequence of the failure of formal rules of constitutional amendment. Those rules fail in these circumstances because they reflect one of the competing, substantive constitutional positions that is the subject of constitutional politics. Because they are enmeshed in the constitutional dispute they purport to regulate, those rules become incapable of functioning as a framework for constituting constitutional politics; instead, they are drawn into constitutional politics and become part of it.

I think that this framework for constitutional moments can help us to make sense of one of what is simultaneously the most controversial, important, and puzzling constitutional episode in recent Canadian constitutional history -- the judgment of the Supreme Court of Canada in the *Secession Reference*. I will argue that although the Court purported to do otherwise, it amended the Canadian constitution under the guise of constitutional interpretation. Moreover, since the relevant rules confer the power of constitutional amendment on political institutions, the Court acted extra-legally. I will then turn to a discussion of the political circumstances which gave rise to the posing of the reference questions, as well as the ongoing political controversy surrounding the Canadian rules governing constitutional amendment. I will demonstrate that the procedures

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<sup>77</sup> Ackerman & Katyal, *supra* note 5 at 569 to 570 [italics added].

for constitutional amendment themselves reflected a substantive conception of the Canadian political community which the Quebec secession movement sought to challenge, and hence were drawn into constitutional politics and proved incapable of legally regulating the process of secession itself, including the adoption of procedures governing secession that would be acceptable to all parties. The Court's judgment must therefore be understood against the backdrop of constitutional failure – as an extra-level move the Court felt was made necessary by the breakdown of the procedures governing constitutional amendment.

## **2. The *Secession Reference* as Extra-Legal Constitutional Change**

The Supreme Court of Canada possesses an advisory jurisdiction, and in September, 1996, the federal government posed three questions to the Court that asked it to address aspects of the legal framework governing the secession of a province from the Canadian federation. The first of these questions asked if “[u]nder the Constitution of Canada ... the National Assembly, legislature or government of Quebec [could] effect the secession of Quebec from Canada unilaterally”. To explain how the Court was expected to answer question one, and why its answer was so surprising, it is important to understand what the question does and does not ask. Question one asks whether a province can secede from Canada “unilaterally”. Although the reference questions do not define what unilateral secession is, it was widely understood to mean the secession of a province without the consent of other Canadian governments. At the very least, this includes the federal government, but could also connote secession without the consent of the other provinces, or Quebec's aboriginal peoples, some of whom are legally ordered into self-governing communities.

If one turns to the provisions of the Canadian constitution governing provincial legislative and executive authority, neither is there a right for provinces to secede, nor can any of the relevant provisions be interpreted as conferring such a right.<sup>78</sup> Moreover, since the Canadian constitution creates the province of Quebec, defines its territory and borders, creates its legislative and executive branches, and confers limited areas of jurisdiction on them, the province of Quebec is a creature of the Canadian constitution, as opposed to a sovereign entity that pre-existed and survived the creation of the Canadian federation, and which retains inherent sovereignty.<sup>79</sup> The Canadian constitution also creates federal institutions, and confers limited authority on them that

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<sup>78</sup> Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, ss. 58-68, 92, 92A, 93, 94A and 94, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter Constitution Act, 1867].

<sup>79</sup> *Id.* ss. 5, 6, 58-63, 65-68, 71-80, 82-87.

extends to the entire country, including Quebec.<sup>80</sup> Finally, the constitution asserts its supremacy over the actions of both the federal and provincial governments.<sup>81</sup> The secession of Quebec would accordingly require a number of sweeping constitutional amendments that would authorize Quebec's governing institutions to effect the secession of the province and declare statehood, to transfer areas of existing federal jurisdiction to the province, and to terminate the legal authority of federal institutions over Quebec.

The debate over the right to unilateral secession therefore quickly turns into a problem of constitutional amendment. The rules for constitutional amendment in Canada are contained in Part V of the *Constitution Act, 1982*, which contains five different "amending formulas" applying to different categories of amendments.<sup>82</sup> All the amending formulas, save for one, absolutely require the consent of the federal government.<sup>83</sup> Only one amending formula permits provinces to amend the constitution unilaterally.<sup>84</sup> This provision applies to "the constitution of a province", a term which the constitution does not define, and whose meaning is a matter of some debate. Its core meaning includes matters internal to a province and its institutions and the prevailing view is that it would not extend to the structure and powers of federal institutions, and to the scope of provincial powers (such as a provincial right to secede), changes to both of which would be required to effect the secession of a province. So the answer to question one is "no" – under the Constitution of Canada, a province cannot secede unilaterally.

This relatively straight-forward outline for the judgment comes directly from the federal government's written and oral submissions, as well as those made by other parties to the case. Observers accordingly expected the Court to begin its analysis with the constitutional text, and to grapple with the relevant questions of textual interpretation much as the parties had done so. The only unpredictable aspect of the judgment was whether it would be relatively narrow or broad – a narrow judgment limiting itself to ruling on the inapplicability of the provincial unilateral procedure, a broader judgment addressing which other amending formulas would be engaged by secession.

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<sup>80</sup> *Id.* ss. 3, 4, 9-57, 91, 92(10), 92A(2), 94, 94A, 95, 96-101.

<sup>81</sup> Constitution Act, 1982, s. 52, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter Constitution Act, 1982].

<sup>82</sup> *Id.* ss. 38-47.

<sup>83</sup> *Id.* s. 45.

<sup>84</sup> *Id.*

But the judgment was dramatically different. The Court opened by signalling the importance of “underlying principles,” and stated that it was “not possible to answer the questions” without considering them.<sup>85</sup> The Court identified these principles on the basis of a lengthy review of the “historical context,”<sup>86</sup> which consisted of a selective account of the constitutional practice of Canadian governments since the founding of Canada in 1867. According to the Court, four principles characterize “the evolution of our constitutional arrangements”<sup>87</sup>: federalism, democracy, constitutionalism and the rule of law, and respect for minorities. The Court then applied these principles to develop the constitutional framework for secession. It set out this framework in the context of a referendum vote that was as “a clear expression by the people of Quebec of their will to secede from Canada”.<sup>88</sup> The Court clarified that a “clear” result must have two dimensions to it – that it “be free of ambiguity both in terms of the question asked and in terms of the support it achieves”<sup>89</sup> – i.e. with respect to the wording of the question and the degree of public support required for that question. The Court provided further detail on both dimensions. The question had to be “a clear question in favour of secession”.<sup>90</sup> The level of support required was “a clear majority of Quebecers”.<sup>91</sup> Taken together, this has come to be known as the requirement for “a clear majority on a clear question”.<sup>92</sup>

The Court noted that the Constitution was silent on referenda, and that “a referendum, in itself and without more, has not direct legal effect, and could not in itself bring about unilateral secession”.<sup>93</sup> But the Court then went to state that a referendum vote that met these criteria

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<sup>85</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217 at para. 1.

