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NOTE

SOMETHING WICKED THIS WAY COMES: CONSTITUTIONAL TRANSFORMATION AND THE GROWING POWER OF THE SUPREME COURT

Matthew B. Stein

*The people reign over the American political world as does God over the universe. They are the cause and the end of all things; everything comes out of them and everything is absorbed into them.*¹

INTRODUCTION

In 1936, amidst the devastation of the Depression, three million people thronged the polling stations in New York State to cast their votes in support of President Roosevelt and his New Deal.² People saw President Roosevelt's vision of the future as the saving grace of the country—a country deeply wounded by severe economic turmoil³—and they desperately wanted four more years of President Roosevelt's leadership.⁴ The New Deal began the transformation of federal government that the People of America wanted, and they came out in unprecedented numbers to express that support.⁵

Standing in the way of this revolutionary vision was a solid wall of Supreme Court jurisprudence.⁶ Over the previous thirty-five years, the Court had overturned many legislative acts designed to alleviate the ills of the working class on the basis of the Due Process and Equal

¹ J.D. Candidate, 2003, Fordham University School of Law. I would like to thank Professor Martin Flaherty, whose guidance and assistance was invaluable in getting this Note off the ground. I also want to thank my friends for enabling me to keep all things in perspective, and to Dad, Mom and Josh, *sine qua non*.

1. Alexis de Tocqueville, *Democracy in America* 55 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1840).

2. Jerrold G. Rusk, *A Statistical History of the American Electorate 189* (2001).

3. See FDR and the Supreme Court, FDR Press Conference (May 31, 1935), available at http://newdeal.feri.org/court/fdr5_31_35.htm.

4. See Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 26 (1998) [hereinafter Cushman, *Structure*].

5. *Id.*

6. Elizabeth C. Price, *Constitutional Fidelity and the Commerce Clause: A Reply to Professor Ackerman*, 48 *Syracuse L. Rev.* 139, 159 (1998).

Protection Clauses.⁷ The Court emphasized the rights of property and contract over any interference by the federal government, regardless of the motivation behind that legislation.⁸ This stand placed the Court increasingly at odds with President Roosevelt. With the election of 1936, it became apparent to the Court that being at odds with President Roosevelt meant being at odds with the very people whose rights it intended to protect.⁹

With that realization, the Court took an about-face in terms of its constitutional interpretation.¹⁰ The Court began supporting New Deal legislation, allowing for the expansion of federal powers and overturning many of its own prior decisions.¹¹ In case after case, the Court allowed the federal government to legislate, regulating the national economy. Some suggest that this change occurred because President Roosevelt threatened to “pack” the Court by expanding the number of justices to fifteen, thereby ensuring the Court’s support of his legislation.¹² This interpretation, however, ignores the fact that Justice Roberts, for example, began to change his interpretation of the Constitution before President Roosevelt’s threat.¹³ The more accurate explanation is that the Court was responding to a mandate from the People, that it understood that the time had come to change its interpretation of the Constitution.¹⁴

As Bruce Ackerman argues, the Court’s well-known “switch in time” was part of a larger series of events that forced the Court to validate the New Deal.¹⁵ Before 1937, the Court had rejected most of President Roosevelt’s proposals. However, a series of landslide victories for President Roosevelt and the Democrats pushed the Court to read the Commerce Clause more broadly, permitting the federal government to take on a larger role in curing the woes of the Great Depression.¹⁶

This validation of the New Deal is part of Ackerman’s larger theory that the “switch in time” and its aftermath deserve the same

7. *Id.* at 158.

8. *See, e.g.,* *Lochner v. New York*, 198 U.S. 45 (1905) (holding that legislation regulating working hours violated the substantive due process right of liberty of contract).

9. *See* 2 Bruce Ackerman, *We the People: Transformations* 310-11 (1998) [hereinafter Ackerman, *Transformations*]; Robert H. Jackson, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics* 176-79 (1941).

10. *See* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

11. Ackerman, *Transformations*, *supra* note 9, at 25-26.

12. David M. O’Brien, *1 Constitutional Law and Politics: Struggles for Power and Governmental Accountability* 947 (4th ed. 2000) [hereinafter O’Brien, *Constitutional Law*].

13. Leonard Baker, *Back to Back: The Duel Between FDR and the Supreme Court* 175-76 (1967).

14. Ackerman, *Transformations*, *supra* note 9, at 23-26.

15. *Id.*

16. *Id.*

prominence as the Founding and the Reconstruction Amendments.¹⁷ While no formal amendments accompanied the New Deal, it ushered in a new era of constitutional politics, one which Ackerman argues stemmed directly from a mandate from the People.¹⁸ Along the same line of argument, if a constitutional mandate from the People was necessary to implement this interpretation, then another mandate from the People must be necessary to alter it. Likewise, a constitutional change on this level without a mandate undermines the very essence of American democracy and the founding principles of our country.

Recently, the Court similarly has taken an about-face in its constitutional interpretation, chipping away at the very principles that have shaped our country since the New Deal.¹⁹ Beginning with *United States v. Lopez*,²⁰ the Court has curtailed the powers of the federal government under the Commerce Clause, relying on the concept of dual sovereignty inherent in the Tenth Amendment.²¹ This change in interpretation has altered the balance of power between the federal and state governments.²² The question remains as to whether this change is supported by any mandate from the People as existed during the mid-1930s.

Part I of this Note explains the details of Ackerman's theory of constitutional change and uses his analysis of the New Deal as an illustration.²³ The New Deal is particularly instructive in examining the current situation because it is an example of major constitutional change without amending the Constitution.²⁴ If the current situation

17. *Id.*

18. *Id.*

19. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045, 1052-58 (2001); Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's We the People*, 108 Yale L.J. 2237, 2273 (1999); Price, *supra* note 6, at 220-21.

20. 514 U.S. 549 (1995).

21. *See id.* at 552 (reviewing the emphasis Madison placed on reading the Constitution as a delegation of power to the federal government); *id.* at 574-78 (Kennedy, J., concurring); Tinsley E. Yarbrough, *The Rehnquist Court and the Constitution* 114 (2000); John F. Stack, Jr. & Colton C. Campbell, *The Least Dangerous Branch?: The Supreme Court's New Judicial Activism, in Congress Confronts the Court: The Struggle for Legitimacy and Authority in Lawmaking* 95, 102-04 (Colton C. Campbell & John F. Stasck, Jr. eds., 2001); *see also* Ralph A. Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment* 249-50 (2001) (using reasoning similar to that of *New York v. United States*, 505 U.S. 144, 156-57 (1992)). The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X.

22. John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* 5 (2002).

23. *See infra* Part I.A.

24. *See infra* Part I.B.

fits into the Ackerman model, it is another major constitutional change that has occurred without a constitutional amendment.

Part II looks at current Supreme Court jurisprudence, illustrating the alteration of the Commerce Clause doctrine.²⁵ This part then analyzes more recent events, focusing on polling data during the Reagan and Gingrich years to determine if a popular mandate for constitutional change existed as it did in 1936.²⁶ The platforms of the two politicians and their successes, as well as the popular support for states' rights are also examined.

Part III contends that the new Commerce Clause cases represent a fundamental change in constitutional interpretation.²⁷ The part then compares the polling data from the modern era to data from the mid-1930s to determine whether this change in constitutional interpretation is the product of another mandate from the People.²⁸ The inescapable conclusion is that minimal support exists for a major change in constitutional jurisprudence.

I. WE THE PEOPLE: ACKERMAN AND CONSTITUTIONAL CHANGE

The foundation of our current governmental system rests on the legitimacy of the New Deal and the Supreme Court opinions that eventually affirmed its legislative accomplishments.²⁹ This part discusses Ackerman's theory of constitutional change and, more importantly, how he uses it to explain the "switch in time" within the Supreme Court in 1937, which legitimized the New Deal. The purpose of Ackerman's analysis is to create a paradigm that functions as the control, the standard by which everything else is judged.

Section A explains Ackerman's theory of constitutional jurisprudential change. Section B elaborates on Ackerman's theory by looking at his account of the New Deal, following his chronological analysis. This analysis is significant because it explains how a major change in constitutional interpretation can occur without an amendment to the Constitution. Section C concludes this part by summarizing the steps of Ackerman's analysis and emphasizing its focus on the voice of the People.

A. *How Much Higher Is Higher Lawmaking: The Underlying Theory*

In 1991, Professor Bruce Ackerman introduced the first volume of a multi-volume project called *We the People*.³⁰ In this volume,

25. See *infra* Part II.A.

26. See *infra* Part II.B.

27. See *infra* Part III.A.

28. See *infra* Part III.B.

29. Ackerman, Transformations, *supra* note 9, at 26.

30. 1 Bruce Ackerman, *We the People: Foundations* (1991) [hereinafter Ackerman, Foundations].

Foundations, Ackerman focuses on the Constitution and its two-track system of lawmaking, called dualism.³¹ One legislative track consists of everyday decisions made by the government, while the other track is the product of a “mobilized and politically self-conscious majority” resulting in greater, revolutionary change. Volume Two of this project, published in 1998 and titled *Transformations*, uses the dualist system to explain the Founding, Reconstruction, and the New Deal as periods of heightened engagement from the People.³²

The centerpiece of Professor Ackerman’s thesis is that normal lawmaking, that is, everyday legislation, is distinct from constitutional change, or higher lawmaking.³³ This conclusion appears obvious on its face, for constitutional change by definition is a major change in government,³⁴ and is very different in both procedure and substance from laws that are passed by Congress. Major constitutional change is marked by a change in constitutional interpretation that ten years before was not “within th[e] evolutionary envelope of possibility.”³⁵ Ackerman, however, is stating more than just the obvious. Higher lawmaking is unique in that it is driven by prolonged periods of political awareness and, more importantly, by political activism on the part of the People.³⁶

The underlying premise of Ackerman’s thesis is that the power of the United States Government was initially and still is derived from the People.³⁷ “People” in this context refers to the American electorate in the same way as the Constitution uses the word in the Preamble to the Constitution.³⁸ The Founders purposely declared that the power and force of this new document—the Constitution—came from the People.³⁹ The People and the states relinquished power to the government so that it could effectively govern; thus, the government was subject to the People rather than the other way around.⁴⁰

31. *Id.* at 5-6.

32. Ackerman, *Transformations*, *supra* note 9.

33. *Id.* at 5.

34. However, not every amendment has resulted in a major change in government. *See, e.g.*, U.S. Const. amend. XXVII.

35. Bruce Ackerman, *Revolution on a Human Scale*, 108 *Yale L.J.* 2279, 2287 (1999) [hereinafter Ackerman, *Revolution*].

36. Ackerman, *Transformations*, *supra* note 9, at 6.

37. *Id.* at 3-4.

38. *Id.*

39. “We the People of the United States . . . do ordain and establish this Constitution for the United States of America.” U.S. Const. pmb.; *see also* Ackerman, *Foundations*, *supra* note 30, at 167-79. Abraham Lincoln referred to this very idea when he spoke of the “government of the people, by the people, and for the people” during his Gettysburg Address. Balkin & Levinson, *supra* note 19, at 1050 (quoting Abraham Lincoln, Gettysburg Address, *reprinted in* Gary Wills, *Lincoln at Gettysburg: The Words that Remade America* 263 (1997)).

40. *See* Ackerman, *Foundations*, *supra* note 30, at 183-86.

The dualist democracy theory has wide implications in the context of American lawmaking. If the power of the government is derived from the People, major constitutional change—change that shakes the foundation of the government—can only occur during those episodes in which the People speak out in force. To bring about reform, the People must repeatedly gain overwhelming support for their initiative in deliberative assemblies and consecutive popular elections so that the elected leaders may revise the foundation of our government in their name.⁴¹ Accordingly, it is possible for constitutional change to occur outside of Article V, as long as the change comes from the People.⁴² Major constitutional change during periods of normal lawmaking by elected politicians, without the impetus of the populace, is therefore illegitimate.⁴³ It is illegitimate not because it is unconstitutional but because the popular atmosphere surrounding the change does not support such a change. Thus, constitutional change is less a distinction between a formal amendment and normal legislative change than it is a distinction between higher lawmaking and normal lawmaking.

Ackerman's theory conspicuously ignores one branch of the federal government entirely—the Federal Judiciary. The theory ignores the Supreme Court's role in lawmaking because the Court has no power under the Constitution to legislate or to execute the law;⁴⁴ therefore, it does not have any capacity to *initiate* the normal lawmaking process, let alone the higher lawmaking process. The Supreme Court does play a role; however, "a larger part will be played by Presidents and Congresses—and their efforts to gain the support of the American people at general elections."⁴⁵ In Ackerman's view, the Court enters the higher lawmaking process only when legislation is challenged on constitutional grounds.⁴⁶ Its role is one of reaction, and any legislating in which it engages results through its decisions regarding existing legislation.

