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On Amending Constitutions

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Abstract. Bruce Ackerman has described three occasions upon which the U.S. Constitution underwent a massive transformation, and one failed attempt to bring about such a transformation. Only one of the major transformations that actually took place took the form of amendments to the Constitution, and even these did not follow the procedures laid down in the Constitution. This has led Ackerman to propose alternative amendment procedures. In this article, I discuss the "ideal" procedures for amending a constitution, Ackerman's proposal, and my own preferred alternative.

In the first two volumes of his masterful account of the main events in the constitutional history of the United States, Bruce Ackerman describes three occasions upon which the U.S. Constitution underwent a massive transformation, and one failed attempt to bring about such a transformation.[1] The three successful, major transformations were the initial ratification of the Constitution itself in the 1780s, which transformed the United States from a confederation into a federation; Amendments XIII and XIV from the 1860s, which emancipated the slaves and gave them suffrage; and a series of landmark decisions by the Supreme Court in the 1930s, which redefined and extended the powers of the central government within the U.S. federalist system. The failed attempt was the Reagan/Bush Administrations' effort to restrict women's right to obtain abortions (pp. 389–403).

A central theme of Ackerman's account of these "constitutional moments" is that each has broken the rules for constitutional amendment in some fundamental way: the Convention that wrote the Constitution was supposed to amend it, and thus to adhere to the rules laid down in the Articles of Confederation, which it ignored; the XIIIth and XIVth Amendments were not approved in accordance with the amendment procedures of Article V of the Constitution; and the third great transformation of the Constitution's meaning was made without passing any amendments at all. The Reagan and Bush Administrations also sought to employ this third strategy.

Ackerman's intended audience often is his colleagues in the legal profession, and the message that he seeks to convey to them is to accept the legitimacy of the three successful legal transformations despite their somewhat dubious legal pedigre. All three were legitimized through the approval given by *We the People*. Indeed, in all three instances the *Will* of the People was revealed through the same five-step sequence events. Although Ackerman seems happy with the final outcomes in all three cases, he recognizes the awkwardness of the People's having to break the rules of the Constitution, every time they wish to see it transformed. Ackerman therefore closes Volume Two with some proposals for

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new procedures for amending the Constitution that would allow the People to express their preferences for constitutional change in an orderly and legitimate fashion (pp. 406–16).

Students of constitutional political economy will without doubt be fascinated by Ackerman's historical account of the major events in the evolution of the Constitution. But it does more than just fill in lacunae in our knowledge of the United States's judicial history. It challenges us to reflect upon the ideal procedures for amending a constitution, and to compare these against both the formal rules for amendment contained in Article V and the actual manner in which the Constitution has been amended. This article takes up this challenge. Section 1 describes the kinds of procedures for both amending the constitution and selecting the judiciary that citizens might place in a constitution that they themselves wrote to advance their interests. These "ideal procedures" are compared with Article V of the U.S. Constitution and the actual procedures followed in the three great transformations that have occured. Ackerman's proposals are taken up in Section 3 with conclusions drawn in Section 4.

1. "Ideal Procedures"

1.1. The Selection of Judges

Imagine that, as depicted in so much of the constitutional political economy literature,[2] the citizens of a community wrote their constitution themselves, or more realistically, directly elected representatives to a constitutent assembly, which wrote the constitution. Their purpose is to create a government that will improve their welfare by providing those goods and services that the citizens cannot efficiently provide themselves. Institutions for revealing what these goods and services are must be defined, along with institutions to see that the goods and services demanded actually get provided. These institutions might be designated as belonging to the legislative and executive branches, as in the U.S. Constitution.

The sagacious citizen would recognize that, just as many of her own actions were intended to advance her own personal interests, her fellow citizens might try and use the government to advance their interests at her expense, and that those within government may often act likewise. The prudent individual would therefore define institutions to protect herself from future legislation by her fellow citizens and their representatives, and from future actions by those in government. Defining certain *individual rights* in the constitution that would circumscribe the actions future members of the legislative and executive branches can undertake would be one way to try and secure this protection.[3]

But, of course, merely *defining* rights in the constitution does not guarantee that they are enforced. The citizen must create procedures for selecting agents who will protect her interests, and an institution to enforce them. She must create a judicial branch with the sole responsibility of protecting each citizen from the actions of other citizens, and all citizens from the actions of those in the government.