<sup>86</sup> *Id.* at para. 32.

<sup>87</sup> *Id.* at para. 48.

<sup>88</sup> *Id.* at para. 87. The Court also referred to a “clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province”, or “clear repudiation by the people of Quebec of the existing constitutional order”. *Id.* at para. 88.

<sup>89</sup> *Id.* at para. 87.

<sup>90</sup> *Id.* at para. 148. In another formulation, the Court stated that the question was one which asked Quebecers to indicate “that they no longer wish to remain in Canada”. *Id.* at 151.

<sup>91</sup> The Court also used other formulations: “the unambiguous expression of a clear majority of Quebecers” *Id.* at para. 104. Also see *id.* at para. 150: “a clear majority vote in Quebec”.

<sup>92</sup> *Id.* at para. 153. What constitutes a “clear majority” and a “clear question” has generated extensive commentary in the literature; I will not address it here.

<sup>93</sup> *Id.* at para. 87.

“would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire”.<sup>94</sup> This is the so-called “duty to negotiate”, which flows from the four constitutional principles, which the Court deployed to reject “two absolutist propositions”.<sup>95</sup> First, it rejected the view “that there would be a legal obligation on the other provinces and federal government to accede to the secession of a province, subject only to the logistical details of secession”,<sup>96</sup> i.e., that “Quebec could ... invoke a right of self-determination such as to dictate the terms of proposed secession to the other parties.”<sup>97</sup> But it also rejected “the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose no obligations upon the other provinces or the federal government.”<sup>98</sup> The Court rejected these propositions because each was based on one constitutional principle to the exclusion of the others. Thus, the first view (which had been advocated by some Quebec sovereignists) was mistaken because it invoked “[t]he democracy principle ... to trump the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole.”<sup>99</sup> The second view – which the Court did not attribute, but which had been advanced by hard-line federalists – “fails to give sufficient weight to underlying constitutional principles that must inform the amending process, including the principles of democracy and federalism”.<sup>100</sup> Thus, “once it is realized that none of the rights or principles under discussion is absolute to the exclusion of the others”, the Court arrived at the conclusion that “other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec’s rights, and similarly, that so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiation”.<sup>101</sup>

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<sup>94</sup> *Id.* at para. 88.

<sup>95</sup> *Id.* at para. 90.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at para. 91.

<sup>98</sup> *Id.* at para. 92.

<sup>99</sup> *Id.* at para. 91.

<sup>100</sup> *Id.* at para. 92.

<sup>101</sup> *Id.* at para. 93.

In addition to specifying that the vote of a clear majority on a clear question would trigger negotiations, the Court also addressed who the participants in such negotiations would be, and how negotiations must be conducted. The Court offers numerous statements on the parties, involving Quebec and shifting combinations of other parties – the federal government, the provinces, and other participants.<sup>102</sup> The Court said that the negotiations must be conducted “in accordance with the underlying constitutional principles already discussed”,<sup>103</sup> which seems to have two implications. First, it mandates that negotiators must take into account the four constitutional principles.<sup>104</sup> This kind of duty is procedural, and would require the negotiators to take these constitutional principles seriously, such that negotiations would be “principled”,<sup>105</sup> but would impose no constraints on the outcome of the negotiations. Second, the Court also seemed to suggest that the constitutional principles impose substantive restraints on the terms of whatever agreement is negotiated, when it said that “[t]he negotiation process ... would require the reconciliation of various rights and obligations”.<sup>106</sup>

The judgment was enormously surprising. It bore no relationship to the submissions of the parties and intervenors. The questions of the judges in the oral hearing offered no clue as to the unexpected direction of the Court’s judgment. Now to be sure, the Court was not bound to frame its judgment within the framework suggested by the parties, if it concluded that that framework was somehow mistaken or deficient in legal terms. But the judgment was surprising for another reason – because it departed from the standard manner in which Canadian courts approach questions of constitutional interpretation. In Canadian constitutional practice, the starting point of constitutional interpretation is the text of the Constitution. This is not to say that

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<sup>102</sup> (a) “the other provinces and the federal government” (*Id.* at paras. 88 and 151; also see *id.* at paras. 92 and 103); (b) Quebec, the federal government, the other provinces, and “other participants”; *id.* at para. 92; (c) Quebec and the other provincial governments, but perhaps not the federal government; (d) bilateral negotiations involving “the representatives of two legitimate majorities, namely the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be” – perhaps meaning the federal government, or potentially a joint federal-provincial negotiating team. (*Id.* at para. 93; also see *id.* at para. 152).

<sup>103</sup> *Id.* at para. 88.

<sup>104</sup> *Id.* at para. 90. Thus, the Court said, “[t]he negotiation process must be conducted with an eye to the constitutional principles”. *Id.* at para. 94.

<sup>105</sup> *Id.* at 104.

<sup>106</sup> *Id.* at para. 93; also see *id.* at paras. 101 and 153. The “reconciliation” of principles connotes that principles cannot override one another. As the Court said earlier in its reasons: “These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.” *Id.* at para. 49.

principles of substantive political morality – such as the constitutional principles identified and applied by the Court – do not play a role in constitutional argumentation. As Fred Schauer has persuasively argued, some constitutional provisions appear to incorporate principles of political morality "by reference," and therefore invite (but do not compel) courts to engage in the type of normative reasoning characteristic of moral and political philosophy.<sup>107</sup> This is true of many, if not most of the provisions of the *Canadian Charter of Rights and Freedoms*,<sup>108</sup> which has generated a jurisprudence in which abstract questions of political principle occupy centre-stage. But not all constitutional provisions are worded in this way. Setting to one side the inherent limitations of legal language to address factual situations that were unanticipated when that language was framed (the problem of open-texturedness), some provisions are relatively specific and precise, and have interpretive frames narrow enough to create a strong presumption against the recourse to normative reasoning. In the end, constitutional text plays a primary role in signalling interpretive style.<sup>109</sup>

Indeed, the Court in the *Secession Reference* itself offered this account of the relationship of the constitutional text and the “underlying principles” of the Canadian constitution, suggesting that this account reflected its own approach to constitutional interpretation. The Court suggested that the “principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based”.<sup>110</sup> The idea appears to be that the specific provisions of the constitutional text implement or actualize underlying principles which are abstract and general in nature. This view is supported by the Court’s statement that “[t]he principles dictate major elements of the architecture of the Constitution itself”.<sup>111</sup> Moreover, this conception of the relationship between principles and text suggests that the former could be used to interpret the latter, and to reconcile divergent or conflicting constitutional provisions, which the Court said as well.<sup>112</sup> But the Court cautioned that the recognition of underlying principles “could not be taken

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<sup>107</sup> Fred Schauer, *Constitutional Invocations*, 65 *Fordham L. Rev.* 1295, (1997).