Ackerman's theory is retrospective. The theory provides no guide to the future, nor does it inform the President and Congress how to act; rather it is meant as a guide to differentiate among episodes of non-Article V lawmaking for the purpose of determining what

41. *Id.* at 4.

42. Article V describes the process by which the Constitution is amended. U.S. Const. art. V. It goes without saying that Ackerman does not believe that Article V prescribes an exclusive process. "None of [Article V's] 143 words say anything like 'this Constitution may only be amended through the following procedures, and in no other way.' The article makes its procedures sufficient, but not necessary, for the enactment of a valid amendment." Ackerman, Transformations, *supra* note 9, at 15.

43. Ackerman, Transformations, *supra* note 9, at 5.

44. *See* U.S. Const. art. III.

45. Ackerman, Transformations, *supra* note 9, at 17.

46. *Id.* This would occur when the Court declares a certain act or section of an act unconstitutional, changing the way that the law is enforced or the way that Congress solves the problem that it is addressing. *Id.*

legislation qualifies as higher lawmaking. To differentiate between valid instances of higher lawmaking and invalid ones, Ackerman highlights a four-step pattern present during periods of higher lawmaking.⁴⁷ First, there is a signal, an indication from the People that change is needed.⁴⁸ Second, there is a constitutional impasse, in which the branches of the federal government disagree on an interpretation of the Constitution.⁴⁹ Third, the impasse is followed by an electoral mandate, supporting one branch's opinion in favor of constitutional reform, inciting a challenge to the minority institution, and culminating in a switch in interpretation by the minority institution.⁵⁰ Fourth, the change is followed by a consolidating election in which politics returns to normal.⁵¹ The process is meant to take place over a number of years, thus ensuring that the People have spoken. Because of the multi-staged, prolonged nature of the higher lawmaking procedure, its occurrence is rare.⁵² Ackerman focuses on three major episodes in American history as examples of past higher lawmaking: the Founding,⁵³ the ratification of the Civil War Amendments,⁵⁴ and the "switch in time" of the New Deal Court.⁵⁵

B. *The Theory in Motion: The New Deal*⁵⁶

An examination of Ackerman's theory as it applies to the New Deal best illustrates the underlying process of constitutional change. The New Deal is a useful illustration, not only because it is more recent than the Civil War Amendments, but also because this transformation occurred outside of Article V's amendment process.⁵⁷ This framework, once established, provides a useful backdrop against which to compare the events of the modern era. For if we are in the midst of another period of higher lawmaking and constitutional

47. *Id.* at 20.

48. *Id.* at 17.

49. *Id.* at 20.

50. *Id.*

51. *Id.*

52. Justice Kennedy has noted that, although there are twenty-seven amendments to the Constitution, only four sets of amendments have much significance. Justice Anthony M. Kennedy, Speech at Fordham University School of Law (Jan. 20, 2001). These were the Bill of the Rights, the Civil War Amendments, the creation of the income tax and the extension of the right to vote to women. These four events, examples of higher lawmaking, illustrate that higher lawmaking is not only a rare occurrence, but also a harbinger of monumental change.

53. Ackerman, Transformations, *supra* note 9, at 32-68.

54. *Id.* at 7-13, 99-254.

55. *Id.* at 17-26.

56. For a more detailed, but not necessarily different, version of the events of the New Deal era, see Laura Kalman, *Law, Politics and the New Deal(s)*, 108 Yale L.J. 2165 (1999). Without objecting to the legal analysis, Professor Kalman argues that Ackerman's historical account is overly simplified.

57. Ackerman, Transformations, *supra* note 9, at 383.

change, it is taking place outside of the procedure set forth in Article V.

1. The Signal

In November of 1932, Franklin Delano Roosevelt was swept into the presidency with 57.4% of the popular vote.⁵⁸ He brought with him ninety-seven new Democrats into the House of Representatives and twelve new Democrats into the Senate.⁵⁹ After the election, 310 Democrats occupied seats in the House, compared to 117 Republicans, and Democrats enjoyed a 61-35 advantage over Republicans in the Senate.⁶⁰

This monumental shift in power was not surprising because most Americans attributed the Great Depression to President Hoover and his Republican party. The economy of the United States was in ruins: unemployment levels were near 25%, prices had dropped by 37% and the gross domestic product had dropped by almost 50%.⁶¹ According to Ackerman, Roosevelt's rousing success in 1932 reflected not a mandate to govern from the People, but a rejection of the incumbent.⁶²

President Roosevelt's plan was to alter the economy radically by enacting federal regulations, even though this was a power that the government did not yet have.⁶³ Within four months of his inauguration, President Roosevelt signed the National Industrial Recovery Act ("NIRA") into law.⁶⁴ The Act allowed the government to serve as a regulator of economic life, abolishing the free market system.⁶⁵ Other acronymic acts followed, each one regulating a sector of the economy, with some teetering on the edge of socialism.⁶⁶ Congress passed each regulation without considering whether the laws fit within the federal government's limited powers.⁶⁷ Clearly, there existed an unwillingness on Capital Hill to obstruct President Roosevelt's proposals for sweeping reform. While the New Deal had opponents within the Republican party, those opponents believed that

58. Rusk, *supra* note 2, at 132.

59. Price, *supra* note 6, at 157.

60. Ackerman, Transformations, *supra* note 9, at 286. Because Alaska and Hawaii had not yet been admitted as states in the Union, only ninety-six members constituted the Senate.

61. Price, *supra* note 6, at 157.

62. Ackerman, Transformations, *supra* note 9, at 281.

63. Jackson, *supra* note 9, at 76-78.

64. Ackerman, Transformations, *supra* note 9, at 286-87.

65. *Id.*

66. *Id.* at 288. Ackerman views the Tennessee Valley Authority as Roosevelt's socialistic experiment. *Id.* Other programs that gained Congressional approval during this time included the regulation of unions, agricultural controls, working condition standards, and the regulation of Wall Street with the Securities and Exchange Commission. *Id.*

67. Jackson, *supra* note 9, at 76-78.

they could not publicly contest the legislation, as such a battle would cost too much political capital.⁶⁸ Consequently, Congress passed President Roosevelt's proposals one after the other with wide support.⁶⁹

With these reforms before them, the populace returned to the polls in 1934. Throughout American history, the President's party has rarely achieved victory in midterm Congressional elections.⁷⁰ Moreover, in 1934, the socialist tilt of the administration, as well as the far-reaching legislation legitimizing that vision, provided the Republican Party with a solid platform from which to attack the President and his party.⁷¹ The federal government was systematically absorbing the duties of the states, an event that had been feared since the Founding. The Republicans believed a sweeping victory in both houses was at hand.⁷² Their hopes were dashed, however, when the People elected 322 Democrats and only 103 Republicans to the House of Representatives.⁷³ In the Senate, the gap widened to sixty-nine Democrats and twenty-five Republicans. Additionally, the Republican representatives who were elected were far more progressive than their predecessors had been two years earlier, as eight leading conservatives lost their seats.⁷⁴

Instead of a backlash against the President's ideology and party, the Democrats received, as one New York Times columnist dubbed it "the most overwhelming victory in the history of American politics."⁷⁵ The People's vote reflected support for the Democrats and thus, for President Roosevelt's legislative agenda. The New Deal had been the central issue in both parties' campaigns and the People gave resounding support to its proponents.⁷⁶ The midterm election was a great personal victory for President Roosevelt and, by extension, for the New Deal, as "even Republicans had invoked Roosevelt's name to get elected."⁷⁷ President Roosevelt and his Democrats now possessed an indisputable mandate from the People to continue with the New Deal, and thereby increase the power of the federal government.⁷⁸

68. Baker, *supra* note 13, at 109.

69. *See id.*; Ackerman, Transformations, *supra* note 9, at 285, 288-89.

70. Ackerman, Transformations, *supra* note 9, at 289; Rusk, *supra* note 2, at 132, 216, 377.

71. *See* Ackerman, Transformations, *supra* note 9, at 288, 289.

72. Barry Cushman, *Rethinking the New Deal Court*, 80 Va. L. Rev. 201, 229 (1994) [hereinafter Cushman, *Court*].

73. Ackerman, Transformations, *supra* note 9, at 289.

74. *Id.*

75. *Id.*

76. Cushman, Structure, *supra* note 4, at 26 (quoting Leuchtenburg, Franklin D. Roosevelt and the New Deal 116-17 (1963)).

77. *Id.*

78. *Id.*

2. A Constitutional Impasse

One small group of Americans did not support the New Deal. The era before the New Deal found its most powerful judicial expression in the 1905 Supreme Court decision of *Lochner v. New York*.⁷⁹ In *Lochner*, the Court held that the Due Process Clauses of the Fifth and Fourteenth Amendments protect liberty of contract and private property against unwarranted governmental interference.⁸⁰

While *Lochner* today is “one of the most condemned cases in United States history and has been used to symbolize judicial dereliction and abuse,”⁸¹ it accurately reflected the prevailing economic and social philosophy of the time.⁸² The laissez-faire doctrine of Adam Smith, the eighteenth-century economist, combined with the thinking of Herbert Spencer, the nineteenth-century social Darwinist, swayed the Court into placing the “fundamental” rights of property over and above the regulations passed by the state legislatures.⁸³

This precedent stood directly in the path of President Roosevelt’s New Deal.⁸⁴ On January 7, 1935, by its decision in *Panama Refining Co. v. Ryan*,⁸⁵ and then again on May 27, 1935, by its decision in *A.L.A. Schechter Poultry Corp. v. United States*, the Supreme Court declared unconstitutional major provisions of the New Deal.⁸⁶ The latter decision signaled the end of the NIRA, the crown jewel of President Roosevelt’s New Deal legislation.⁸⁷ The Court unanimously

79. 198 U.S. 45 (1905).

80. *Id.* at 53-54.

81. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. Rev. 1383, 1390 n.20 (2001) (citing Bernard H. Siegan, *Economic Liberties and the Constitution* 23 (1980)).

82. *Id.* at 1424.

83. *Id.* at 1422. Not all members of the Court adhered to this philosophy. As Justice Holmes argued in his *Lochner* dissent,

the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

Lochner, 198 U.S. at 76.

84. Price, *supra* note 6, at 158. For example, “between 1899 and 1937, the Supreme Court invalidated over 180 state statutes as unconstitutional, primarily on due process or equal protection grounds.” *Id.*; e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (holding that a New York statute restricting working hours in a bakery violated the substantive due process right of liberty of contract). *But see* Jack Wade Nowlin, *The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis*, 89 Ky. L.J. 387, 454-57 (2000/2001) (stating that *Lochner* symbolized an era of radical judicial activism with regards to the use of the Fourteenth Amendment in invalidating laws).

85. 293 U.S. 388 (1935) (invalidating a section of the NIRA pertaining to the oil industry).

86. 295 U.S. 495 (1935) (the “Sick Chicken” case).

87. *Id.* at 528.

held that the federal government's requirement that trade associations adopt codes of fair competition was an unconstitutional expansion of federal power.⁸⁸ The Court stated that, "[w]ithout in any way disparaging th[e] motive [of Congress], it is enough to say that the recuperative efforts of the Federal Government must be made in a manner consistent with the authority granted by the Constitution."⁸⁹ After *Schechter*, known to posterity as the "Sick Chicken" case, the Supreme Court continued to strike down legislation throughout the rest of 1935 and into 1936.⁹⁰ The Court was at a constitutional impasse with both Congress and the President.

President Roosevelt acted as if the Court's opinion in *Schechter* was a direct challenge to his presidency and he responded by giving an uninterrupted 90-minute press conference attacking the decision.⁹¹ President Roosevelt criticized the opinion from a legalistic perspective, aimed not at the outcome of the case, but at its reasoning.⁹² Strikingly, President Roosevelt isolated the issue at stake and charged the American public to act:

Is the United States going to decide, are the people of this country going to decide that their Federal government shall in the future have no right under any implied power or any court-approved power to enter into a solution of a national economic problem, but that that national economic problem must be decided only by the States?⁹³

President Roosevelt now charged the People to decide what type of government they wanted.

The fact that President Roosevelt had taken the issue to the public was not as remarkable as the method by which he communicated his message. He spoke to the public as if they had all read and comprehended the Court's opinion in *Schechter*. Dissecting each section of the opinion, he argued constitutional doctrine, challenging the Court's reading of its proscriptions.⁹⁴ The message was not processed and simplified, it was not rhetoric and it certainly was not filled with campaign slogans.⁹⁵ As Ackerman notes, President Roosevelt was actually engaged in an unprepared intellectual conversation with the public.⁹⁶ Even the press ran with the story, detailing the constitutional impasse between the President and the Court with great specificity.⁹⁷

88. *Id.* at 551.