In creating this "special branch," as in creating government itself, the citizen confronts a classic principal/agent problem. Ideally, she along with all of her fellow citizens would make all collective decisions directly and unanimously. But for familiar reasons this "ideal method" is impractical, and citizens select agents who make and carry out the collective decisions for them. The collective decisions of the legislative and the executive branches

involve the provision of goods and services and the levying of taxes to pay for them. By granting these branches the authority to make these decisions the citizen provides her agents in these branches the power to do her considerable harm. To mitigate this harm, she creates a second agent, independent of the first, whose sole responsibility is to enforce the constitutional contract fairly and to protect all citizens from one another, and from agents with the powers to harm them in the other branches.

Now it is obvious that the citizens' agents in the judiciary are unlikely to protect one group of citizens from another, if one of the groups can select and reward these agents. Thus, we would not expect citizens who were fearful that their fellow citizens might try and circumvent the law and/or constitution for their personal gain to include the popular election of judges under a plurality or even a majority rule system in their constitution. To have a truly impartial judiciary, judges must either be beholden to no one group of citizens, or beholden to all of them.[4]

It should be equally obvious that the citizens' agents in the judiciary are unlikely to protect them from their agents in the other two branches, if members of the judiciary are beholden to either of the other two branches. Thus, there are essentially two ways that citizens might try and select members of a judiciary who would not favor one branch of government over the other, or one group of citizens over another: (1) Require that *both* branches concur on the identity of judges, as say when the executive branch nominates and the legislative branch approves the appointment of a new judge. To ensure the impartiality of the nominee, a supramajority of the legislature should be requird for approval.[5]

With a substantial majority of the legislature required to approve a nominee, a deadlock between the legislative and executive branches over appointees could arise. This possibility would be avoided by our second proposal: (2) The judiciary itself nominates persons to fill vacancies in its ranks. These persons assume their places on the bench, *unless* the legislature agrees within six months by a majority of, say, 3/4ths to substitute someone for the person nominated by the judiciary. This option could be expected to produce a truly independent judiciary, which under normal circumstances would fill its own vacancies. The possibilty of a united legislature replacing a nominee of the judiciary would protect against the judiciary's enjoying too much independence and degenerating into a corrupt or incompetent body.[6]

1.2. Amendment Procedures

Almost any statement is open to different interpretations, and thus allowance must be made in the constitution for the resolution of future disagreements over its content. Allowance must also be made for the possibility that future generations wish to change the content of the constitution to better correspond to the circumstances and preferences of the citizenry at that time. There are essentially four separate procedures for dealing with these contingencies:

(1) Reconvene a constitutional convention by electing new delegates any time a disagreement over content or a proposed new amendment arises.

(2) Allow the legislature as the duly elected representatives of the citizenry to serve as a constitutional convention and resolve the disagreement over content or decide whether the proposed new amendment should be adopted.

(3) Hold a national referendum in which the citizens themselves settle any disagreement over content or accept or reject a newly proposed amendment.

(4) Appoint an agent of the citizens—a special constitutional court or the highest court in the judicial hierarchy—to settle disagreements over content.

Although the fourth option does not specifically refer to amendments, it could be used to amend the constitution, if the language of the constitution were sufficiently broad to allow the judiciary to effectively amend it through "reinterpretation."

Assuming that a substantial qualified majority of the original convention was required to adopt the constitution, the same qualified majority should be required to adopt any amendments to it under each of the first three options. Such a provision is necessary to avoid gaming at the convention that adopts the initial constitution, and perhaps to obtain any constitution at all. Many of the articles of the constitution are likely to be controversial, and thus the final agreement on its language will need to involve compromise and "vote trading," if the requirement of a substantial majority is to be met. But individuals at the convention are unlikely to trade away their votes on Article X to obtain the inclusion of Article Y, if the opponents of Y can subsequently amend the constitution by a simple majority, and thereby bring about Y's repeal. This consideration makes amendment by referendum a rather unattractive option, since amendments tend to be either/or propositions with little scope for compromise. Both of the first two options allow for vote trading and compromise in the amendment process, and thus are superior to the third.