<sup>108</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

<sup>109</sup> Fred Schauer, *Easy Cases*, 58 *S. Cal. L. Rev.* 399 (1985).

<sup>110</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217 at para. 49.

<sup>111</sup> *Id.* at para. 51.

<sup>112</sup> *Id.* at para. 52.



as an invitation to dispense with the written text of the Constitution”.<sup>113</sup> In other words, the text delimits constitutional interpretation, and principles on their own have no binding legal force.

So the question is whether we can make sense of the judgment’s reliance on unwritten constitutional principles as the application of constitutional principles to the construction of a constitutional text which permits or invites such an interpretive approach. Recall the Court’s central holding – that notwithstanding any constitutional provisions on referenda or secession, a vote by a clear majority of Quebecers in favour of a clear question on secession would trigger a duty to negotiate, that negotiating parties would have to take into account the four constitutional principles in attempting to negotiate secession, and that the resulting agreement would have to reconcile the four constitutional principles. I refer to this constitutional framework as the “secession clause”. Now unlike other federal constitutions,<sup>114</sup> the Canadian constitution lacks an express secession clause – it contains no provision regulating secession, either prohibiting it or permitting it under certain circumstances. To locate a textual hook for the Court’s judgment, we must look to elsewhere. Since the Court itself stated that secession could be achieved through constitutional amendment,<sup>115</sup> we should examine Part V. But when we read these constitutional provisions, it is difficult to find any basis for the Court’s interpretive moves. Consider, for example, the rule that the vote of clear majority in favour of a clear question on secession in a referendum would trigger negotiations. Under Part V, the initiating process for constitutional amendment is the passage of a resolution by a provincial legislative assembly or Parliament.<sup>116</sup> A referendum in itself is of no constitutional significance in commencing the amendment process. To be sure, provinces and the federal government may opt to rely on referenda as part of the process of constitutional amendment. Some provinces have enacted legislation prohibiting the tabling of resolutions for constitutional amendments before legislative assemblies without prior approval of those amendments in a province-wide referendum.<sup>117</sup> But a political choice to weave referenda into the amendment process, and legislation pre-committing future governments to hold referenda for constitutional amendments, are altogether different from reading referenda into Part V as an alternative constitutional mechanism for initiating the process of constitutional revision.

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<sup>113</sup> *Id.* at para. 53.

<sup>114</sup> For a careful review, see Patrick Monahan, *Coming to Terms with Plan B: Ten Principles Governing Secession* (C.D. Howe Institute 1996).

<sup>115</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217 at para. 84.

<sup>116</sup> Constitution Act, 1982, *supra* note 76, s. 46.

<sup>117</sup> See for, e.g., Alberta’s Constitutional Referendum Act, R.S.A. 2000, c. C-25.

Not surprisingly, the weak connection between the constitutional principles and the constitutional text was acknowledged by the Court itself, for in addition to its account of constitutional principles as interpretive aids, the Court offered an alternative account of the role they play in constitutional interpretation. Thus, it stated that principles themselves “in certain circumstances give rise to substantive legal obligations ... which constitute substantive limitations upon government action”; these obligations could be either “very abstract or general” or “more specific and precise” – like a constitutional text. And the Court quoted, with approval, from an earlier judgment in which the Court had stated that in the course of constitutional adjudication, it could fill “gaps in the express terms of the constitutional text”.<sup>118</sup> Thus, principles could be used not merely to interpret the constitutional text, but also to supplement it. The question then arises of when the Court would do this. The idea of gap-filling appears to be supported by a statement earlier in the Court’s reasoning, where it posited that problems might arise “which are not expressly dealt with by the text of the Constitution” and that “[i]n order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government”.<sup>119</sup>

So if there is any doubt as to whether the Court approached the task of constitutional interpretation rather differently from its normal practice in the *Secession Reference*, the Court’s own depiction of its interpretive methodology – i.e. the filling of gaps in the constitutional text through the use of constitutional principles, as opposed to the use of those principles when invited by textual cues, to interpret constitutional provisions – should put an end to these reservations. And it is equally clear that the Court relied on this conception of the role of underlying principles in constitutional adjudication, because the Court added new rules governing secession that were not present in the text but which were rather specific. What must be acknowledged – and what the Court came very close to saying itself – is that the Court wrote a secession clause into the Canadian constitution through the use of unwritten constitutional principles.

However, the major problem with “gap-filling” through judicial interpretation is that the Canadian constitution itself sets up a process for filling constitutional gaps, whether perceived or actual – the process of constitutional amendment in Part V. The relevant actors in Part V are provincial legislative assemblies, the Senate, the House of Commons, the Governor General, Parliament, and provincial legislatures. Notably absent from this lengthy list of constitutional

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<sup>118</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217 at para. 53 (quoting Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 at para. 104).

<sup>119</sup> *Id.* at para. 32.

actors are courts, which are granted no formal role at any stage of constitutional amendment. Now to be sure, the courts may be called upon to interpret Part V, but that kind of role is far from the power to initiate, let alone make, a constitutional amendment. The challenge which Part V poses to the Court in the *Secession Reference* is why it did not permit the political actors to effect an amendment to the Constitution, and instead engaged in amendment-like interpretation itself.

In making an analytical distinction between constitutional interpretation and constitutional amendment, each a distinct constitutional process involving a different set of institutional actors under the Canadian constitutional system, I do not mean to deny an important role for constitutional interpretation as a mechanism of constitutional change. That would be a serious mistake, since Canadian courts have been an important source of constitutional adaptation over time that has enabled the Canadian constitution to keep track with massive economic, social and political change without formal amendment,<sup>120</sup> much like courts in the United States.<sup>121</sup> Moreover, formal constitutional amendments – both successful and unsuccessful – have been framed as direct responses to judicial interpretations of the constitution,<sup>122</sup> which illustrates that the two can operate as functional equivalents, and that the space between amendment and interpretation can be very small indeed.