89. *Id.* at 550.

90. O'Brien, *Constitutional Law*, *supra* note 12, at 549-50.

91. Ackerman, *Transformations*, *supra* note 9, at 297.

92. *Id.*

93. FDR and the Supreme Court, *supra* note 3.

94. *Id.*

95. *Id.*

96. Ackerman, *Transformations*, *supra* note 9, at 298.

97. *Id.* at 299-300. This is striking considering the nature of the press today when

On the legislative front, President Roosevelt came back at the Court with his Second New Deal. The new legislation no longer attempted to supplant the free market system entirely, but instead sought to regulate it to protect against abuses.⁹⁸ While this method existed in parts of the original New Deal, such as the Securities Acts of 1933 and 1934, this regulatory theme now became the new focus of President Roosevelt's plan.⁹⁹ With the conflict now defined, both sides stuck to their positions as the Presidential election of 1936 approached.

Ackerman asserts that when the voters went to the polls that November, they went to decide the future direction of the country.¹⁰⁰ Nevertheless, President Roosevelt remained somewhat silent in the last few months before the election. This reticence was uncharacteristic for the President, especially given the Supreme Court's deluge of anti New-Deal opinions.¹⁰¹ Some historians argue that President Roosevelt was trying to retreat from the strong position that he took after *Schechter*.¹⁰² A more plausible explanation is that the President saw that the issue no longer needed provoking—his opponents were doing a fine job of provoking the issue themselves.¹⁰³ As one columnist wrote at the time, “[i]nterest in the political situation is intense because the vote this Fall will shape our individual lives and the nation's future. This election will determine who shall appoint perhaps a majority of the Supreme Court.”¹⁰⁴ This message was repeated throughout the entire year, sometimes even including dramatic accounts about President Roosevelt's “intention” to pack the Court with liberal justices if he were re-elected, even though President Roosevelt had not yet announced any such intention.¹⁰⁵

The Republican Party fueled the controversy. Former President Herbert Hoover's speech at the Party's convention in June maligned

it comes to covering politics. The stories of Whitewater, Travelgate, Monica Lewinsky, the Lincoln Bedroom and Enron are prime examples. Deplorably, these stories got larger press coverage than the government did during the two times it shut down during the mid-1990's due to the lack of a budget. The recent constitutional controversy of the 2000 Presidential election was seemingly “dumbed down” by the press, especially the television media—who treated it as if it were another political scandal. The broadcasting of the truck carrying the ballots up to Tallahassee was very similar to the way in which O.J. Simpson's Bronco was followed by the cameras in 1994.

98. *Id.* at 301-02.

99. *Id.*

100. *Id.* at 310. *Contra*, William E. Leuchtenburg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 108 Yale L.J. 2077 (1999); Price, *supra* note 6, at 181.

101. Leuchtenburg, *supra* note 100, at 2082-87.

102. *See* Jackson, *supra* note 9, at 177.

103. *Id.*

104. Leuchtenburg, *supra* note 100, at 2088-89 (quoting *Gannett Calls Borah the Best Candidate*, N.Y. Times, Feb. 23, 1936, at 31).

105. *Id.* at 2095-97.

President Roosevelt's attempt to usurp judicial power and charged the People to stand up to Roosevelt.¹⁰⁶ The Party's platform was even more aggressive. It lambasted the Democratic Party's betrayal of American traditions and the American people.¹⁰⁷ Commenting on President Roosevelt's attack on the integrity and authority of the Court, it pledged "to maintain the American system of Constitutional and local self government, and to resist all attempts to impair the authority of the Supreme Court of the United States."¹⁰⁸ The Republican presidential candidate, Alf Landon, continued this attack, and yet he realized that the Constitution was no more of a winning issue than it had been in 1934.¹⁰⁹ He was not completely silent and while he did support a few aspects of the New Deal, he criticized "laws 'which an untrammelled Congress would not have passed and a wise Executive would not have signed.'"¹¹⁰ Landon further criticized the President for taking such an aggressive stance against the Court.¹¹¹

Critics of the Court who supported the President, most notably members of Congress, were also very vocal in the months preceding the campaign.¹¹² Additionally, the Court provoked this ideological hornets' nest in its final decision of the 1935-1936 term, *Morehead v. New York ex rel. Tipaldo*,¹¹³ which overturned a minimum wage law for women.¹¹⁴ The decision created a large amount of press and single-handedly shifted public opinion away from the Court.¹¹⁵ While sixty percent of newspapers publicly opposed President Roosevelt's reelection, "a sample of 344 editorials found only ten . . . favorably disposed toward the [*Tipaldo*] ruling."¹¹⁶ Americans became increasingly aware that the Constitution, as interpreted by the sitting Court, did not "offer protection for the most essential conditions of life to even the poorest and weakest of its members."¹¹⁷

106. "Suppose these New Deal acts had remained upon the statute books. We would have been a regimented people. Have you any assurance that he will not have the appointments if he is re-elected?" *Id.* at 2090 (quoting Herbert Hoover, Address Delivered to the Republican National Convention, (June 10, 1936)).

107. *Id.* at 2091 (citing *Republican Platform for 1936*, in National Party Platforms 1840-1956, at 365, 365-66 (Kirk H. Porter & Donald Bruce Johnson eds., 1956)).

108. *Id.*

109. *Id.* at 2092. Landon pledged to support laws protecting women and children as to maximum hours, minimum wages and working conditions. *Id.* at 2091.

110. *Id.* at 2092 (quoting *The Texts of Governor Landon's Addresses Yesterday*, N.Y. Times, Oct. 14, 1936, at 21 (transcribing the speech by Gov. Alf Landon in Detroit on Oct. 13, 1936)).

111. *Id.* at 2092.

112. *Id.* at 2100.

113. 298 U.S. 587 (1936).

114. *Id.* at 603-04, 611.

115. Leuchtenburg, *supra* note 100, at 2102-03.

116. *Id.*

117. *Id.* at 2103 (quoting Dorothy Thompson, N.Y. Herald Trib., June 4, 1936, at 23).

While the Court continued to ravish the New Deal, it was not immune to the ideological controversy surrounding its decisions. Within the Court itself, several justices wrote seething dissents against the anti-New Deal decisions. Justice Stone, dissenting in *United States v. Butler*,¹¹⁸ criticized the Court's opinion as "hardly ris[ing] to the dignity of argument," and opined that the Court itself was not immune from abuse.¹¹⁹ He continued, "It must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."¹²⁰ Justice Cardozo also admonished the Court in his dissents, stating that the decisions were overturning sound legislative decisions in favor of irresponsibility.¹²¹

Polling data gathered by George Gallup provides some insight into the minds of the People.¹²² A November 1935 poll showed that employment and the economy were the two most vital issues facing the country at the time.¹²³ Another poll conducted just after the election in 1936 had almost 60% of those polled believing that the Supreme Court needed to review the New Deal more liberally.¹²⁴ A year after the election, a poll found that 13% of Americans still believed that the Supreme Court's New Deal opinions were the most interesting events in 1937, even though the Court was now upholding the New Deal and was thus less controversial.¹²⁵ Another 27.5% believed that the controversy surrounding the court packing plan was the most interesting issue, trailing the Sino-Japanese War and the floods in Ohio by less than one percent.¹²⁶ This data shows that the American populace was not only aware of, but also was deeply concerned with the Supreme Court's constitutional jurisprudence and the impasse regarding the feasibility of the New Deal. The New Deal's plan to revive the nation's economy was the most important issue in the election and was constantly addressed by many interested parties on all sides of the debate.¹²⁷

118. 297 U.S. 1 (1935).

119. *Id.* at 87 (Stone, J., dissenting).

120. *Id.* (quoting *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U.S. 267, 270 (1904)).

121. *Jones v. Sec. & Exch. Comm'n*, 298 U.S. 1, 32 (1936) (Cardozo, J., dissenting).

122. See generally George H. Gallup, 1 *The Gallup Poll: Public Opinion 1935-1971* (1972). Gallup began collecting data in the mid-1930s and quickly made a name for himself because he was the only pollster accurately to predict Roosevelt's landslide victory in 1936. John H. Lienhard, *Engines of Our Ingenuity, No. 1199: Gallup Poll*, at <http://www.uh.edu/engines/epi1199.htm>.

123. Gallup, *supra* note 122, at 5.

124. *Id.* at 43.

125. *Id.* at 80.

126. *Id.*

127. Baker, *supra* note 13, at 43-45; Jackson, *supra* note 9, at 176-77.

3. The Electoral Mandate and the "Switch in Time"

With the future of the New Deal on the line, the People went to the polls in 1936. President Roosevelt won 523 electoral votes, winning every state except Maine and Vermont, and 60.8% of the popular vote.¹²⁸ No other President had achieved so great an electoral victory since James Monroe, who ran uncontested in 1820; no other president has achieved such a feat in the sixty-six years that have followed.¹²⁹ Landon managed to win only 36.54% of the popular vote.¹³⁰ The polls drew a turnout 61.1% of eligible voters, compared with 56.8% in 1932,¹³¹ reflecting an increase of six million voters.¹³² In terms of the entire eligible adult population, the election drew 57.7% to the polls in 1936 compared with 53.2% in 1932.¹³³ With the influx of new voters, President Roosevelt received 4,951,612 more votes in 1936 than he did in 1932.¹³⁴ Equally as impressive, the Democrats gained thirteen seats in the House, for a total of 335, and seven seats in the Senate for a total of seventy-six.¹³⁵ The Republicans were left with only eighty-nine seats in the House and sixteen in the Senate.¹³⁶

While the public may have been against weakening the power of the Court to review congressional legislation,¹³⁷ President Roosevelt's landslide reelection is proof that he had wide support for his recovery effort, which supported the expansion of federal powers.¹³⁸ As Supreme Court Justice Robert Jackson noted, "[t]he election had gone against the Court quite as emphatically as against the Republican Party, whose bedfellow it had been."¹³⁹ With the depressed economy greatly influencing the voters' decision, the reelection gave President Roosevelt the mandate that he needed to push forward.¹⁴⁰

President Roosevelt signaled to the nation that he had won a mandate to change the nature of the federal government and that he had every intention to use that mandate in pushing his reforms forward. On February 5, 1937, President Roosevelt announced to Congress his plan to increase the size of the Supreme Court, adding an

128. Leuchtenburg, *supra* note 100, at 2108; Rusk, *supra* note 2, at 132-33.

129. Leuchtenburg, *supra* note 100, at 2108.

130. See Rusk, *supra* note 2, at 132.

131. *Id.* at 52.

132. Jackson, *supra* note 9, at 176. This was in addition to the three million more voters who came to the polls in 1932 compared with 1928. *Id.*

133. Rusk, *supra* note 2, at 51.

134. Jackson, *supra* note 9, at 176.

135. Rusk, *supra* note 2, at 215, 377.

136. *Id.*

137. Gallup, *supra* note 122, at 43; Leuchtenburg, *supra* note 100, at 2111.

138. Ackerman, Transformations, *supra* note 9, at 310-11; see also Jackson, *supra* note 9, at 176-79.

139. Jackson, *supra* note 9, at 177.

140. *Id.* at 177-79.

additional justice for every justice currently over seventy years old.¹⁴¹ This plan would have enlarged the Court at that time by six members, “infusi[ng] new blood” into the Court, and allowing President Roosevelt to appoint justices who would uphold the New Deal.¹⁴²

In retrospect, it is unlikely that Congress, especially given the eruption of acrimonious debate in both houses over the plan, would have approved of President Roosevelt’s court packing scheme.¹⁴³ In the alternative, President Roosevelt could have dealt with the Court by advocating for an amendment to the Constitution that essentially ratified the New Deal. The amendment most certainly would have altered the balance of power between the national government and the states in favor of Washington. The problem was that an amendment would not have solved the perceived crises with the speed and efficiency that President Roosevelt thought was necessary.¹⁴⁴ The amendment process is inherently slow because it requires passing through the gauntlet that is state ratification.¹⁴⁵ President Roosevelt probably feared that an amendment with such sweeping reforms would not have passed this requirement.¹⁴⁶ With state approval in question, President Roosevelt attempted to bypass the states by taking dead aim at the Supreme Court.¹⁴⁷

The court packing plan was cut short because of the Supreme Court’s ruling in *West Coast Hotel Co. v. Parrish*, decided on March

141. *Id.* at 187-88.