Although requiring a high qualified majority to pass amendments when the legislature sits as a constitutional convention would help protect citizen minorities from discrimination in the constitutional amendment process, this requirement would not effectively protect the citizenry from the legislature itself, when situations arose in which the interests of citizens and the interests of their representatives in the legislature diverge. Suppose, for example, that the proposal came up to amend the constitution to limit legislator terms to X years. Public choice analysis conclusively demonstrates that citizens would benefit from such an amendment, and well over 3/4ths of the population favors it. Nevertheless, it fails to receive the required 3/4ths of the legislature needed to pass an amendment to the constitution—surprise, surprise. This example illustrates that between the first and second options enumerated above, the first is likely to serve the citizens' interests better.

Option (1) has the highest potential transaction costs for the citizens. Each time a proposal to amend the constitution comes up, a new convention must take place and delegates must be chosen. Yet, it is the option with the highest potential for maintaining widespread citizen support for the constitution, and for ensuring that it continues to serve *all* citizens' interests. The transaction costs inherent in option (1) might be mitigated or at least spread out over time, by requiring periodic constitutional conventions to consider revisions and reinterpretations of the constitution's language, and amendments to it.[7]

If, say, a constitutional convention were held every 25 years, the language of the constitution could be made quite specific, and the judiciary could be instructed to stick to a literal interpretation of its language. Disagreements about the language of the constitution and alterations to it could be left to the next convention. Under this option, the average citizen would be called upon three times in her life to elect delegates to a convention and to become actively engaged in "constitutional politics."

These burdens on the citizen could be eliminated by adopting an extreme version of option (4). Suppose, for example, that *no* allowance was made in the constitution for its amendment. All alterations were left to the judiciary, which would keep the constitution in tune with the preferences of each generation of citizens through reinterpretation of its language. Obviously, if this option were adopted the language of the constitution would need to be much broader than under option (1) to give the judiciary ample scope for invention, and the instructions to the judiciary would *not* be to offer a narrow and literal reading of the constitution's text, but rather to transpose its language into the present, and interpret it in a way that best advances the interests of the current generation. Equally obviously, option (4) carries with it a greater danger than option (1) that the constitution does not achieve this goal.

2. Amending the United States's Constitution

Although the Constitution does not require periodic constitutional conventions, it does allow for the possibility of calling a convention to amend or replace it. No such convention has ever taken place, however. Instead, the other option under Article V has been used—2/3rds support of both houses in the legislature, ratification by 3/4ths of the states. Two aspects of this procedure will concern us here: the effective majority required for ratification that is implied by the procedure, and its *con*federalist nature.

If we assume that an amendment proposal just achieves the minimum 3/4ths support across the states, and that in each state that supports it 60 percent of the citizens are in favor and 40 percent opposed, while the reverse percentages hold where the amendment is not successful, then if the average population of a state in support equals that of a state in opposition, a successful amendment to the constitution would occur with only 55 percent of the population in favor of it. If the percentages for and against are 55/45 instead of 60/40, the implied percentage of voters across the nation in favor of the amendment is only 52.5 percent. Since margins of victory in Presidential elections rarely reach 55, let alone 60 percent, the first thing to note about this procedure from Article V is that it does not necessarily imply a substantial supramajority of support among the citizenry for an amendment to take effect. Few students of constitutional political economy, including myself, would regard majorities of 52.5 and 55 percent as capturing the degree of consensus over constitutional matters that should be achieved before changes are implemented.

Because the ratification process focuses on the number of *states* in favor of an amendment, not the number of people, rather bizarre outcomes are possible. An amendment can be ratified if not more that 12 states oppose it. If we imagine the 12 most populous states in opposition, then an amendment could be ratified over the opposition of states that account for almost 60 percent of the population of the United States. Conversely, the 13 smallest states representing scarcely five percent of the U.S. population could block an amendment favored by the rest of the country. These sorts of calculations are disturbing, *unless* one accepts the confederalist rationale underlying Article V, and other parts of the U.S. Constitution.