However, to accept that courts have served as important engines of constitutional change and adaptation should not obscure the fact that constitutional interpretation functions within important limits that inhere in the very nature of the judicial process. The most significant of these is the incremental nature of legal change which occurs according to the common law method of constitutional interpretation. Although changes may accrete over time through the development of constitutional doctrine, and cumulatively move the meaning of constitutional provisions a significant extent away from its origins, these changes are nonetheless different in degree from the kind of sweeping constitutional revision possible by formal constitutional amendment. The change to the Canadian constitution worked by the *Secession Reference* was

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<sup>120</sup> Stephen A. Scott, *The Canadian Constitutional Amendment Process: Mechanisms and Prospects* in *Recurring Issues in Canadian Federalism* 77, 77-78 (Claire Beckton & A. Wayne Mackay eds., University of Toronto Press 1986).

<sup>121</sup> David Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv. L. Rev. 1457 (2001). For a contrasting view, see Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law* (unpublished). For an interesting discussion, see Sandy Levinson, *How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27* in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, *supra* note 37, 13.

<sup>122</sup> For example, in Canada, section 91(2A) of the Constitution Act, 1867, *supra* note 73 and in the United States, U.S. Const. amend. XVI.

enough of a departure from the existing constitutional position to be much more like a formal constitutional amendment than a narrow court judgment. And so the question remains – why did the Court assert and exercise a power of constitutional amendment that the Canadian constitution expressly vests in a set of institutions that does not include the courts? Why did the Court engage in extra-legal constitutional change, one of the defining features of Ackerman’s constitutional moments?

### **3. The Constitutional Failure of the Canadian Amending Formulas**

The Supreme Court of Canada behaved the way it did because of the failure of the processes of constitutional amendment spelled out in the Canadian constitution. This explanation is analogous to how during the Reconstruction, the rules in Article V were unable to regulate constitutional politics, because they reflected a conception of the American political community which was itself challenged by the Reconstruction amendments, and hence were unable to regulate constitutional change. I argue that a parallel dynamic took place in Canada in the mid-1990’s. An important preoccupation of Canadian constitutional politics has been the process of constitutional amendment itself, driven by awareness that rules regarding constitutional amendment reflect the ultimate locus of political sovereignty, and accordingly mirror a conception of what Canada is. In the context of Quebec’s secession from Canada, the applicable rules of constitutional amendment embodied the very conception of Canada that Quebec secessionists sought to challenge. For that reason, they failed in performing their basic function of standing outside of constitutional politics and regulating and constituting that potential constitutional change, and were drawn into it.

An important theme in Canadian constitutional history has been the search for an amending procedure in which some combination of Canadian political actors would hold the power to amend the Canadian constitution. This search was driven by the absence of a procedure for constitutional amendment in the *Constitution Act, 1867*,<sup>123</sup> the constitutional document which created the Canadian federation. Because the 1867 Constitution is an ordinary British statute, the power of amendment, by default, rested with the Imperial Parliament, which made twenty-two amendments over more than a century.<sup>124</sup> Accordingly, the development of an amending

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<sup>123</sup> *Supra* note 73.

<sup>124</sup> See, James Hurley, *Amending Canada’s Constitution: History, Processes, Problems and Prospects*, (Canada Communications Group 1996).

procedure necessarily entitled bringing the Canadian constitution “home” from Britain – a project of constitutional “patriation”, a term popularized by Pierre Trudeau.<sup>125</sup>

For as long as the formal practical power of constitutional amendment rested outside of Canada, Canadian sovereignty was regarded as being incomplete. Until the end of the First World War, this did not pose any great problem, as Canada understood itself as possessing internal powers of self-government, with international relations handled by Britain. However, as Canada attained independence, the lack of a domestic amending formula became a constitutional anomaly. What thrust the issue onto Canada’s political agenda was the Balfour Declaration of 1926, which formally recognized Canada’s statehood.<sup>126</sup> The end of Canada’s colonial status required that Canadian governments come to some agreement on the shape of a domestic amending procedure. However, an agreement did not occur until 1981 – and even then, was not unanimous.<sup>127</sup>

Because of the curious constitutional dynamic created by Canada’s incomplete constitution and its gradual evolution to statehood, Canadian constitutional politics were driven by the search for a domestic amending formula for over fifty years, as much as they were by proposals for substantive changes to Canada’s federal structure. This proved to be an enormously difficult task. In order to shift ultimate sovereignty back to Canada, Canadian political actors had to agree where the locus of sovereignty should lie, or more accurately, who the constituent actors in a domestic amending procedure should be – the federal government, provincial governments, the national population, or various provincial populations. Answering this question, in turn, required political actors to grapple with the basic question of what the terms of political association in Canada were – that is, the very nature of the Canadian political community. But on that basic question, there was a lack of consensus. The constitutional politics of constitutional amendment accordingly took place on two levels. On the one hand, it was intimately concerned with practical questions of constitutional design, focusing on the consequences of alternative options. On the other hand, it was a symbolic politics, a terrain for a struggle over the meaning of the country. Canada’s failure to secure agreement on a procedure to amend its constitutional

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<sup>125</sup> Roy Romanow, John Whyte, Howard Leeson, *Canada ... Notwithstanding: The Making of the Constitution, 1976-1982* (Carswell/Methuen, 1984).

<sup>126</sup> The Balfour Declaration stated that Canada and Britain were “equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs”. Cmnd 2768 in *Sessional Papers* (1926).

<sup>127</sup> In the interim, the power of constitutional amendment rested with Britain. Even in the *Statute of Westminster* enacted in 1931, whereby the Imperial Parliament formally “terminated” its power to legislate for Canada and thereby recognized Canada’s political independence, an exception was made for amendments to the Canadian constitution. *Statute of Westminster, 1931* (U.K.) 22 Geo. V, c. 4.

amendment can therefore be understood, as Peter Russell has argued, as the consequence of conflicting national narratives that illustrated how Canadians had not yet constituted themselves as a sovereign people.<sup>128</sup>

The inextricable link between the constitutional politics of process and substantive constitutional politics serves as backdrop through which to understand the failure of Part V to regulate constitutional politics of secession in the mid 1990's. Quebec was a central player in the constitutional politics of constitutional amendment from 1927 to the early 1990's, and throughout pushed for a constitutional veto, informed by a vision of the Canadian political community and its place in it. But as Peter Oliver has explained, Quebec's self-understanding changed over time.<sup>129</sup> Initially, Quebec invoked the "compact theory" of Confederation, which imagined the Canadian constitution as a contract or treaty among the original federating colonies. Accordingly, the Canadian constitution could only be changed with the consent of the parties, which translated into provincial vetoes on constitutional amendment for every province including Quebec. The scope of provincial vetoes extended beyond the federal-provincial division of powers to the shape and structure of federal institutions, which were designed to protect important provincial interests. Quebec eventually shifted away from the compact theory, for two reasons. Although other provinces initially supported Quebec in advancing the compact theory, beginning in 1950, they became willing to adopt procedures for constitutional amendment that would permit constitutional change without unanimous provincial consent. Second, the requirement for provincial unanimity built into the compact theory threatened to thwart Quebec's evolving constitutional agenda, which changed shape in the 1960's from defending its constitutional position against erosion to expanding its areas of jurisdiction. Quebec responded by formulating the "two nations" theory of Canadian federalism, which views Canada as a contract or treaty between two founding peoples, English and French, whose consent was required for constitutional changes. Quebec was the sole representative of French Canadians, which granted it a veto. By contrast, since the other provinces collectively spoke for English Canadians, no other province possessed a veto.