142. *Id.*

143. Ackerman, Transformations, *supra* note 9, at 320-33. “The President’s Court proposal hit the country like a bombshell. ‘For five months, the mass media, Congress, and the president focused on little else . . . the Court has not since then surfaced so long and so prominently on the public agenda, even during the salad days of the Warren Court.’” *Id.* at 324 (quoting Greg Caldeira, *Public Opinion and the U.S. Supreme Court: FDR’s Court-Packing Plan*, 81 *Am. Pol. Sci. Rev.* 1139, 1140, 1144 (1987)).

144. Jackson, *supra* note 9, at 179.

145. *Id.*

146. Price, *supra* note 6, at 191. “[T]hirteen States which contain only five percent of the voting population can block ratification even though the thirty-five States with ninety-five percent of the population are in favor of it.” Ackerman, Transformations, *supra* note 9, at 326 (quoting *The Public Papers and Addresses of Franklin D. Roosevelt* 132 (Samuel Rosenman ed., 1937)). While Roosevelt feared this scenario, it may have bordered on the unrealistic—the election of 1936 brought with it thirty-eight Democratic governors and liberal governors in three others. *Id.* at 341 (quoting Burton Wheeler, Speech of February 19, 1937, 10 P.M., NBC Museum of Public Broadcasting, box t37-23, disks 4995-96). Additionally, Democrats controlled both houses of the legislatures of thirty-three states and of the remaining fifteen states, two were non-partisan, seven were divided, and only in six were both houses Republican. *Id.* (citing Rafael Gely & Pablo Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt’s Court Packing Plan*, 12 *Int’l Rev. L. & Econ.* 45, 63 (Table 5) (1992)).

147. This is almost revolutionary. The state governments, which at the Founding were considered more representative of the people than the federal government, were now thought of as a hindrance to reform. *See generally* The Federalist Nos. 45, 46, at 256-68 (James Madison) (Clinton Rossiter ed., 1961).

29, 1937.¹⁴⁸ In *West Coast Hotel*, which overruled *Adkins v. Children's Hospital of D.C.*,¹⁴⁹ the Court gave its first opinion in support of the New Deal by upholding the constitutionality of a state law that regulated employment conditions and wages for women.¹⁵⁰ The Court's logic showed a genuine switch in the ideological tenor of the Court. Proving that this was not a fluke, the Court in *NLRB v. Jones & Laughlin Steel Corp.*¹⁵¹ upheld the National Labor Relations Act, a major cornerstone of the New Deal.¹⁵²

This change reflected a genuine reversal of opinion, rather than a response to President Roosevelt's court packing plan. In fact, Justice Roberts had already switched his position when the Court's preliminary vote on *West Coast Hotel* was taken.¹⁵³ The switch occurred before President Roosevelt had even announced his intention to pack the Court.¹⁵⁴ With the switch, the debate between a formal amendment and President Roosevelt's court packing plan was moot, and the constitutional impasse between two parts of the federal government came to an end. There was no longer a need to assert the legitimacy of the New Deal, as the Court had succumbed to the will of the country.

4. The Consolidation Election

The approach of the midterm elections in 1938 gave the Republicans a final realistic chance to challenge the emerging constitutional change. The trend toward the expansion of federal government could still be modified, or even reversed, by a sweeping Republican victory.¹⁵⁵ Moreover, a victory in 1938 could possibly lead to capturing the presidency two years later, divesting control of Court appointments from President Roosevelt and the New Deal Democrats.

However, the Republicans essentially acquiesced to the emergence of the new era of constitutional politics. Neither in 1938, nor in the presidential election of 1940, did the Republican candidates make President Roosevelt's New Deal a campaign issue.¹⁵⁶ Senatorial resistance against President Roosevelt's liberal Supreme Court appointments never materialized, and in the 1940 election, the only constitutional issue that the Republican candidate Wendell Willkie

148. 300 U.S. 379 (1937).

149. 261 U.S. 525 (1923).

150. Price, *supra* note 6, at 162-63.

151. 301 U.S. 1 (1937); see Price, *supra* note 6, at 163.

152. Price, *supra* note 6, at 163.

153. Geoffrey R. Stone et al., *Constitutional Law* 215 (3d. ed. 1996).

154. *Id.*

155. Ackerman, *Transformations*, *supra* note 9, at 355.

156. *Id.* at 355-57.

discussed was that of President Roosevelt running for a third term.¹⁵⁷ Willkie's nomination itself signaled the end of the struggle, as Willkie was a self-declared liberal democrat who publicly supported much of the major New Deal legislation.¹⁵⁸ Once President Roosevelt was elected for his third term, more Court nominations were confirmed without a fight in the Senate, and the transformation became complete.¹⁵⁹

C. *The New Deal as Higher Lawmaking*

The Supreme Court's decision in *West Coast Hotel* was not an aberration. Rather, this decision heralded a new era of constitutional interpretation allowing for broader congressional power under the Commerce Clause.¹⁶⁰ But, was this "switch in time" an example of higher lawmaking? Is it deserving of the same precedential weight traditionally accorded to the Constitution and its amendments?

The amendment process in Article V is necessarily an arduous path to traverse. The requirement that three-quarters of the states ratify any amendment¹⁶¹ creates a high barrier to change. A New Deal Amendment might have faced immense opposition from the states because it would have expanded federal power to the detriment of state autonomy.¹⁶² The fact that the constitutional changes underlying the New Deal were accomplished without going through the Article V amendment process challenges their legitimacy.¹⁶³ If the change, as an amendment, would have faced staunch opposition in the states, how can it be a constitutional change deserving the higher lawmaking distinction? Nevertheless, the New Deal achieved legitimacy because it satisfied the four steps of Ackerman's model. The switch eliminated any need for a constitutional amendment. After President Roosevelt had achieved victory, the popular support that once might have ratified an amendment diminished due to lack of interest. It is therefore disingenuous to discount what occurred simply because the Court had preempted Article V and the amendment process.

157. *Id.* at 357.

158. *Id.* "In his acceptance speech, Willkie declared himself 'a liberal Democrat who changed his party affiliation because he found democracy in the Republican party rather than the New Deal party.'" *Id.* (quoting N.Y. Times, August 18, 1940, § 1, at 13.)

159. *Id.* at 358; see generally Jackson, *supra* note 9, at 232-86. Roosevelt elevated Harlan F. Stone to Chief Justice, and appointed Robert H. Jackson, James F. Byrnes and Wiley B. Rutledge. Stone, *supra* note 153, at ci.

160. See Stone, *supra* note 153, at 215.

161. U.S. Const. art. V.

162. Price, *supra* note 6, at 195.

163. See *id.* at 190. The fact that a New Deal amendment might have faced staunch opposition in the states has little to do with the efficacy of Roosevelt's plans for economic recovery. The states would have objected to the amendment because of the absolute decrease in their power, altering the vertical separation of powers in our government. *Id.* at 195.

Looking back at the New Deal, the four distinct periods of Ackerman's higher lawmaking process are clearly defined. First, the constitutional moment begins with a signal, the formal announcement by the public that change is needed.¹⁶⁴ A possible signal must be confirmed by repeated support. In Ackerman's words, "no movement for revolutionary reform can rightfully expect an easy victory for its transformative vision. It must earn its claim to speak for the People by repeatedly winning electoral support in the face of sustained constitutional critique."¹⁶⁵ The election of Roosevelt in 1932 was the initial signal that the People wanted change in the wake of the Great Depression.¹⁶⁶ The signal was confirmed by the midterm election in 1934, in which the Democrats, under President Roosevelt's leadership, took overwhelming control over both houses of Congress.¹⁶⁷

Second, the implementation of change with the New Deal led to the conflict between the President and Congress on one side, and the Court on the other side.¹⁶⁸ As the Presidential election of 1936 approached, the debate between President Roosevelt's New Deal and the Court's adherence to the notion of a limited federal government spread to the electorate.¹⁶⁹

Third, the 1936 election brought continued support for the President and his party.¹⁷⁰ This "mandate" resulted in the eventual "switch in time" by the Supreme Court, as New Deal legislation was subsequently upheld as constitutional.¹⁷¹ With the switch of the Court, there was no need for a constitutional amendment because President Roosevelt had achieved his desired result. The popular support, which at one time might have pushed the states to ratify an amendment regardless of the states' desire to retain their own power, faded because the goal was achieved.

Finally, the switch was confirmed by the elections of 1938 and 1940, which allowed President Roosevelt the opportunity to appoint justices to the Supreme Court that would continue to uphold the New Deal and its progeny.¹⁷²

The "switch in time" was a legitimate period of higher lawmaking because the People had spoken—the People believed that President Roosevelt presented a "manifest and irresistible proof[] of a better administration."¹⁷³ The shape of the government changed because of the new interpretation of the Constitution, a change necessary as a

164. See *supra* text accompanying note 48.

165. Ackerman, Transformations, *supra* note 9, at 291.

166. See *supra* text accompanying notes 58-62.

167. See *supra* text accompanying notes 70-78.

168. See *supra* text accompanying notes 84-99.

169. See *supra* text accompanying notes 100-27.

170. See *supra* text accompanying notes 128-36.

171. See *supra* text accompanying notes 148-54.

172. See *supra* text accompanying notes 155-59.

173. The Federalist No. 46, *supra* note 147, at 263.

response to the crisis of the Great Depression. In this regard, the New Deal era served “as the formative period of modernist governance in America . . . whose special cultural significance was not unlike that encompassing the Declaration of Independence, the Revolutionary War, and the framing of the Constitution.”¹⁷⁴

II. NARROWING THE NATION’S POWER: COMMERCE CLAUSE REDEFINED

Law is always subject to interpretation, regardless of whether it is the product of higher lawmaking or ordinary lawmaking. The difference is that higher lawmaking cannot be interpreted out of existence.¹⁷⁵ Only a process of higher lawmaking has the power to reverse past episodes of higher lawmaking. Thus, if the “switch in time” was an episode of legitimate higher lawmaking, then another mandate from the People is needed to back away from its precedent.

This part shifts focus to the past decade of Supreme Court jurisprudence. Section A details the interpretation of the Commerce Clause that now prevails on the Court and how this new interpretation marks a drastic shift in our government’s underlying structure. Section B compares this change with Ackerman’s explanation of the New Deal, looking particularly at whether a mandate existed for the revolution of the Reagan and Gingrich eras, and whether that mandate was directed at affecting the specific ideological change pursued by the Court.

A. Decline of the Commerce Clause¹⁷⁶

In the fifty-eight years since *West Coast Hotel* was decided, the Commerce Clause has become a staple of national legislative power.¹⁷⁷ Congress has used this power to pass statutes regarding, *inter alia*, economic regulation,¹⁷⁸ federal criminal law,¹⁷⁹ and civil rights.¹⁸⁰ This

174. G. Edward White, *The Constitution and the New Deal* 9 (2000).

175. *But see* *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873) (severely limiting the “privileges or immunities” clause of the Fourteenth Amendment).

176. Although the Rehnquist Court revolution extends well beyond the Commerce Clause, it is unnecessary to discuss it in its entirety. The purpose of this section is to illustrate the current revolutionary movement underway in the Court, the Commerce Clause being a prime example. Other areas where the revolution has extended include the limitation on Congress’s ability to pass civil rights legislation under Section five of the Fourteenth Amendment in *City of Boerne v. Flores*, 521 U.S. 507 (1997); the limitation on the federal regulation of state instrumentalities in *Printz v. United States*, 521 U.S. 898 (1997); and the limitation on the use of affirmative action in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

177. *See* Price, *supra* note 6, at 166-67.

178. *See* *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding the marketing penalties under the Agricultural Adjustment Act, discarding the direct and indirect effects rule); *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act of 1938).

broad power, however, has come under increasing attack from the Court, acting in the name of states' rights under the influence of now Chief Justice William H. Rehnquist.

1. Early Rumblings

The first inclination of change came in the 1976 case, *National League of Cities v. Usery*,¹⁸¹ where the Court held that three amendments to the Fair Labor Standards Act, which extended hour and wage standards to all state, county, and municipal employees, were unconstitutional.¹⁸² The decision marked the first occasion since the "switch in time" that the Court imposed a limit on Congress's use of the Commerce Clause.¹⁸³ This decision is striking not so much because of its outcome, but because of the reasoning that Justice Rehnquist employed in writing the majority opinion. Interpreting the Tenth Amendment, Rehnquist opined that the amendment was a restriction on congressional power, prohibiting it from regulating the "States as States."¹⁸⁴ This interpretation contrasted with the Amendment's traditional reading that it merely granted the states residual power.¹⁸⁵ Furthermore, the Court held that it was its duty to protect the states by restraining Congress.¹⁸⁶

179. See *Perez v. United States*, 402 U.S. 146 (1971) (upholding Congress' prohibition of "loan sharking" under the Consumer Credit Protection Act).