The issue of whether the United States are or ought to be viewed as a federation or as a confederation has reoccurred throughout the country's history. The Articles of Confederation created a confederate form of government with the central government able to act only

with the unanimous support of the states. The U.S. Constitution replaced this confederate structure with a federalist one, but only in part. The salient difference between a confederation and a federation is that a confederation joins independent *states* together, while a federation is best thought of as a joining of individuals.[8] The Convention in Philadelphia operated under the rules one would expect for a confederation. Not only were delegates chosen by state, but voting on issues was also by state, the Convention having rejected a proposal of Benjamin Franklin to count individual delegate votes. Both Article V and the grossly unfair method of representation in the Senate retain and reflect this confederalist orientation. Given these features and the references to the "sovereign states" in the Constitution, it is understandable how many in the Old South might have believed that they retained the right to secede. Appropriately enough they named themselves a Confederacy upon secession. The issue of whether the United States was a federation or a confederation was unfortunately not resolved through the force of logic in a constitutional convention but, of course, by the force of arms on the battlefield.

All three of the constitutional transformations that Ackerman describes were concerned with the federalism issue, all three involved an intense struggle between those who wished a more centralized, powerful federalist government, and those who preferred more decentralization, if not an outright confederalist structure. The first was over the adoption of a federalist constitution; the second over the right of the North to impose its views regarding the rights of negroes on the states of the South, and much of the third was over the central government's authority to regulate economic life within the individual states. All three struggles were won by those favoring a more powerful central government in a federalist state. All three were won by unorthodox if not outright illegitimate means. Was this for the good? Did the ends justify the means in these three cases? Bruce Ackerman would clearly answer in the affirmative, as would I suspect most readers of this journal, at least with respect to the first two transformations. But there is clearly something awkward, for anyone who believes that constitutions can make a difference and can improve the working of a democracy, in having to circumvent the rules laid down in the constitution to improve it. Would it not have been better if the proponents of change had stuck to the rules and secured their victories by following Article V?

As Ackerman convincingly argues, the XIIIth and XIVth Amendments would not have been ratified if the ratification process laid down in Article V had been strictly followed. The Southern states had enough votes to block its passage. But obtaining the endorsement of 3/4ths of the states is not the only procedure open under Article V. Suppose a convention had been called with the delegates chosen not by state, but at large, so that *citizens* were being represented at the convention, not states? Might those who favored emancipation and negro rights been able to convince those in opposition to accept some package of proposals, perhaps heavily compensating those who freed their slaves, that would secure the required majority for inclusion in a new constitution? More speculatively, suppose the convention in Philadelphia had been of the mind of Thomas Jefferson and had provided in the Constitution for the periodic reconvening of a convention with the authority to amend it, reaffirm it, or abandon it. What then would have been the outcome?

No one can of course know, but it is difficult to imagine that the outcome would have been any worse than the one that occurred. One possibility is certainly, even if we assume

that delegates to each convention were chosen by states, that some compromise involving a gradual phasing out of slavery and compensation for slave holders would have been achieved. Given the immense destruction of life and property that occurred in the Civil War, this sort of compromise would have had to be preferred. More likely than such a rational Pareto move, however, is that at one of the periodic conventions, say in the mid-1800s, representatives from the North insist that the Constitution be amended to prohibit slavery and enfranchise all former slaves, and that the representatives from the South cannot be convinced or bribed to accept these amendments. The Union of States is dissolved and the Northern and Southern states form two independent nations.

Under this scenario, it is less likely that the Northern States would choose to go to war against the South. If they did, it could not be under the pretext of stamping out a rebellion to preserve the Union, since the South would not be in rebellion. The Union would have dissolved in accordance with the rules laid down in the Constitution. Would this have been an unfortunate outcome? Slavery would not have disappeared from the South in 1865, but it most certainly would have disappeared at some later date. No country in the world authorizes slavery today, and it is inconceivable that the South would have preserved this institution up to the present. Thus, the trade-off in judging the benefits from the Civil War is between the gains from having slavery end in 1865 rather than at some later date, and the costs of the War. When contemplating this trade-off, one must consider that life for negroes in the South following their emancipation was not all that much better than under slavery. Had the South *voluntarily* abandoned slavery at a later date, it might have accompanied this conscious act with reforms that allowed negroes to become full-fledged citizens, and their fate following this delayed emancipation might have been much better.