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<sup>128</sup> Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (2<sup>nd</sup> ed. University of Toronto Press 1993).

<sup>129</sup> Peter Oliver, *Canada, Quebec, and Constitutional Amendment*, 49 U.T.L.J. 519 (1999). Also see Peter Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press 2005).

It is against this background that one has to read the events of 1981 surrounding the adoption of the amending formulas. The current amending procedures spelled out in Part V were adopted as part of a package of constitutional amendments agreed to by the federal government and the nine provinces other than Quebec. Prior to this agreement, Quebec had indicated its willingness to abandon its claim for a constitutional veto in exchange for the right to opt out of any future constitutional amendments transferring provincial powers to the federal government with full financial compensation. Quebec rejected the 1981 amendments, because it contained only a narrow right of compensation for educational and cultural matters. But the debate quickly turned to process. Although as a legal matter, the power of amendment rested with the Imperial Parliament, a pair of constitutional conventions had developed, in the absence of a domestic amending formula, to condition the exercise of this formal legal power.<sup>130</sup> First, constitutional amendments would only be made by the Imperial Parliament upon the request of the federal government. Second, the federal government would not transmit requests to Britain to amend the Canadian constitution without a “substantial” degree of provincial consent. Quebec argued that the convention of a substantial degree of provincial consent actually required unanimous provincial consent, on the basis of the compact theory, and that there was an additional constitutional convention granting Quebec a veto, because of the two nations theory of Canada.<sup>131</sup>

Quebec first made these arguments directly to the federal government, which rejected them, and after that to the British government, which declined to intervene. Faced with its failure in politics, Quebec turned to the courts, which rejected the existence of these conventions. Quebec’s official response was bitter. It refused to concede any ground on the substantive visions of Canada it had advanced in framing its objections to the substance of the 1982 amendments. And furthermore, because the process whereby the 1982 constitutional amendments was described by Quebec as a breach of the *existing* constitutional norms governing constitutional amendment, it viewed both the federal government’s conduct and the Court’s judgment as unconstitutional, setting the stage for later arguments by Quebec that it was not bound by the rules governing constitutional change spelled out in Part V.

The historical background to the adoption of the procedures for constitutional amendment illustrates how they were perceived in Quebec as being far from neutral. Rather, they were viewed as having been adopted in contravention of existing constitutional norms which reflected Quebec’s proper constitutional status, and as reflecting and entrenching a substantive vision of

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<sup>130</sup> Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753.

<sup>131</sup> See, generally, *Documents Relating to the Constitution Act, 1982*, 30 McGill L.J. 645, (1984/85).

Canada which was incompatible with Quebec's sense of itself in the Canadian federation. As a direct consequence the suspension of political judgment necessary for decisions made under the rules for constitutional amendment in Canada to produce political settlement was no longer possible. Part V had become part of constitutional politics and would not be able to perform its regulative function to constrain and channel constitutional politics in those instances where its decision-rules were perceived as openly favouring one side in constitutional debate. To be sure, this would not necessarily be true of each and every constitutional amendment, because not every question of constitutional politics raised existential issues that go to the very nature of the political community. However, in those cases which did, one would expect important political actors openly putting Part V to one side.

This is precisely what happened during the constitutional politics of secession, from 1994 to 1998. The substantive question was whether Quebec should remain part of Canada, or become an independent state, potentially re-associated with Canada in an economic and political partnership based on sovereign equality. However, equally important was the process whereby Quebec intended to determine its constitutional status. Quebec had enacted referendum legislation which clearly contemplated that referenda are strictly consultative, and non-binding.<sup>132</sup> A positive referendum vote in favour of sovereignty would not purport to effect a change in Quebec's constitutional status. However, the referendum question asked Quebecers whether "Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political Partnership, within the scope of the Bill respecting the future of Quebec...?"<sup>133</sup> The Bill referred to is Bill 1, *An Act respecting the future of Quebec*.<sup>134</sup> Bill 1 was introduced in the Quebec National Assembly in September 1995. The key provision is section 1, which would have authorized the National Assembly "to proclaim the sovereignty of Quebec". Given that federalism is a system of dual sovereignty, a declaration of sovereignty may have been nothing more than an assertion of Quebec's existing powers under the Canadian constitution. But section 2 clarified that upon the proclamation of sovereignty, "Quebec shall become a sovereign country", and set out the well-established incidents of sovereignty as belonging to an independent Quebec – "the exclusive power to pass all its laws, levy all its taxes and conclude all its treaties." The text of the declaration of sovereignty was set out in the

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<sup>132</sup> An act respecting the process for determining the political and constitutional future of Québec, S.Q. 1991, c. 34.

<sup>133</sup> Motion introducing the referendum question, presented by Premier Jacques Parizeau to the National Assembly of Quebec, 7 September 1995.

<sup>134</sup> Bill 1, *An Act Respecting the Future of Québec*, 1st Sess., 35th Leg., Quebec, 1995.



preamble, and concluded with the words “Québec is a sovereign country”. Sovereignty meant Quebec’s departure from the Canadian federation.

Although Bill 1 did not give any juridical effect to a referendum vote, the political implication was that a positive vote would set in train a process that would lead to a unilateral declaration of independence by Quebec within a year. Bill 1 made no pretence to proceeding through Part V, and contemplated instead that Quebec would become independent outside the existing constitutional framework, through a legal revolution. The constitutional implications of Bill 1 became very clear in a constitutional challenge launched in the Quebec Superior Court slightly before the Quebec referendum to the precursor to Bill 1, the Draft Bill on Sovereignty,<sup>135</sup> on the basis that it would attempt to achieve the secession of Quebec from Canada without relying on the procedures for constitutional amendment. Quebec filed a motion to dismiss which responded directly to this constitutional argument, by asserting that “the will of people is the foundation of the authority of public power”.<sup>136</sup> The constitutional theory at work here is the one I described earlier, which holds that the rule of recognition of a constitutional order is a sociological fact which is neither valid nor invalid, but instead, simply exists, regardless of *how* this basic political fact arose -- through legal mechanisms, or a violent or velvet revolution. Accordingly, the Quebec government, and many of the Quebec elite – including federalists committed to Quebec remaining within Canada – viewed Quebec’s accession to independence, and the termination of the sovereignty of the Canadian state over Quebec, as originating from the democratic will of Quebecers as expressed in a referendum vote in favour of independence, followed by a declaration of sovereignty – an expression of political will that would operate to change the locus of sovereignty, and to which the law would have to adapt.