180. See *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding unanimously the Civil Rights Act of 1964 solely on Congress's authority under the Commerce Clause); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (same).

181. 426 U.S. 833 (1976).

182. *Id.* at 851-52.

183. See O'Brien, *Constitutional Law*, *supra* note 12, at 682.

184. *Usery*, 426 U.S. at 845. Rehnquist went on to state that

It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

Id.

185. See, e.g., *United States v. Darby*, 312 U.S. 100, 124 (1941); see also Louis J. Virelli III & David S. Leibowitz, "Federalism Whether They Want it or Not": *The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation After United States v. Morrison*, 3 U. Pa. J. Const. L. 926, 944-45 (2001); Yarbrough, *supra* note 21, at 111.

186. *Usery*, 426 U.S. at 852. In fact, less than a week later, in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), Rehnquist, writing again for the Court, held that Congress could prohibit state and local discriminatory actions under the Fourteenth Amendment. *Id.* at 456; see O'Brien, *Constitutional Law*, *supra* note 12, at 683.

This interpretation reflected a truly radical approach.¹⁸⁷ Aside from the fact that Rehnquist limited his reasoning to adjudicating cases under the Commerce Clause,¹⁸⁸ the Constitution simply does not explicitly guarantee the states any specific powers.¹⁸⁹ Moreover, the Constitution does not require the judiciary to protect state sovereignty.¹⁹⁰ As Justice Brennan argued in dissent in *Usery*, “effective restraints on [Congress’s commerce power] must proceed from political rather than judicial processes.”¹⁹¹ “Judicial restraint,” he continued, “recognizes that the *political branches* of our Government are structured to protect the interests of the States . . . and that the States are fully able to protect their own interests.”¹⁹² Legislation is proposed and passed by those who have the interest of their state and its citizens in mind when they vote. Overwhelming encroachments on state power by the federal government would affect numerous states and plans of resistance will arise.¹⁹³

While the decision rejuvenated the federalism debate, the effect of the holding was short-lived. Nine years after the *Usery* decision, the Court refused to strike down another federal statute under the decision’s rationale.¹⁹⁴ In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court officially overturned *Usery*.¹⁹⁵ The Court held that the amendment to the Fair Labor Standards Act, which applied minimum wage and overtime standards to state and local government employees, was constitutional.¹⁹⁶ In essence, *Garcia* affirmed Justice Brennan’s dissent in *Usery*.¹⁹⁷ However, this decision did not finalize any issues. *Garcia* was a 5-4 decision, hardly strong precedent.¹⁹⁸

187. O’Brien, *Constitutional Law*, *supra* note 12, at 682. Underscoring this point, Justice Blackmun, who was the majority’s fifth vote, had reservations regarding the scope of the opinion, and stated in his concurrence that he was “not untroubled by certain possible implications of the Court’s opinion—some of them suggested by the dissents.” *Usery*, 426 U.S. at 856.

188. O’Brien, *Constitutional Law*, *supra* note 12, at 683.

189. Instead, the Constitution grants the states all powers that are neither reserved to the federal government nor prohibited. U.S. Const. amend. X.

190. Noonan, *supra* note 22, at 150-56.

191. *Usery*, 426 U.S. at 876 (citing *Wickard v. Filburn*, 317 U.S. 111, 120 (1942)).

192. *Id.* (emphasis added).

193. See *The Federalist*, Nos. 45, 46, *supra* note 147, at 258-59, 265-66 (James Madison).

194. O’Brien, *Constitutional Law*, *supra* note 12, at 683.

195. 469 U.S. 528 (1985). The Court stated that, “the attempt to draw the boundaries of state regulatory immunity in terms of ‘traditional governmental function’ is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which [*Usery*] purported to rest.” *Id.* at 531.

196. *Id.*

197. *Id.* at 550-54. Notwithstanding the various changes that have occurred since the Founding, including the Seventeenth Amendment, the states are still protected from the reach of the Commerce Clause through the political process. *Id.* at 554.

198. Significantly, Justice Blackmun—who had reservations about *Usery* but joined the majority—wrote the *Garcia* opinion.

Additionally, the minority promised to pursue the overturning of *Garcia* at their first opportunity.¹⁹⁹ Justice Rehnquist, who wrote the opinion in *Usery*, and the other justices were not going to quietly back away.²⁰⁰

2. *United States v. Lopez*

In the early 1990s, the rationale in *Garcia* was attacked, and although *Garcia* was not overruled, its scope was severely limited.²⁰¹ In 1995, the Court decided *United States v. Lopez*,²⁰² a decision that pushed the Court in a new direction that threatened the legitimacy of the “switch in time.” For the first time since the New Deal era, the Court struck down a federal statute for exceeding the scope of the Commerce Clause.²⁰³ At issue was the Gun Free School Zones Act, which prevented the possession of a firearm at or near a school. In invalidating the law, the Court set free the defendant, who was arrested under the statute for carrying a loaded .38 caliber handgun to school with him.²⁰⁴

The Court set up a three-part framework for deciphering Commerce Clause cases, distinguishing between legislation that “regulate[s] the use of the channels of interstate commerce”,²⁰⁵ legislation that “regulate[s] and protect[s] the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities”,²⁰⁶

199. *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting).

200. *Id.*

201. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452 (1991). The Court, in upholding Missouri’s mandatory retirement law as applied to judges, stated that Congress needs to make a “plain statement” whenever it intends to preempt a power of the state with the Commerce Clause. *Id.* at 460-61; *see also* *New York v. United States*, 505 U.S. 144 (1992). Although the Court declined to overrule *Garcia*, it staunchly defended state sovereignty, holding that Congress could not force the state legislatures to enact and enforce federal programs. *Gregory*, 501 U.S. at 464. Dissenting, Justice White noted that the congressional act resulted from the combined effort of state governors to achieve a state-based remedy, because the Constitution mandates that “no State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State.” U.S. Const. art. I, § 10, cl. 3; *New York*, 505 U.S. at 190 (White, J., dissenting). “By invalidating the measure designed to ensure compliance for recalcitrant States . . . the Court upsets the delicate compromise achieved among the States and forces Congress to erect several additional formalistic hurdles to clear before achieving exactly the same objective.” *New York*, 505 U.S. at 210 (White, J., dissenting).

202. 514 U.S. 549 (1995).

203. Candice Hoke, *Arendt, Tushnet, and Lopez: The Philosophical Challenge Behind Ackerman’s Theory of Constitutional Moments*, 47 Case W. Res. L. Rev. 903, 911 (1997). The *Usery* Court did not hold that the legislation addressed exceeded the powers granted by the Commerce Clause, but that the legislation did not apply to state officials. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 845-46 (1976).

204. *Lopez*, 514 U.S. at 551.

205. *Id.* at 558.

206. *Id.*

and legislation that “regulate[s] those activities having a substantial relation to interstate commerce.”²⁰⁷ The Court further concluded that, based on precedent, only economic activities that have a substantial relation to interstate commerce fall under the scope of congressional Commerce Clause power.²⁰⁸

To clarify the legislative landscape, the Court gave Congress some direction for future legislation, as the Court no longer intended to unconditionally defer to congressional judgment.²⁰⁹ The Court inferred that Congress should prove the “substantial relation to interstate commerce” with legislative or congressional committee findings whenever the connection is unclear on its face.²¹⁰ These legislative findings would help the Court evaluate the statute.²¹¹ The Gun Free School Zones Act, however, contained no legislative findings, so it was unclear how much deference the Court would extend to these findings.

In holding that Congress cannot encroach upon traditional state powers,²¹² however, the Court did not establish from where this concept was derived. Admittedly, the Commerce Clause does have a built-in limitation, but that limitation is jurisdictional in nature rather than substantive.²¹³ Congress may not regulate activity that is completely within a single state. Congress may regulate activity that involves more than one state, regardless of the nature of that activity.²¹⁴

In a concurrence, Justice Kennedy stated that the traditional state power limitation arises out of the concept of federalism that is inherent in the Tenth Amendment,²¹⁵ which the Court had expounded in *New York v. United States*.²¹⁶ Thus, the foundation of *Lopez* relies on the soundness of Justice O’Connor’s opinion in *New York*, and her use of the Tenth Amendment.²¹⁷

The reasoning in *New York* rested on an interpretation of the Tenth Amendment that it was the Court’s duty to determine whether a

207. *Id.* at 558-59.

208. *Id.* at 560.

209. *Id.* at 562-63.

210. *Id.*

211. *See id.* at 559.

212. *Id.* at 564.

213. *Id.* at 553 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824)).

214. *Id.*

215. *Id.* at 576-78, 583 (Kennedy, J., concurring). “While the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant. Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce.” *Id.* at 583.

216. 505 U.S. 144 (1992).

217. *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring).

power delegated to Congress was limited by a state power.²¹⁸ This interpretation was a departure from the previous belief that the Tenth Amendment was just a formal statement of the obvious; whatever is not granted to Congress remains with the states.²¹⁹ The opinion in *New York*, however, is unclear in defining how these limits on Congress are determined, as O'Connor admits that they "are not derived from the text."²²⁰ One commentator claims that the limits are, in fact, derived from the conscience of the Court itself.²²¹ Although the contours of the new constitutional limits and how the Court arrived at those limits were still unclear, it was apparent that the Court had begun making inroads into the vast power that the Commerce Clause had conferred to Congress over the previous sixty years.

3. *United States v. Morrison*

This shift in Commerce Clause doctrine found reinforcement in *United States v. Morrison*.²²² In *Morrison*, the Court overturned a provision of the Violence Against Women Act ("VAWA"), holding that the regulated non-economic activity was beyond the limited scope of the Commerce Clause.²²³ Congress passed the Act to remedy a perceived failure by the states to provide a civil action for damages to victims of gender-based crimes.²²⁴ Taking a cue from *Lopez*, Congress assembled extensive data showing the effect that violence against women has on interstate commerce.²²⁵ Their data showed that the cost of such violence grew from roughly three billion dollars in 1990 to between five and ten billion in 1993, and that the violence had the effect of keeping women from participating in all aspects of the economy.²²⁶ As Judge Noonan comments, "that there was sufficient evidence for Congress to act could scarcely be challenged."²²⁷

The Court, using the same reasoning as in *Lopez*, discussed the traditional eminence of the state in certain areas, such as criminal law enforcement.²²⁸ After *Lopez*, it appeared that as long as Congress

218. *New York*, 505 U.S. at 156-57.

219. *E.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985) (holding that the states' sovereign authority depends on which powers the Constitution has transferred to the federal government); *United States v. Darby Lumber Co.*, 312 U.S. 100, 124 (1941) (holding that the Tenth Amendment is nothing "but a truism"); *see also* Yarbrough, *supra* note 21, at 111 (agreeing with the belief that the Tenth Amendment was nothing more than a "truism").

220. *New York*, 505 U.S. at 156.

221. Rossum, *supra* note 21, at 249.

222. 529 U.S. 598 (2000).

223. *Id.* at 617.

224. *Id.* at 601-02; *id.* at 653 (Souter, J., dissenting).

225. Noonan, *supra* note 22, at 132.

226. *Id.*

227. *Id.*

228. *Morrison*, 529 U.S. at 613.

kept its hands off traditional state concerns, such as criminal law, it could still enact civil rights statutes under the Commerce Clause.²²⁹ The significance of *Morrison* is that it seemingly closed this “non-economic loophole.”²³⁰ In doing so, the Court modified the aggregate effect standard established under *Wickard v. Fulburn*,²³¹ while maintaining that its holding remained valid.²³² The *Morrison* majority held that activities that Congress regulated for their substantive effect on commerce must themselves have an economic characteristic.²³³ Since gender-related crime is not an economic activity, Congress could not regulate it by means of the Commerce Clause.

The invalidation of VAWA signaled the Court’s drawing a sharp distinction solely based on the difference between interstate commerce affected by economic activity and interstate commerce affected by non-economic activity.²³⁴ This distinction was completely new, as before the test depended on whether the activity substantially affected interstate commerce,²³⁵ not whether the nature of the activity itself was economically based.²³⁶

Furthermore, the Court continued its trend of limiting the deference that it had previously given to Congress during the sixty years following the “switch in time.” Whereas in *Lopez*, the Court found fault with Congress’s failure to produce legislative findings of fact,²³⁷ the *Morrison* court rejected the clear congressional findings that gender-motivated violence substantially affects interstate commerce.²³⁸ These findings were nearly identical to Congress’s findings that racial discrimination substantially affects interstate commerce,²³⁹ findings that the Court *accepted* in upholding Title II in *Katzenbach v. McClung*.²⁴⁰ Ironically, the *Morrison* Court itself claimed to support the rationale of *McClung*.²⁴¹

The new limits on the reach of the Commerce Clause and the impact of congressional findings enforced by the Court had an even greater implication. As Chief Justice Rehnquist, again writing for the Court, stated,

229. Virelli & Leibowitz, *supra* note 185, at 956.

230. The Court also reasoned that the federal government was not justified in interfering with existing state criminal law, as it traditionally has been an area of state concern. See *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995).