Had the North and South divided into two independent nations, the North might still have chosen to go to war against the South. It would not in this case have been able to claim that it was merely squashing an act of rebellion that violated the constitution, however. Instead, its purpose would need to be characterized as a simple act of territorial conquest, as most wars are, or, more nobly, as an effort to free the slaves. With victory the North could annex the South and impose any additional conditions it wanted on it including emancipation and suffrage for the slaves. If the stated purpose for the war was to free the slaves, perhaps the North would have made a greater effort to ensure that the slaves once freed benefitted from their new freedom to a much greater extent than occurred under Reconstruction.

Less speculation is needed to conclude that the outcome of a convention held during the 1930s would have been a dramatic expansion of the authority of government in general, and the central government in particular, to regulate market transactions. The consistent victories of the Democrats in each election starting with 1932 reveal general support for the changes in government advocated by the New Deal Democrats. Had the constitutional transformation of the New Deal occurred through amendments passed at a convention, the People would have been brought into the transformation process directly. Delegates would have campaigned to be elected to the convention, and the People would have had to weigh the proposals of each candidate for changing the constitution. The People could have followed the debate of issues in the convention, and expressed their support for the different proposals directly to the delegates. Instead, of this fairly direct form of participation in the constitutional revision process, the People were only able to indicate general support for

the New Deal by reelecting the Democrats and Roosevelt, and then passively waiting to discover the nature of the changes in the Constitution that they had implicitly authorized, as they were revealed in subsequent Supreme Court decisions.

3. The Ackerman Proposals

Bruce Ackerman is also unhappy with the lack of direct citizen participation in the Constitution amendment process, and proposes the following three-step procedure, which we name The Ackerman Amendment, as a substitute for Article V (406–16).

3.1. The Ackerman Amendment

(1) The President upon being elected for a second term of office is empowered to propose one or more Amendments to the Constitution.

(2) A successful Amendment must be approved by a 2/3rds majority in both Houses of Congress.

(3) Once it has passed step (2) a successful Amendment must be approved by a simple majority of those voting in two, successive Presidential elections.

Advantages. The proposal combines elements of options (2) and (3) listed above. It improves on option (2), however, by requiring approval by both the legislature and the executive. Thus, the procedure guards against constitutional changes that would strengthen one of these two branches over the other. It guards against constitutional changes that would benefit those in government over the citizenry, by giving the citizens a direct veto of any amendment, even when it is favored by both branches. It guards against whimsical changes by requiring that the citizens twice approve a proposed change with an interval of four years inbetween. Most importantly, of course, The Ackerman Amendment has the great advantage of involving the People directly in the Constitution amendment process.

Disadvantages. When voting for a candidate to represent him in the legislature, the rational voter considers the positions that the different candidates will take on future issues in the legislature. If one of the candidates is an incumbent who voted on a constitutional amendment in the previous session of Congress, the rational voter ignores this vote, as no matter what the outcome was, the issue has been decided as far as the next session of Congress is concerned. All that matters is how the candidate will vote on future legislative issues. Even when the voter knows that a Constitutional amendment will be voted on in the upcoming session of Congress, because this vote is only one of many that the representative may cast, the voter may not reveal his position on the amendment through his vote in the Congressional election. When the legislature votes on both normal legislation and constitutional matters, the danger exists that elections do not send clear signals on one or both of these sets of issues.

Of course, the citizen still has the opportunity to vote directly on an Amendment, *if the President proposes it, and Congress approves it*. It is possible under The Ackerman

Amendment, however, that constitutional changes that would be approved by the citizens never are placed before them. One can well imagine, for example, that 2/3rds of Americans would approve an amendment limiting a citizen's "right to bear arms." With such widespread support, a second-term President might well propose it. But, one can also well imagine that the National Rifle Association would muster the resources to convince 34 Senators to vote against it. Given that the proposal had failed, voters represented by these Senators would have no rational reason to vote against them, if they continued to endorse these Senators' positions on the everyday issues that come up in Congress.

The danger of errors of omission under The Ackerman Amendment is even greater with respect to constitutional amendments that would directly affect members of the legislative or executive branches. Suppose that someday the People are convinced that the Constitution should be amended to eliminate the President's veto to bring an end to the continual deadlocks between the two branches over legislation. Can one imagine any President proposing such an amendment? Could one imagine 2/3rds majorities in both Houses of Congress ever approving an amendment to replace single-member-district representation with proportional representation, because the People wished to have a system of representation that fairly represented ethnic and ideological minorities?