The Quebec Superior Court denied the motion to dismiss the constitutional challenge, stating that “[t]he menace that the government of Quebec would pose to the political institutions of the Canadian federation is a serious question, which is by its nature justiciable with respect to the Constitution of Canada”.<sup>137</sup> In response Quebec took the unprecedented step of withdrawing from the proceedings.<sup>138</sup> The message sent by Quebec was direct and clear – it refused to accept the authority of the Canadian courts and the Canadian constitution over Quebec’s potential

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<sup>135</sup> Draft Bill, *An Act Respecting the Sovereignty of Quebec*, 1st Sess., 35th Leg., Quebec, 1994.

<sup>136</sup> Motion of Attorney General of Quebec to dismiss Mr. Bertrand’s motion for interlocutory measures, *Bertrand v. Bégin* (24 August 1995) Québec 200-05-002117-955 (Sup. Ct.) [my translation].

<sup>137</sup> *Bertrand v. Quebec (Procureur General)*, [1995] J.Q. no 2484 at para. 8 [my translation].

<sup>138</sup> *Bertrand v. Quebec (Procureur General)* (1995), 127 D.L.R. (4<sup>th</sup>) 408 at 417 (Que. S.C.).

independence. The court ultimately ruled that the actions undertaken by the Quebec government, and the procedure describe in the Bill, would lead Quebec to issue a universal declaration of independence (UDI) without first securing a constitutional amendment, and “would result in a break in continuity in the legal order, which is manifestly contrary to the Constitution of Canada”.<sup>139</sup> The Attorney General of Quebec stated in a press conference in response to the court’s ruling that a UDI would not and need not conform with the Canadian constitution, because “the effect of a yes vote would be a rupture with the Canadian constitution ... Quebec will have become a nation”.<sup>140</sup>

Quebec did not expressly state why it refused to work within the framework of Part V. But the answer becomes clear if we identify the substantive conception of Canada that Part V embodies, and Quebec’s place in it. Part V imagines Quebec as a constituent component of the Canadian federation, as a sub-national political community with extensive but limited rights of self-government within Canada. It is a constitutionally recognized actor in the process of constitutional amendment with the power to consent to constitutional amendments, but whose consent is not absolutely required in all circumstances. This vision was at odds with both the two nations and compact theories of Canada, which both granted Quebec a veto over constitutional change.

Moreover, after 1982, in Quebec, the right to self-determination became a corollary of a constitutional veto over modifications to the Canadian federation, including the right for Quebec to freely determine its political and legal status. Although the right to secede does not necessarily follow from the right to veto, in the wake of Quebec’s objections to the process surrounding the adoption of the 1982 constitutional amendments, it was understood by many of Quebec’s elite in this way. The right to veto had been grounded in a theory of the Canadian federation that recognized Quebec as a founding partner, and a breach of those original understandings was thought to be so fundamental that it allowed Quebec to treat those arrangements as a nullity and to exit the constitutional order if it chose to. As a consequence, Part V was not perceived as providing a neutral framework within which Quebecers could engage in collective political choice over their future political status, because it reflected a Quebec constituted by, embedded in and restrained by the Canadian constitutional order. Not surprisingly, Part V was drawn into substantive constitutional politics.

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<sup>139</sup> *Id.* at 428.

<sup>140</sup> Press Conference with Paul Bégin, Attorney General of Quebec, (8 September 1995).

The constitutional failure of Part V becomes even clearer if we examine the federal stance on the applicability of the amending provisions to the secession of Quebec during the 1995 referendum. From the outset of the campaign, the federal government deliberately chose to focus on the substantive question of whether Quebec should remain within Canada, and not on the procedural issue of how secession would occur. It absolutely refused to launch and to be drawn into debates regarding the constitutional framework governing the secession of a province from the Canadian federation. Thus, the federal government made a conscious decision to not constitutionally question the Draft Bill on Sovereignty, which authorized the National Assembly to issue a unilateral declaration of independence in clear contravention of Part V. Moreover, when presented with public requests by individuals and groups in Quebec that it refer the Draft Bill to the Supreme Court of Canada for its constitutional opinion, it refused. Once constitutional litigation had been launched, the federal government chose to not intervene in the pre-referendum litigation, notwithstanding that the case raised basic questions regarding the survival of the Canadian constitutional order.

The decision to not raise constitutional issues, either in the courts or through public debate, was a political judgment by the federal government that the political costs of doing so outweighed the possible benefits. One concern was that by spelling out the procedure for secession under Part V, the federal government would make secession more likely to happen. But another reason was the fear that any discussion of legal issues would be interpreted as a threat to use the constitution to stand in the way of Quebecers' right to self-determination, and would be seen as an attempt to intimidate Quebecers.<sup>141</sup> Moreover, it was understood that the fact that the law in question was Part V would make matters even worse. Quebec elites persistently invoked the history of the 1982 constitutional amendments, focusing both on the process surrounding their adoption, as well as the substance of their terms.<sup>142</sup> An additional layer of complexity was added

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<sup>141</sup> In a personal interview in November 2003, then Justice Minister Alan Rock described such an approach as “méchant, legalistic, having abandoned the high ground of arguing for Canada, retreating to a legalistic, technical defence of the country, you would be seen as threatening ...”. Interview with Alan Rock in Ottawa, Ontario (3 November 2003). A senior federal official who was heavily involved in the secession file for several years likewise said that raising the constitutional issues would have been understood by Quebecers as an attempt to “put them on their backs ... get them irritated, get them upset, humiliate them”, and that “[n]o body wants to say anything about these things and I say for good reason, because the polls were such that the No forces were in the lead, [and] negative statements like this simply might cause Quebecers to react”. Interview with Senior Official in Ottawa, Ontario (6 November 2003).