231. 317 U.S. 111, 128-29 (1942).

232. See *Morrison*, 529 U.S. at 617-18; Virelli & Leibowitz, *supra* note 185, at 957.

233. *Morrison*, 529 U.S. at 609-11.

234. Virelli & Leibowitz, *supra* note 185, at 956.

235. *Wickard*, 317 U.S. at 125; Virelli & Leibowitz, *supra* note 185, at 956-57.

236. *Morrison*, 529 U.S. at 617.

237. See *supra* text accompanying notes 209-11.

238. *Morrison*, 529 U.S. at 614-15.

239. Virelli & Leibowitz, *supra* note 185, at 957, 958.

240. 379 U.S. 294 (1964).

241. *Morrison*, 529 U.S. at 635-36, 641; Virelli & Leibowitz, *supra* note 185, at 957-58.

[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. . . . Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. Rather, whether particular operations affect interstate commerce sufficiently . . . is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.²⁴²

The Court left the decision-making in its own hands without giving Congress any standard by which to distinguish an activity that may be quasi-economic. In doing so, the Court effectively increased its own power vis-à-vis Congress, and thus kept itself free from any future restraint in a subsequent case. Since 1937, Congress's power under the Commerce Clause was not restricted to a categorical approach. The only constraint that Congress had was that it needed to have a rational basis for exercising its power.²⁴³ After *Morrison*, even a rational basis does not satisfy the Court.

4. The End of the New Deal?

Recent cases have affirmed the fact that the Court established a new formula for Commerce Clause cases when it decided *Lopez* and *Morrison*. At the same time, these cases enhance the notion that the standard is still unclear and almost impractical. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,²⁴⁴ the Court was asked to decide whether the "Migratory Bird Rule," an Army Corps of Engineers regulation interpreting the Clean Water Act, gave jurisdiction to the Army Corps over intrastate ponds.²⁴⁵ The other issue before the Court was whether Congress had the authority under the Commerce Clause to grant the Army Corps such jurisdiction.²⁴⁶ The Court held that the relevant section of the Clean Water Act was clear, such that the "Migratory Bird Rule" exceeded the authority that Congress granted the Army Corps.²⁴⁷ Thus, the constitutional question regarding the Commerce Clause was not reached.

While the Court did not base its decision on the Commerce Clause, the Court did briefly discuss the Commerce Clause, noting the "serious constitutional problem" looming in the background.²⁴⁸ The Court addressed the government's argument, based on the prior Supreme Court opinion in *Missouri v. Holland*, that, the "protection of migratory birds is a 'national interest of very nearly the first

242. *Morrison*, 529 U.S. at 614 (citations omitted).

243. Virelli & Leibowitz, *supra* note 185, at 951.

244. 531 U.S. 159 (2001).

245. *Id.* at 166.

246. *Id.*

247. *Id.* at 170-73.

248. *Id.* at 173.

magnitude,” as well as the argument that the presence of migratory birds substantially affects interstate commerce.²⁴⁹ The Court relied on its reasoning in *Morrison* in focusing on the traditional control that states had over intrastate concerns, yet at the same time, the majority refused to retreat completely from the opinion in *Holland*.²⁵⁰ The majority did signal though, that if the Court had reached this issue, it would have preserved the new restrictive interpretation of the Commerce Clause.²⁵¹

In the second case, *Gibbs v. Babbitt*,²⁵² the Fourth Circuit upheld a challenge to a regulation promulgated by the Fish and Wildlife Service (“FWS”) under the Endangered Species Act.²⁵³ The FWS designated the red wolf as a threatened species and, as part of a reintroduction program, prohibited the “taking” of the endangered species without prior authorization, even on private land.²⁵⁴

The Fourth Circuit held that the preservation of the wolf was an economic activity, recognizing that a “close connection” existed between preservation and commerce.²⁵⁵ The court stated that the main reason why individuals “take” red wolves is to promote commercial and economic interests.²⁵⁶ In turn, this “taking” affects interstate commerce in areas such as tourism, scientific research and commercial trade.²⁵⁷ The court also relied on *Missouri v. Holland*,²⁵⁸ holding that federalism mandated intervention by Congress, since this was an area of federal expertise and of extreme national importance.²⁵⁹ This view is seemingly at odds with the holdings in *Lopez* and *Morrison*.²⁶⁰ Although the Fourth Circuit labeled the preservation of the red wolf an “economic activity,” it is no closer to economic activity than was the Violence Against Women Act, assuming the accuracy of the legislative findings.²⁶¹ At the very least, this case illustrates the potential confusion that lower courts will have in interpreting the Commerce Clause under the new standard,

249. *Id.* (quoting *Missouri v. Holland*, 252 U.S. 416, 435 (1920)).

250. See Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: Lopez, Morrison, SWANCC, and Gibbs*, 31 *Envtl. L. Rep.* 10,413, 10,419-20 (2001); Virelli & Leibowitz, *supra* note 185, at 966-67.

251. *Solid Waste*, 531 U.S. at 174; Virelli & Leibowitz, *supra* note 185, at 966-67.

252. 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

253. *Id.* at 487.

254. *Id.* at 488. The “takings” provision was altered with respect to private lands to only prohibit those “takings” which were intentional or willful, except where the taking relates to self-defense or the defense of others. *Id.*

255. *Id.* at 492-93.

256. *Id.* at 492.

257. *Id.* at 493-96.

258. 252 U.S. 416 (1920).

259. *Gibbs*, 214 F.3d at 500-01; Dral & Phillips, *supra* note 250, at 10,422.

260. Virelli & Leibowitz, *supra* note 185, at 969-70.

261. *Id.* at 970.

especially since the Supreme Court is unwilling to reject the New Deal cases and admit that the standard has changed.²⁶²

The Commerce Clause jurisprudence, which gave broad interpretation to activities that affected interstate commerce prior to the decisions in *Lopez* and *Morrison*,²⁶³ has been strictly limited to extend to only economic activity.²⁶⁴ This change is evinced by the Court's decision in *Solid Waste*, which emphasized the narrowing of what qualifies as economic activity. Moreover, in scrutinizing legislative findings, the Court has declared that only it can truly distinguish between what is and what is not economic activity.²⁶⁵ Furthermore, the new standard is one that even Chief Justice Rehnquist admitted was difficult to apply.²⁶⁶ By creating a standard that makes it difficult for Congress to judge its future legislative acts and is one that only the Court can truly distinguish on a case by case basis, the Court has increased its power to the detriment of Congress.²⁶⁷

B. *Morning in America: The Reagan and Gingrich Revolutions and the Dawn of a New Era?*

Over the course of the past two decades, surrounding the alteration of the Commerce Clause, two events had the potential of acting as signals under Ackerman's theory—the Reagan revolution of 1980 and the Gingrich revolution of 1994. Both events were marked by sweeping Republican victories, and both events are potential parallels to the events of the mid-1930s that ushered in the broader interpretation of the Commerce Clause.

1. The Reagan Revolution

In 1980, Ronald Reagan became the fortieth President of the United States. While he received only 50.75% of the popular vote,²⁶⁸ he received 90.89% of the electoral vote.²⁶⁹ In the House of Representatives, the Republicans gained thirty-four new seats, although they were still at a fifty-one seat disadvantage.²⁷⁰ In the Senate, the Republicans gained twelve new seats, giving them a seven

262. Dral & Phillips, *supra* note 250, at 10,418, 10,424.

263. *See supra* text accompanying notes 177-80.

264. *See supra* text accompanying notes 234-36.

265. *See supra* text accompanying note 242.

266. *United States v. Lopez*, 514 U.S. 549, 566 (1995).

267. Dral & Phillips, *supra* note 250, at 10,421.

268. The 1980 election featured a third-party candidate, John B. Anderson, making Reagan's capture of the majority of popular votes even more impressive than it might otherwise appear. Rusk, *supra* note 2, at 132.

269. *Id.*

270. *Id.* at 216.

seat advantage.²⁷¹ Dissatisfied with the Democrats' control of the Presidency and both branches of Congress during the preceding four years, the People wanted change.²⁷² On January 20, 1981, in his first inaugural address, President Reagan proclaimed the need to limit greatly the powers of the federal government, giving such power back to the states.²⁷³ The People had spoken and many Democrats joined the Reagan bandwagon out of fear that they would be left behind.²⁷⁴

In the 1982 midterm election, the Republicans gained a seat in the Senate, but lost twenty-two seats in the already Democrat-dominated House.²⁷⁵ Clearly suffering a setback, President Reagan encountered greater resistance in his transformative agenda.²⁷⁶ Additionally, voter turnout dropped dramatically, as only 39.8% of eligible adults and 61.1% of registered voters came to the polls.²⁷⁷ However, all was not lost—another landslide election and President Reagan's agenda could get back on track.

In the 1984 presidential election, President Reagan garnered 58.77% of the popular vote and 97.58% of the electoral vote, losing only Minnesota and the District of Columbia.²⁷⁸ Republicans gained sixteen seats in the House and only lost one seat in the Senate.²⁷⁹ While Reagan had a mandate to lead as President, his initiatives failed to capture Congress. The situation failed to improve, with Republicans losing another five seats in the House and eight seats in the Senate in the 1986 midterm election.²⁸⁰ Congress was now completely controlled by the Democrats.

President Reagan's inability to capture the legislature meant that many of his reforms could not get the exposure he desired. Public outcry was nominal, and the conflict between the President and a "preservationist Court," as in the New Deal era, never materialized.²⁸¹ Also, while voter turnout improved in 1984 compared with 1982, it merely returned to the turnout levels during the 1976 and 1980

271. *Id.* at 377.

272. Ackerman, Transformations, *supra* note 9, at 390; Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 Case W. Res. L. Rev. 845, 848 (1996).

273. Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 Duke L.J. 307, 339 (2001).

274. *See id.*

275. Rusk, *supra* note 2, at 216, 377.

276. Ackerman, Transformations, *supra* note 9, at 391; Tushnet, *supra* note 272, at 846.

277. National Voter Turnout in Federal Elections: 1960-2000, available at <http://www.infoplease.com/ipa/A0781453.html> [hereinafter Nat'l Voter Turnout]. "Eligible adults" refers to all U.S. citizens who are able to register to vote, while "registered voters" refers to the population that actually did register to vote. The percentage of registered voters needs to be independently calculated.

278. Rusk, *supra* note 2, at 132, 168.

279. *Id.* at 216, 377.

280. *Id.*

281. Ackerman, Transformations, *supra* note 9, at 391.

presidential elections.²⁸² This was despite the fact that, compared to 1980, an additional six million voters came to the polls.²⁸³

President Reagan's inability to capture Congress for the Republican party does not demonstrate that Reagan's election failed to change the government. The direction of politics in the country definitely changed.²⁸⁴ Through Supreme Court appointments, Reagan was successful in ensuring the longevity of his ideology.²⁸⁵ The Senate confirmed President Reagan's elevation of Justice Rehnquist to Chief Justice and confirmed Antonin Scalia in 1986.²⁸⁶ During this time, President Reagan was still extremely popular and the Republicans had control of the Senate.²⁸⁷ When Robert Bork was nominated in 1987 to succeed Justice Powell, the situation had changed. Democrats, who had taken control of the Senate, were wary of a conservative revolution led by the Supreme Court and rejected him.²⁸⁸ Republicans, unwilling to confront the Senate Democrats and turn Supreme Court appointments into a political issue in the 1988 campaign, backed down.²⁸⁹ President Reagan appointed the moderate Anthony Kennedy, who was easily confirmed.²⁹⁰

2. The Gingrich Revolution

In 1992, a Democrat, William Jefferson Clinton, was elected President.²⁹¹ However, in 1994, the Democrats lost control of both the House and the Senate.²⁹² Most striking was the fifty-two seat shift in the House, as seventy-four new Republicans were ushered into office,²⁹³ switching control in that chamber for the first time since 1955.²⁹⁴ Led by the Republican Whip Newt Gingrich,²⁹⁵ who became

282. Nat'l Voter Turnout, *supra* note 277.

283. *Id.*

284. Ackerman, Transformations, *supra* note 9, at 390-92.

285. *Id.* at 394-95; David M. O'Brien, *How the Republican War Over "Judicial Activism" Has Cost Congress*, in *Congress Confronts the Court: The Struggle for Legitimacy and Authority in Lawmaking* 69, 72-73 (Colton C. Campbell & John F. Stack, Jr. eds., 2001)[hereinafter *Republican War*].