Given these disadvantages with The Ackerman Amendment, I would prefer a Constitutional amendment process in which citizens elect representatives to a convention whose sole purpose is to consider alterations to the Constitution. Nevertheless, his proposal would be a great improvement on what is de facto the currently employed procedure for amending the U.S. Constitution through judicial appointments, and eventually judicial reinterpretation of the language of the Constitution.

4. Conclusions

When the constitution that forms a nation is first written, two fundamental choices must be made, before the convention can even begin to consider the constitution's content: (1) Should the future citizens of this nation be directly represented in the convention or, if they are already citizens of sovereign states, should the states be represented at the convention? (2) What voting rule(s) will be employed at the convention? In particular, what degree of consensus must the convention reach, for the constitution's approval?

Beginning at least with Buchanan and Tullock (1962), if not Wicksell (1896)[9], the constitutional political economy literature has considered full unanimity the ideal required majority at both the constitutional and the subsequent parliamentary stage of the political process. While all contributors to this literature would concede that some less-than-unanimity rule would need to be adopted at the second stage, to avoid political paralysis, few if any have made the same claim for the constitutional stage, and one infers that most if not all contributors would argue that some substantial majority—at least 2/3rds if not much more—should be required at the constitutional stage.

If this inference is valid, then there is a wide gap between the required majority contemplated by scholars of constitutional political economy, and the actual majorities that have been realized in bringing about the most fundamental transformations in the Constitution that have occurred. Indeed, if registered voters in both the South and the North are included

in the definition of *We the People*, then Abraham Lincoln did not receive the support of even a simple majority of the People in 1860, and presumably would also not have done so in 1864. Northern Republicans won substantial majorities in Congress in both 1864 and 1866, but this support was probably in part for the government's policy of preserving the Union, in part for its policy on slavery, and, at least in 1864, in part the common tendency of citizens to rally round the flag and support the government in time of war. Whether a referendum on the XIVth amendment in 1866 would have secured the support of a simple majority of voters *even* in the North is uncertain, since "an overwhelming majority of white Americans—North as well as South—were racists" at the time (p. 163). Anyone, who accepts the principle that the original Constitution and any changes to it *ought* to receive the substantial support of the People before the changes are enacted, must regard the adoption of the XIIIth and XIVth Amendments as a gross violation of this principle.

It seems clear, in contrast, that a set of Constitutional amendments to allow the federal government to implement its New Deal program would have been approved by a majority of voters across the United States, if it had been proposed and endorsed by President Franklin Roosevelt and the New Deal Democrats in Congress. How substantial this majority would have been is less clear. Roosevelt received over 60 percent of the Presidential votes only once, and then just barely (60.8 percent in 1936). In two of his four victories, he got less than 55 percent. Given that Franklin Roosevelt was probably the most popular President of the 20th century, while he was in office,[10] it is reasonable to assume that the man received more votes in elections than any abstractly and, undoubtedly, arcanely worded Amendments that he proposed would have gotten. We conclude that the great Constitutional transformation of the 1930s, if it had been formulated as specific amendments and put directly to the People, quite likely would have received little more than a simple majority of their votes. Certainly, there is no reason to expect that such amendments would have secured the 2/3rds and more majorities students of constitutional political economy contemplate.

What should we make of all this? None of the three major Constitutional transformations upon which Bruce Ackerman focuses meet the criterion of having demonstrably achieved the support of a large fraction of the citizenry at the time they occurred.[11] All thus fail the normative criterion advanced in the constitutional political economy literature. All meet the normative criterion that Ackerman appears to be willing to accept, however, namely "repeated institutional and electoral victories . . . provided [those seeking change] with *a mandate from the People* adequate to authorize new constitutional law" (p. 12, italics in original). For Ackerman, what is of utmost importance to justify constitutional reform in the name of the People is not the *expressed* support of a substantial majority of the People, but of *sustained* majorities of the institutions of government. Had the Republicans been able to achieve the successive Congressional victories in both Houses that they won in the 1990s during Reagan's Administration in the 1980s, all of the Constitutional changes that were on the "Reagan Revolution's" agenda from the reversal of *Roe v. Wade* to a Balanced Budget Amendment would have been mandated by the People. This sustainability criterion reappears in Ackerman's proposed amendment, where in the third step a simple majority of the electorate can approve the adoption of an amendment, *if the majority vote is once repeated after four years*. By Ackerman's account the three great Constitutional transformations did achieve the required number of "repeated institutional and electoral

victories" to "mandate" constitutional change. Today, the first two and perhaps all three great Constitutional transformations would receive the substantial endorsement of the People that constitutional political economists would like to see. Does this imply that the requirement of direct and substantial support for constitutional change is too conservative, in the literal sense of the word? Or where the adoption of the Constitution, the adoption of the XIIIth and XIVth amendments, and the late-New Deal related Supreme Court decisions all mistakes?