<sup>142</sup> As a senior federal official said to me in an interview: “we had the *Constitution Act* of 1982 that set out the amending formulae and the first issue in relation to secession against ... was that secession can be done but it requires a constitutional amendment. Well that means you are back in the amending formulae and Quebec is saying that well the *Constitution Act* of 1982 is illegitimate.” *Id.*

by Prime Minister Chrétien's close personal and political link with the 1982 constitutional process. Chrétien was the federal minister of justice under Pierre Trudeau during the early 1980's, and was pivotal in negotiating the constitutional agreement among the federal government and nine provinces, including Part V, which Quebec rejected.<sup>143</sup>

In addition, it is arguable that federal political actors did not raise the constitutional issue because they may have even concluded that legal processes, including Part V, could not restrain and regulate the constitutional politics of secession in the event of an attempt by Quebec to secede unilaterally. In a widely discussed and unscripted set of remarks shortly after the release of the text of the Draft Bill on Sovereignty, the federal Minister of Justice acknowledged "[c]learly, there exists no provision in Canada's constitution" for Quebec to unilaterally secede from Canada, but went on to say:

But I wonder whether that's the real question now ... Is everyone interested in these technical details? ... To my mind, it's not constitutional [for a province to secede unilaterally] ... But that's a technical question. The real question is for Quebecers, in a referendum. ... It's possible to have a debate on the constitutionality of (Parizeau's) draft legislation - a very interesting (debate) for lawyers - but what matters more is the will of Quebecers.<sup>144</sup>

Although Rock was publicly corrected by the Prime Minister,<sup>145</sup> the fact that the federal Minister of Justice would voice such a view suggests that within some quarters of the federal government, there was very early on an understanding that Part V would operate in the secession context. A similar incident took place shortly before the hearing, when the federal Minister of Justice stated in a newspaper interview that "the existing constitutional framework" might not apply in the event of a yes vote.<sup>146</sup> This position flatly contradicted the federal argument. During the hearing, the Court asked the federal government's lawyers to explain this comment. Chief counsel actually at first suggested that in the event of the unworkability of secession under Part V, "the Government of Canada would not stand in the way of a clear expression by the majority of

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<sup>143</sup> As the senior official explained, "[t]he current Prime Minister ... is also the Prime Minister who was the Minister of Justice at the time of patriation, so there are photos of him smiling and laughing with Trudeau and so on as the thing as going through". *Id.*

<sup>144</sup> Paul Wells & Philip Authier, *Sovereignty Law Illegal, Rock Says*, *Montreal Gazette*, 16 December 1994, at A1.

<sup>145</sup> Jim Brown, *Not Our Job to Negotiate Split: PM*, *Montreal Gazette*, 20 December 1994, at A20.

<sup>146</sup> As quoted by Chief Justice Lamer in his question to counsel for the Attorney General of Canada in oral hearing of the Reference re Secession of Quebec (Reference re Secession of Quebec, Transcription of Cassettes, 19 February 1998, p. 4).

Quebecers, a clear expression of its wish to secede from Canada”<sup>147</sup> – suggesting that Part V could be put to one side.

Finally, the desire not to refer to Part V by name continues in the judgment of the Court itself. Before setting out the secession clause, the Court accepted that secession could be achieved through constitutional amendment.<sup>148</sup> But this did not address the constitutionality of *unilateral* secession by Quebec. There were two possible ways for the Court to address *this* issue, which both required the Court to grapple with Part V. One way to justify this conclusion would have been to specify which amendments would be required, to consider the relevant amending formulas, and to determine whether any of these required the consent of the federal government. However, the Court did not follow this route. Beyond stating that the amendments required “could be radical and extensive”<sup>149</sup> the Court did not suggest what specific amendments would be required. The other avenue open to the Court would have been to look at the one amending formula that allows unilateral constitutional amendment by a province, and to ask whether the internal limits of that provision rendered it inapplicable to secession. However, the Court failed to avert to the mere existence of the provincial unanimity formula, let alone attempt to interpret its scope to rule out the constitutionality of unilateral secession.

Indeed, aside from failing to enumerate and interpret the provisions of Part V, the judgment does not even refer to the existence of Part V. This may have been a political judgment on its part, reflecting the perceived illegitimacy of Part V in Quebec. Had the Court framed its analysis of the constitutionality of unilateral secession around Part V, it could have deepened and prolonged the country’s constitutional crisis, because a principal political actor – the government of Quebec – would likely have refused to comply with it. By exposing Part V to political criticism by Quebec, it might have further damaged it, by drawing it into the very centre of constitutional politics. And unsurprisingly, the Court held that unilateral secession would be unconstitutional, not because it would contravene Part V, but because it would contravene constitutional principles – it would invoke “[t]he democracy principle ... to trump the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole.”<sup>150</sup>

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<sup>147</sup> *Ibid.* at p. 9.

<sup>148</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217 at paras. 86-88.

<sup>149</sup> *Id.* at para. 84.

<sup>150</sup> *Id.* at para. 91.

For the judgment to count as a component of a constitutional moment, we must link the failure of Part V to the Court's move to *change* the Canadian constitution through extra-legal means – explaining the latter as a function of the former. Part V was not only incapable of constituting the constitutional politics of secession in its current form, and governing the process of Quebec's departure from Canada. It was also incapable of being deployed by political actors to enact amendments to the Canadian constitution that would have added procedures designed to channel secessionist impulses into a process more likely to be followed by the relevant parties in the event of a future sovereignty referendum than the existing constitutional framework.

It is not hard to understand why. A round of constitutional politics focusing on the constitutional regulation of the process of secession, much like constitutional negotiations focused on the actual secession of Quebec itself, would have raised existential questions regarding the basic terms of political association of the Canadian political community. Although Canada has never had such a round of constitutional politics, any of the plausible alternatives that parties would have raised would themselves have reflected an understanding of the very nature of the Canadian federation. For example, a constitutional ban on secession arguably reflects a political theory which holds that the entire territory of country belongs to all of its citizens equally, and therefore, that those citizens occupying a particular portion of the national territory would be violating the rights of fellow citizens through unilateral secession. Conversely, a constitutional right to secede could be premised on exactly the opposite view – for example, and Daniel Philpott has written, that since membership in a political community is voluntary, it must also include the right to withdraw from an existing political community and to construct a new one, and that for this right to be meaningful, it must encompass the right to a territory over which to exercise political control.<sup>151</sup> Alternatively, a right to secede grounded in a theory of Canada as a multinational federation, with its constituent communities retaining the right to withdraw from the federal pact – would also reflect a concept of the Canadian political community.<sup>152</sup> In short, parallel to how the rules governing constitutional change reflect a vision of the ultimate locus of political sovereignty in a political community, so do the rules governing constitutional exit. And so a debate over what rules to adopt governing secession would also have drawn into question Part V, which reflected one of the substantive conceptions on the table, rendering it incapable of providing a framework within which such a constitutional change could be debated.

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<sup>151</sup> Daniel Philpott, *In Defence of Self-Determination* 105 *Ethics* 352 (1995).

