

Some notes on grading of Exam 1

1. If William Bradford Reynolds, instead of responding to Thurgood Marshall's speech on the Constitutional Bicentennial, were responding to Ackerman's *We The People, Volume 2: Transformations*, what main points do you think he would make?

The two best subjects to address would have been Reynolds as a hypertextualist, who would regard the Reconstruction amendments as simply were just Article-V amendments; and the judicial nature of Ackerman's New Deal "ratification" and "consolidation," which Reynolds would regard as "judicial activism." A couple of answers suggested that Reynolds would have subscribed to the "myth of rediscovery" with respect to the New Deal, which is less likely but which I took seriously in grading.

Several answers focused partly on the two authors' attitudes toward the value of the Framers' accomplishment: both argued that the Framers' anticipated and provided for perfection through modification (but through very different routes). This is fair enough, although not as interesting as the above in the sense of being Reynolds's "answer" to Ackerman.

2. Jack M. Balkin gives President Trump's firing of FBI Director James Comey as an example of constitutional rot, which is "decay in the norms and institutions that support democracy." What norms and institutions are threatened by the firing, and how do they support democracy?

The strongest responses drew directly on Balkin's explicit treatment of this example. Answers that spoke more abstractly about the need for supporting institutions such as law enforcement received less credit. Several answers spoke of the confrontation as threatening the separation of powers; on the surface, this is not quite appropriate, since the FBI is itself an executive agency. The same applies to invoking "checks and balances"; in both cases, some explanation would have been needed. Concerns about whether the firing seems to place the President "above the law" also deserve more careful explanation; Balkin speaks more precisely to the norms implied by the Director's 10-year term and the resulting deleterious effect on public trust.

3. In an episode of informal higher lawmaking, why is it necessary that there be a "signal"? For any one of the three episodes of higher lawmaking described by Ackerman, describe the event or events that accomplished the signal, and how those events accomplish it.

There were five consistent errors in the answers to question 3

1. Historical Inaccuracies- students seemed to have the greatest knowledge of the Framing, but occasionally struggled with the details of Reconstruction and the New Deal. With that said, I did not take away many points for small details that were not central to the question. Inaccuracies in conjunction with the other errors in this list

resulted in a greater penalty. For example, I did not find the argument that 1936 was a signaling election convincing.

The next three errors are closely related:

2. Underselling the role of a signal (and higher lawmaking, generally)- this error was largely one of omission. The best answers identified a signal as necessary to introduce the potential for “a long term change in the understanding of the Constitution.” Many answers did not differentiate a signal from expressing dislike for a particular policy.

3. Vague Language- there was an abundance of vague language in the description of a signal. Many students stated a signal is indicative of “some changes that need to be made.”

4. Confusing a signal with a trigger- a handful of essays struggled at keeping a signal distinct from a triggering election. There was too much discussion of signaling elections as some sort of mandate, with little attention given to the signal’s role in introducing an alternative to the political status quo.

Finally,

5. Discounting the role of the reformers- some essays neglected the role played by the political elites in presenting reforms to the public. While there are elements of grass root behavior in all of Ackerman’s episodes, the Framers, Lincoln and the Republicans, and FDR were all essential actors in the higher lawmaking story. A dramatic change in popular opinion, by itself, is not a sufficient description of these episodes.

4. For any one of the three episodes of higher lawmaking described by Ackerman, describe how popular sovereignty was exercised, recognized, and acknowledged. (A good answer will likely stretch across more than just one “phase” of higher lawmaking; you need not explain the more general nature of such phases.)

Common errors, generally not too serious, included

1. Failing to “exercise, recognize, and acknowledge”- the most common error made by the students was to provide an example of popular sovereignty without connecting the example either to a phase of higher lawmaking or to the political actions of an actor in Ackerman’s episodes.

2. Inaccuracies in knowledge of the New Deal- a handful of students tried to weave FDR’s Court Packing Plan into their answer. Many of these students erroneously proclaimed the plan to have robust popular support in both Congress and amongst the public. In addition, at least a couple students were convinced Roosevelt was running for his third term in the triggering election of 1936. At first this error seemed harmless, but

after thinking further it may have influenced the students' ability to recall the importance of the 1932 and 1934 elections.

3. Covering too long of a time period- some answers became less effective because they simply listed too many elections. Students that answered about the New Deal generally focused on 1934 and 1936, but some mentioned every election from 1932-1940. There was a similar pattern in the Reconstruction answers. As a result of covering so many events, details were sparse, and the connections to popular sovereignty and higher lawmaking, not fully formed.

4. Running out of time(?)- the quality of writing took a noticeable dip from Question 3. I suspect this just occurred as the students became tired during the exam. In general, the connection between thoughts was not always explicitly stated and left a lot for the reader to fill in.

5. What exactly was the higher-lawmaking proposal ratified in the New Deal? Explain why.

More precise answers are better. The most precise cited specific recommendations for how to re-interpret the Constitution: broaden the definition of interstate Commerce by eliminating the "direct effects" test; weaken the emphasis on the "liberty to contract" as an implication of the 5th and 14th Amendments; and maybe (although Ackerman doesn't give it much attention) recognize a broader ability of Congress to delegate quasi-legislative powers to government agencies. Somewhat looser were answers invoking an increased power to regulate the economy or to act in the public interest, or an increased government role in the economy; this is right, but was a goal or consequences of the basic proposals for change in the application of certain constitutional provisions. Even looser were general invocations of increased government power or presidential power.

The "Why?" question could be addressed by citing FDR's response to *Schechter* or some of the focus of the Court decisions following the Switch in Time.