As noted above, the convening of the Philadelphia Convention, the rules under which it operated, and some of its outcomes, like Article V, all resemble what one would expect of a confederation. Yet, the great innovation of the Philadelphia Convention was the creation of a *federalist* form of government![12] Now suppose that the goal of the federalists was the right one, and the anachronistic, confederalist elements of the Constitution were mistakes. How can subsequent generations rectify these mistakes? The authorized way to eliminate a confederalist-method of amending the Constitution requires that one use this same confederalist method.

Bruce Ackerman proposes to circumvent both this Catch-22 obstacle and the infinite regress of which procedural rule to use to choose a procedural rule by *using* his three-step Amendment procedure to *introduce* it into the Constitution, a device which he calls The Popular Sovereignty Initiative (pp. 414–17). Since all three major Constitutional transformations have failed to go by the rules, why not this one?

Alas, I cannot propose such an ingenious device for circumventing the obstacles to my preferred Constitutional amendment process—periodic constitutional conventions. The *possibility* of calling a new convention already exists under Article V. If one were called, it would be free to adopt my proposal, Ackerman's, or any other procedure it wished to adopt. The fact that this option has never been used in the more than 200 years of the Republic's existence suggests that it is unlikely to be used in the future. I offer it for consideration, therefore, not to those who like Bruce Ackerman are solely concerned with improving the U.S. Constitution, but to those in other countries who might someday repeat the exercise in Philadelphia of the Founders of the American Republic, but wish not to repeat one of the Founders' most serious mistakes.

Notes

1. Ackerman (1991, 1998). All page references placed in parentheses in this article are to the second volume, which is the cause of this symposium.
2. The classic contributions here are, of course, Buchanan and Tullock (1962), and Buchanan (1975).
3. For further discussion of the nature of constitutional rights from a constitutional political economy perspective, see Mueller (1991; 1996: Ch. 14).
4. The popular election of judges can be defended with the same set of arguments that are used to defend the simple majority rule. Thus, a community that wished to implement a majoritarian democracy to the fullest, and was unconcerned about tyrannous majorities, might choose to elect its judges directly. For further discussion, see Mueller (1996: Ch. 19; 1998).
5. This suggestion resembles that used in the United States, except that only one chamber in the legislature needs to approve a Presidential nominee, and only a simple majority of its votes is required for approval. Ackerman proposes that the required majority of the Senate for approval of a Presidential nominee to the Supreme Court be raised from 1/2 plus one to 2/3rds (p. 407).

6. In the normal, hierarchical judiciary, nominees to fill vacancies at each level of the hierarchy could be made by the sitting judges at that level. They would have an incentive to appoint competent and industrious individuals to lighten their work burden. The whole system could get started by the constitutional convention appointing the judges to sit on the highest level's bench, and they in turn nominating candidates for lower levels. For further discussion, see again Mueller (1996: Ch. 19; 1998).
7. Such a proposal would be endorsed by Thomas Jefferson (Mueller 1996: p. ix).
8. See discussion and references in Mueller (1996: Chs. 6 and 21).
9. Wicksell never actually discussed the writing of the constitution in his classic essay on just taxation. Given that the creation of government is a form of public-good provision, Wicksell's arguments in favor of unanimity would logically carry over to this stage as well.
10. John F. Kennedy, like Lincoln, has become extremely popular since his assassination, but his popularity when elected or during his brief term of office would not have matched Roosevelt's.
11. I have discussed the second two, because there is so little evidence on the degree of support among the Colonists for the Constitution at the time of its ratification. See Ackerman's discussion and works cited in the footnotes of p. 90.
12. See Riker (1964, 1987).

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