<sup>152</sup> As described by Will Kymlicka in *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* 113-114 (Oxford University Press 2001)

### **E. Moving Forward: Constitutional Moments in Comparative Perspective**

At the outset, I suggested that the reinterpretation of constitutional moments as extra-legal responses to constitutional failure, serves a number of intellectual projects. It assists us in better understanding what is at the core of Ackerman's account of extra-legal changes to the American constitutional order. It defines the comparative constitutional research agenda of identifying and better understanding similar episodes of extra-legal change in other legal systems. It brings the two halves of Ackerman's constitutional scholarship together, potentially yielding further dividends for the understanding of American constitutional development through comparative constitutional scholarship. Finally, it extends Ackerman's work on constitutional design to encompass rules for constitutional amendment, and suggests that they may have limited ability to constrain constitutional politics that concerns constitutive questions going to the very identity of a political community. By way of conclusion, I address each of these points in turn.

Ackerman reframes constitutional theory around the following problem: America's constitutional development contains many examples of fundamental, dramatic constitutional change that appear to have occurred outside the textually-prescribed procedures for constitutional amendment. Constitutional theory must therefore come to terms with illegal constitutional change – why and how it has occurred, and what challenges, if any, it poses for the legitimacy of the contemporary American constitutional order. Although his descriptive account of higher lawmaking is unsuccessful, Ackerman deserves credit for posing the right question.

Moreover, a careful analysis of Ackerman's account of the Reconstruction and the Founding suggests that he believes that constitutional moments are actually instances of constitutional failure, marked by the inability of the formal rules of constitutional amendment to provide a procedural framework for constitutional change at moments of constitutive constitutional politics. For the rules of constitutional amendment to operate effectively, they must also be accepted as standing outside the terrain of substantive constitutional politics, as constituting and regulating constitutional politics and not forming part of it. However, rules of constitutional amendment are not substantively neutral, since determining which individuals and communities can participate in constitutional change reflects controversial judgments about the locus of political sovereignty. Constitutional politics accordingly depends on the suspension of political judgment toward the rules of constitutional amendment. However, that suspension of judgment will become most difficult to sustain at those moments when the substantive dispute challenges the very conception of political community that underlies the rules for constitutional amendment. At those moments of constitutive constitutional politics, decisions made under the

rules of constitutional amendment cannot produce political settlement, and the constitutional system may come tumbling down.

Properly reinterpreted, constitutional moments are in reality moments of constitutional failure and paralysis. Moreover, they do travel, and shed considerable light on comparable developments in other constitutional systems. The decision of the Supreme Court in the *Secession Reference* is best understood as part of a constitutional moment – an extra-legal move to amend the Canadian constitution to add a secession clause, prompted by the failure of the rules for constitutional amendment under the Canadian constitution. Those rules failed because they reflected a conception of the Canadian political community which the Quebec sovereignty movement challenged, treating Quebec as one province among many and granting a veto to the federal government. Indeed, much of the history of Canadian constitutional politics has turned on the search for an acceptable formula for constitutional amendment, and has been hotly contested precisely because it was understood that the resulting rules would reflect a conception of Canada. Instead of providing a stable and uncontested framework for constitutional politics, those rules were drawn into constitutional politics, and were unable to perform their basic function. This deep and profound constitutional failure offers a new explanation for the Court's otherwise puzzling move to amend the Canadian constitution extra-legally to add procedures for secession under the guise of constitutional interpretation – a move it made because the formal rules for constitutional change could not yield such a change.

The comparative constitutional research agenda should be to use the re-interpreted concept of the constitutional moment to study dramatic constitutional changes in other jurisdictions. Scholars of comparative constitutionalism must identify moments of constitutional change that appear to have occurred outside normal constitutional processes for constitutional amendment, and to determine whether those episodes are best understood as moments of constitutive constitutional politics which the rules governing constitutional amendment were unable to regulate. A promising source of examples might be the process of decolonization of former British colonies. Those colonies were usually granted independence through acts of the British Parliament which created their post-independence constitution, but were often followed by “paper” constitutional coups which involved the adoption of a new constitution by domestic political institutions without the involvement of the British Parliament and in contravention of the post-independence constitution.<sup>153</sup>

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<sup>153</sup> John Finnis, *Revolutions and Continuity of Law* in Oxford Essays in Jurisprudence: Second Series 64 (A.W.B. Simpson, ed., Oxford University Press 1973).



The reason for these unconstitutional acts of constitution-making may have been the view that the status of post-independence constitutions as Imperial statutes depicted the colony as exercising delegated powers from Britain. On the theory of the British constitution, these delegated powers could theoretically be withdrawn because Parliament retained ultimate sovereignty which it could not surrender. The theoretical possibility of Imperial repeal, in other words, was in effect a rule governing constitutional amendment, which embodied an image of political community that was fundamentally at odds with the existence of independent, self-determining national political entity. As a consequence, post-independence constitutions could therefore not serve as a legitimate basis for regulating constitutional change, and political actors in newly independent states discarded them. The goal was to establish an “autochthonous” source of constitutional title through an extra-legal act that is best understood as a moment of constitutive constitutional politics.

Comparative investigation also could potentially yield dividends for the understanding of American constitutional development. The Canadian constitutional example clearly illustrates how the rules of constitutional amendment were a central part of the history of Canadian constitutional politics. The comparative research question for American constitutional scholars is to focus more squarely and intensely on why political actors opted to proceed outside formal rules for constitutional amendment. In light of the Canadian example, the materials surrounding the gaming of Article V during the Reconstruction and the Articles of Confederation during the Founding may pay revisiting with this comparatively oriented question in mind.

Finally, the re-interpretation of constitutional moments as constitutional failures at moments of constitutive constitutional politics furthers Ackerman’s agenda for constitutional design, but in a way he may not have appreciated. Rules governing constitutional amendment are an indispensable aspect of constitutional design. They are an important device for ensuring the relevance, and hence both the legitimacy and stability of a constitutional order, so much so that the failure of a constitution to include them, or to make them too demanding to deploy, would be a fundamental constitutional defect that could pose a threat to the survival of a constitutional system.

But there is an important lesson to be drawn from the comparative study of constitutional moments for the limits of sound constitutional design. Rules for constitutional amendment face real difficulty in constituting and regulating moments of constitutive constitutional politics, because at those moments, the concept of political community which those rules reflect is at issue. Moreover, no matter how well designed, any set of rules governing constitutional amendment will have a limiting case of some sort – a moment of failure built into the very design

of those rules. And so the true lesson of constitutional moments may be some modesty on the limits of constitutional forms to regulate constitutional politics – and on the limits of constitutionalism itself.