286. See Yarbrough, *supra* note 21, at 11, 14.

287. Ackerman, Transformations, *supra* note 9, at 394-95. One Senator even argued that Reagan's landslide elections in 1980 and 1984 reflected a mandate from the People and demanded confirmation of Reagan's nominations. Yarbrough, *supra* note 21, at 10-11.

288. Ackerman, Transformations, *supra* note 9, at 395.

289. *Id.*

290. *Id.* This contrasts with Roosevelt, who made the Court a political issue, through one of its decisions, not one of his appointees. See *supra* text accompanying notes 91-99.

291. Rusk, *supra* note 2, at 132.

292. *Id.* at 216, 377.

293. Compare 1993-1994 Official Congressional Directory: 103rd Congress 380-83 (1993) with 1995-1996 Official Congressional Directory: 104th Congress 350-52 (1995).

294. Rusk, *supra* note 2, at 216.

the new Speaker of the House, the Republicans promised a new "Contract with America," an effort to complete the revolution President Reagan had started.²⁹⁶ However, only 38.8% of adults and 57.6% of registered voters came to the polls.²⁹⁷ Compared with the election two years before, approximately twenty-nine million fewer people came to the polls, representing roughly a 20% drop in voters.²⁹⁸ Compared with the midterm election four years before, seven million more people came to the polls in 1994, but the percentages remained about the same.²⁹⁹

However, Republican hopes died almost as quickly as they began.³⁰⁰ President Clinton was reelected in 1996 over Republican Bob Dole. Although Clinton won less than 50% of the popular vote, he won a plurality and 70.45% of the electoral vote.³⁰¹ Both margins of victory were larger than those he had in the 1992 election.³⁰² The Democrats reduced their deficit in the House from twenty-two to nineteen,³⁰³ as sixteen of the Republicans that had been swept into Congress in 1994 were voted out.³⁰⁴ The Republicans did manage to gain three more seats in the Senate.³⁰⁵

By 2001, the Republicans had managed to take back the presidency, by the narrowest of margins, in an outcome that has led to questions regarding the legitimacy of the winner.³⁰⁶ In the House, the Republican majority had diminished to a mere five-seat edge, but only 55% of the Republicans that had been swept into office in 1994 remained in office.³⁰⁷ In the Senate, the Democrats regained control by a one-seat margin when Jim Jeffords switched parties in the middle of 2001.³⁰⁸

295. Representative from Georgia's Sixth District.

296. Price, *supra* note 6, at 223; Tushnet, *supra* note 272, at 846.

297. Nat'l Voter Turnout, *supra* note 277.

298. *Id.*

299. *Id.*

300. See Ackerman, Transformations, *supra* note 9, at 397; Price, *supra* note 6, at 224-25. The reversal in fortunes in 1996 was likely another rejection, the rejection of the "Contract with America," which was too extreme for the centrist views possessed by a majority of the country. A negative view of Congress, stemming from the shutdown of the government, only served to heighten this reaction. *Contra* Burnham, *supra* note 19, at 2273 (concluding that the 1994 election was ratified in both the 1996 and 1998 elections).

301. Rusk, *supra* note 2, at 132.

302. *Id.*

303. *Id.* at 216.

304. Compare the list of representatives in 1995-1996 Official Congressional Directory: 104th Congress 350-52 (1995), with the list in 1997-1998 Official Congressional Directory: 105th Congress 492-94 (1997).

305. Rusk, *supra* note 2, at 377.

306. See *Bush v. Gore*, 531 U.S. 98 (2000); Balkin & Levinson, *supra* note 19, at 1045-49.

307. Compare 1995-1996 Official Congressional Directory: 104th Congress 350-52 (1995), with Congressional Yellow Book, (Vol. 27, No. 4, Winter, 2002).

308. After the election, the Senate was evenly split, with the Republican Vice-

III. LEGITIMIZING THE NEW COMMERCE CLAUSE

Whether the Court is “ignor[ing] the constitutional achievements of any generation of Americans,”³⁰⁹ is not an issue that one should easily brush aside. As the decision in *Solid Waste* suggested,³¹⁰ *Lopez* and *Morrison* are now firmly part of the new Commerce Clause doctrine. Therefore, the obvious question is whether this new emerging doctrine is legitimate. This part analyzes that question. Section A discusses the logic of the new interpretation of the Commerce Clause and determines whether it is really a new doctrine or whether it is mostly based in preexisting Supreme Court jurisprudence. Section B analyzes whether the People have issued a mandate for such change if *Lopez* and *Morrison* are, in fact, the beginning of a new constitutional era.

A. *The Logic of the New Commerce Clause*

The authority of the government exists because the People have vested it with that authority.³¹¹ In “refining” the Commerce Clause jurisprudence, the Court has justified its action with the rationale that the vertical separation of powers that is Federalism must be upheld. As Justice Kennedy wrote in *Lopez*, “[t]hough on the surface the idea [of federalism] may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.”³¹² Thus, to preserve liberty, the Court believed that it was imperative to help the states defend themselves from the encroachments of Congress.³¹³

Justice Kennedy bolstered his argument with the need for accountability. The People should know which government is accountable when a particular activity is at issue.³¹⁴ While accountability is a legitimate goal, Kennedy and the rest of the *Lopez* majority failed to acknowledge the role of the political process in achieving this accountability by constraining an overreaching

President giving the Republicans control. However, Jim Jeffords of Vermont switched from the Republican Party to the Independent Party in the middle of 2001, thus giving the Democrats control. Balkin & Levinson, *supra* note 19, at 1085-86.

309. Bruce Ackerman, *A Generation of Betrayal?*, 65 *Fordham L. Rev.* 1519, 1528 (1997) [hereinafter *Betrayal*].

310. *See supra* text accompanying notes 244-51.

311. Ernest A. Young, *Two Cheers For Process Federalism*, 46 *Vill. L. Rev.* 1349, 1355-57 (2001).

312. *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring).

313. *Id.* (Kennedy, J., concurring).

314. *Id.* at 576-77 (Kennedy, J., concurring). Interestingly enough, Kennedy cites as authority for this proposition the opinion of the Court in *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992), which he authored on behalf of the Court. It is unclear in that case where he “discovered” this “truism.”

legislature.³¹⁵ Instead, the majority vested this role of accountability solely within the power of the Court.

The use of the political process was at the center of Justice Brennan's dissent in *Usery*, and the Court's opinion in *Garcia*.³¹⁶ This philosophy extends back to original understandings. Chief Justice John Marshall declared that "[t]he wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, . . . the sole restraints on which [the people] have relied, to secure them from [congressional] abuse."³¹⁷ The Court, according to Marshall, must not interfere with the will of the People.³¹⁸ This also conforms with Madison's comment in *The Federalist*, Number 46:

The adversaries of the Constitution seem to have lost sight of the people altogether . . . and to have viewed [the Federal and state governments] not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other.

. . . .

If . . . the people should in [the] future become more partial to the federal than to the State governments . . . the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due³¹⁹

The intent of the framers was to ensure that liberty was protected. The liberty of the individual must be balanced with the demands of organized society to have the effect that Madison's words intended.³²⁰ As the Court stated in *New York v. United States*,³²¹ "[t]he Constitution does not protect the sovereignty of states for the benefit of the states or state governments To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals."³²²

If the Court no longer defers to the Congress and its legislative

315. Noonan, *supra* note 22, at 134. "In this dynamic world, the interests of the states were not meant to be preserved by the courts, but by politics It was the structure of the Federal government, where representation in Congress was state by state, that set a political limit on what Congress did." See also Yarbrough, *supra* note 21, at 107.

316. See *supra* text accompanying notes 191-93, 197.

317. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824).

318. This is simply a tautology based on the previous statement. If the people are to be the sole check, then the Court has no role to play.

319. *The Federalist* No. 46, *supra* note 147, at 262-63 (James Madison).

320. See *Poe v. Ullman*, 367 U.S. 497, 541-43 (1961) (Harlan, J., dissenting) (using same terminology in describing the Court's due process decisions and the Court's relationship to the living tradition of the Nation).

321. 505 U.S. 144 (1992).

322. *Id.* at 181.

findings,³²³ then, a fortiori, the Court is no longer respecting the political process and the People.³²⁴ For this reason, Justice Kennedy's recent warning that "we must be very careful to preserve the role of the Court" is alarming.³²⁵ While it is true that the Court is the final authority on the Constitution, that the other branches lack an ability to interpret the document is not a natural corollary.³²⁶ The political process ensures that if legislators do not perform according to popular expectations, they do not remain in power for long.³²⁷ Thus, Supreme Court decisions that question the authority of Congress and the democratic process in general need to be rare, occurring when the People are impeded from using the political process. When judicial intervention is necessary, compelling reasoning must support the decision.³²⁸ The Court maintains legitimacy through its decisions and at no time is this more important than when it is overturning a decision of another branch of government.³²⁹

Underscoring this argument is the fact that the Violence Against Women Act received support in Congress from thirty-eight states, and thirty-six state Attorneys General signed a brief for its defense in court.³³⁰ By prohibiting Congress from creating a civil rights statute such as VAWA, the Court essentially ignored the opinion of the vast majority of the states, while at the same time alleging that its opinion was crucial in standing up for the interests of the states.³³¹

Throughout the recent Commerce Clause cases, it is interesting to note that "[e]ven the Rehnquist Court accepts the foundational status of [the New Deal]."³³² It is astonishing that the Court is able to completely change Commerce Clause jurisprudence at the same time that it is insisting that nothing has changed.³³³ The Court's reluctance

323. See *United States v. Morrison*, 529 U.S. 598, 614-16 (2000).

324. Larry D. Kramer, *The Supreme Court 2000 Term: Foreword: We The Court*, 115 Harv. L. Rev. 4, 129 (2001).

325. *Id.* at 137 (quoting Transcript of Oral Argument, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (No. 00-836)).

326. Marci Hamilton, *Why Federalism Must Be Enforced: A Response to Professor Kramer*, 46 Vill. L. Rev. 1069, 1086 (2001). "James Madison explained that 'it is incontrovertibly of as much importance to [the House of Representatives] as to any other [branch of government], that the [C]onstitution should be preserved entire. It is our duty.'" *Id.* (quoting *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (citing 1 *Annals of Cong.* 500 (Joseph Gales ed., 1789))).

327. See Hamilton, *supra* note 326, at 1086; see generally *The Federalist* No. 49 (James Madison) (Clinton Rossiter ed., 1961).

328. See Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 Va. L. Rev. 83, 95-96 (1998).

329. *Id.* at 96-98.

330. Noonan, *supra* note 22, at 134-35.

331. *Id.* at 135.

332. Ackerman, *Revolution*, *supra* note 35, at 2337.

333. See *supra* text accompanying notes 229; Noonan, *supra* note 22, at 75. "History is a powerful force If you grasp its direction, it will carry you with it. Then there are those who try to hitch a lift with history but whose destination is not where history is going. The Supreme Court seems to me like such a hitchhiker." *Id.*

to admit that there has been an interpretative change is evidence of how much the “switch in time” is entrenched in the constitutional doctrine. Such tactics did not go unnoticed, however, and Justice Souter warned in his dissent that the ruling “portend[s] a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago.”³³⁴ Professor Price notes,

On a cynical level, one is reminded of Machiavelli’s assertion that, in altering the law, one must “retain the semblance of the old forms; so that it may seem to the people that there has been no change in the institutions, even though in fact they are entirely different from the old ones.”³³⁵

Only if the majority was changing the rules of the game without a mandate from the People,³³⁶ would it have to desperately convince the People that the rules of the game had not changed.

Applying Ackerman’s ten-year test³³⁷ to these recent Commerce Clause cases reveals that the Court has ushered in a revolutionary change in doctrine. The current interpretation of the Commerce Clause was completely unforeseen ten years ago. One author noted that “nothing in the Court’s opinions prior to *Lopez* pointed to the specific distinction the Court has erected to police those Commerce Clause boundaries.”³³⁸ Also, other federalism cases, specifically those dealing with state sovereignty issues, would have been equally difficult to predict a decade ago.³³⁹ Ackerman himself has expressed his belief that the recent Commerce Clause jurisprudence is revolutionary according to his definition.³⁴⁰

There are scholars, however, who contest the revolutionary nature of the new Commerce Clause. Supporters of this argument focus on the strategic appointments by Republican presidents and the conservatives who worked hard at creating the necessary conditions to

334. *United States v. Lopez*, 514 U.S. 549, 608 (1995) (Souter, J., dissenting).

335. Price, *supra* note 6, at 204 (quoting Niccolo Machiavelli, *The Prince & The Discourses* 182 (Random House 1940)).

336. Justice Thomas explicitly urged the Court to return to the more restricted view of the Commerce Clause that existed before the “switch.” *Lopez*, 514 U.S. at 590-93 (Thomas, J., concurring). In urging the return to Founding values, Justice Thomas essentially denies that fundamental values in the country have changed. *See generally* Ackerman, *Revolution*, *supra* note 35, at 2313.

337. *See supra* text accompanying note 35.

338. Schroeder, *supra* note 273, at 318.

339. *Id.* at 317-18; *see Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)). It would be almost impossible to consider that the reversal of a decision just rendered is within a plausible evolutionary envelope. Schroeder, *supra* note 273, at 317 n.59; *see also* Keith E. Whittington, *Taking What They Give Us: Explaining the Court’s Federalism Offensive*, 51 *Duke L. J.* 477, 487 (2001).

340. Schroeder, *supra* note 273, at 319 (citing E-mail from Bruce Ackerman, Sterling Professor of Law and Political Science, Yale Law School, to Christopher H. Schroeder, Professor of Law, Duke University School of Law (Aug. 24, 2001) (on file with the *Duke Law Journal*)).

achieve the ongoing change.³⁴¹ The argument falls short of proving that these recent decisions are not revolutionary. The “switch in time” was also preceded by four years of President Roosevelt and the New Deal Democrats pushing their agenda and pressuring the Court to confirm,³⁴² yet Roosevelt’s actions did not make the eventual switch by the Court any less revolutionary than it was. The switch was still a major change in the Court’s jurisprudence. Likewise, the actions of the conservatives during the Reagan years do not signify that the current change in jurisprudence is not revolutionary. If one of the requirements of Ackerman’s ten-year test was that the change would qualify as a moment only if there were no external forces pushing for the change, then there would never exist any moment that would satisfy the test.

B. *A New Popular Mandate?*

Ackerman’s theory dictates that this modern switch could only happen if the People issued a mandate. If the People gave Congress the prominence that it enjoyed during the previous six decades, then only the People can rightfully take it away.³⁴³ If the People believed that Congress was in a better position to protect liberties, then only the People could decide that Congress had failed and transfer this power back to the states.

So, does it follow that we are now in the midst of another constitutional moment? If not, how are we to account for the current revolutionary behavior of the Supreme Court?

A mandate, like that issued by the People in the 1936 election,³⁴⁴ by definition, must be clear and convincing, so as to leave no doubt, even in the minds of the opposition. In the aftermath of the election of 1936, the only disagreement between the parties was how to change the constitutional landscape, not whether such a change was needed.³⁴⁵ Likewise, a mandate of today, “reflected in calls and letters to federal representatives, daily tracking polls and the like,” must represent a united electorate with a common goal.³⁴⁶ According to Ackerman, without such a mobilization, change of a constitutional magnitude should not occur.³⁴⁷ The question remains whether either the Reagan revolution of 1980 or the Gingrich revolution of 1994 represent such a mandate from the People.

341. See *id.* at 318-19 (citing Charles Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* 182-88 (1991)).

342. See *supra* text accompanying notes 63-99.

343. See *supra* text accompanying notes 37-43.

344. See *supra* text accompanying notes 128-40.

345. See *supra* text accompanying notes 141-46.

346. Young, *supra* note 311, at 1356.

347. Ackerman, *Transformations*, *supra* note 9, at 4.

President Reagan's election in 1980 was definitely a signal very similar to the one that President Roosevelt received in 1932. Likewise, it was unclear whether the People stood firmly behind President Reagan's ideals or whether his election was a mere rejection of President Carter. The election further mirrored Roosevelt's election in 1932 in that approximately five million more voters came to the polls in 1980 than in 1976.³⁴⁸ However, unlike the 1932 election, the percentage of voter turnout as a fraction of both the adult population and the registered voter population remained unchanged.³⁴⁹

President Reagan's similarities with President Roosevelt end here. The 1982 midterm election, especially when juxtaposed against President Roosevelt's successes in 1934,³⁵⁰ illustrates President Reagan's failure to build momentum for his vision of a new America. The Democratic victories in 1982 diminished whatever leverage President Reagan's 1980 election had given him.

The Reagan era was a revolution that never gained the same momentum that the New Deal had captured.³⁵¹ While President Roosevelt was able to get his legislative agenda passed and then back it up with his appointments to the Court,³⁵² President Reagan, on the other hand, suffered setbacks in getting his legislative agenda approved. Much of President Reagan's success and legacy stems from the continued impact of his ideology expressed through his Supreme Court appointments.

President George H. W. Bush, continued the attempt to influence politics through Court appointments. While President Bush was never able to continue with the gusto of the Reagan revolution, he did manage to push the nomination of Clarence Thomas through the Democrat-controlled Senate.³⁵³ On the Court today, Justice Thomas continues to speak, with Justice Antonin Scalia, a Reagan appointee, for many of the principles that comprised the Reagan revolution.³⁵⁴

President George H. W. Bush's unsuccessful attempt at reelection marked the end of a revolution that never really fulfilled its own

348. Nat'l Voter Turnout, *supra* note 277.

349. *Id.* In 1976, 53.6% of the voting age population and 77.6% of registered voters came to the polls. In 1980, the percentages were 52.6% and 76.5%, respectively.

350. Ackerman, Transformations, *supra* note 9, at 390-92.

351. *Id.* at 390-92, 395.

352. *Id.* at 391-93.

353. *Id.* at 396-97.

354. See David M. O'Brien, Storm Center: The Supreme Court in American Politics 52-53 (5th ed. 2000); see also *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (urging a return to "original understanding" for Commerce Clause jurisprudence); *Printz v. United States*, 521 U.S. 898, 936-39 (1997) (Thomas, J., concurring) (same); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring) (noting that the government may not make any distinctions based on race).

promises. However, the midterm election of 1994 brought another signal.³⁵⁵ Many people, especially the overwhelming number of new Republicans entering the House and the Senate, treated the outcome as a reaffirmation of the ideals of the Reagan revolution.³⁵⁶ Interestingly, on the same day as the election, the Supreme Court heard oral arguments in *Lopez*.³⁵⁷ One explanation of the decision is that the Court decided to align itself with what it thought the People were signaling with their vote.³⁵⁸ The Court decided to participate actively in the movement and took a first step in reducing the scope of the national government.³⁵⁹ If the Court was actively participating in pushing forward the constitutional change, there is an alarming contrast with the original New Deal Court, which did not align itself with the majority of Washington until after the third consecutive election that overwhelmingly supported President Roosevelt and the New Deal.

An explanation for the 1994 landslide election is that President Clinton misread his electoral victory as a mandate for his party's ideas. The same can be said of Newt Gingrich and the Republican party. The 1996 reelection of Clinton and the minimal change in Congress reflected the failure to carry the "Republican Revolution" beyond a single election cycle. The voters seemed merely to be rejecting the ideas of the one party, rather than affirming the ideology of the other.³⁶⁰ As Ackerman remarks, the problem was that "American revolutionaries cannot rightly hope for instant gratification. . . . To the contrary, our constitutional system rightly requires them to endure a decade-long period of rigorous institutional testing before they can legitimately claim to revolutionize governing values in the name of We the People."³⁶¹ The failure of the Republicans to maintain the high level of support that they received in the 1994 election illustrates, when contrasted with the affirmation of the New Deal and President Roosevelt in the elections of the mid-1930s, that the Contract with America was not something that the People had mandated. Otherwise, such a mandate would have swept Bob Dole into the Presidency in 1996, and would have increased Republican membership in both houses of Congress.

The election of 2000 was fitting in that the lack of a clear winner prevented George W. Bush from declaring a mandate, thereby making the same mistake that Gingrich had made in 1994. As if to

355. Tushnet, *supra* note 272, at 848.

356. Ackerman, *Transformations*, *supra* note 9, at 397; see Tushnet, *supra* note 272, at 849.

357. Price, *supra* note 6, at 223-24.

358. Tushnet, *supra* note 272, at 850-51.

359. *Id.*

360. See Ackerman, *Revolution*, *supra* note 35, at 2341-42; Tushnet, *supra* note 272, at 848-49.

361. Ackerman, *Revolution*, *supra* note 35, at 2343.

emphasize the lack of a mandate, the switching of parties by Senator Jim Jeffords gave the Democrats a one-seat edge in the Senate, thus creating a check on the presidential appointment power, and reflecting the mood of an evenly divided country. Without Jefford's switch, a Republican Senate would have had the ability to confirm the appointments of a narrowly elected President, thereby giving the President a free hand in sculpting the future of the Supreme Court. The problem with a president unchecked by the Senate is that the 2000 election produced no mandate. Bush could have pushed through conservative justices at a time when the country was evenly divided.

As we approach the next mid-term election, the future is unclear. While the President has astronomical approval ratings,³⁶² they are directly related to the war on terrorism and may begin to slide as the focus of the American public shifts back to the domestic front.³⁶³ The effect that the war on terrorism and the slow economy will have on the Congressional elections will no doubt determine whether the Republicans increase their lead in the House and take back the Senate.³⁶⁴ A Senate under Republican control will give the President the ability to appoint future Supreme Court justices. In doing so, the Court may push forward its own transformative agenda that, absent a popular mandate, would be illegitimate. "The powers of the several branches of government are defined, and the excess of them . . . find[] limits, which cannot be transgressed without offending against that greater power from who all authority, among us, is derived; to wit, the people."³⁶⁵

CONCLUSION

We are in the midst of a "revolution by stealth."³⁶⁶ Constitutional principles that have guided this country for the past sixty years are

362. Jeffrey M. Jones, *Bush's Most Recent Quarterly Approval Average Among Five Best* The Gallup Organization (Apr. 18, 2002), available at <http://www.gallup.com/poll/releases/pr020418.asp>.

363. *Id.* Interestingly, in early February 2001, President Bush's approval rating was at 57%, compared with a 25% disapproval rating. The gap closed in the months preceding September 11, so that in early September, he had a 51% approval rating and a 39% disapproval rating. Immediately after the attack on September 11, his approval rating jumped to 86%, peaking at 90% the following week. In contrast, President Bush's disapproval ratings were 10% and 6% respectively. Since then, the numbers have slowly returned, with a poll in early April producing a 75% approval rating and a 20% disapproval rating. *Id.*

364. See generally Lydia Saad, *Democrats Gain Upper Hand in Gallup Test Election for Congress* The Gallup Organization (Apr. 11, 2002), available at <http://www.gallup.com/poll/releases/pr020411.asp>.

365. Kramer, *supra* note 324, at 11 (quoting St. George Tucker, *On Sovereignty and Legislature*, in Blackstone's Commentaries app. A, reprinted in St. George Tucker, *View of the Constitution of the United States with Selected Writings* 18, 19 (Liberty Fund 1999) (1803)).

366. Nicol C. Rae, *When Do Courts "Legislate"?: Reflections on Congress and the Court*, in *Congress Confronts the Court: The Struggle for Legitimacy and Authority*

eroding. This time, however, the transformation is occurring without a mandate from the People. Scholars who have asserted this conclusion before have used it as a launching pad from which to attack the flaws in Ackerman's model.³⁶⁷ The argument goes like this: If this is a constitutional moment and there is no popular mandate, then Ackerman's model must be wrong.

There is an alternative. The current transformation represents an illegitimate usurpation of power by the Supreme Court. While a majority on the Court may desire to set policy in a certain direction, the will of the People, reflected through Congress and the President, must not be ignored. There is a difference between deciding what the law is and what the law should be, and currently the Supreme Court is stuck on the latter track.

Intent on pushing its own agenda, the Supreme Court has continued to alter six decades of constitutional interpretation. Moreover, the Supreme Court has restricted the powers of the other two branches of government and, by extension, the will of the People. The Court is chipping away at the legitimacy of the expanded powers of the national government that have shaped our country since the New Deal.³⁶⁸ It is changing the interpretation of the Commerce Clause and the balance of power between the federal and state governments,³⁶⁹ establishing that the Constitution conferred upon the states an affirmative grant of power, thereby limiting the reach of the Commerce Clause.³⁷⁰

According to Bruce Ackerman, major constitutional change can only occur with a mandate from the People. The signing of the Constitution and the adoption of the Bill of Rights, and the

in Lawmaking 111, 115 (Colton C. Campbell & John F. Stack, Jr. eds., 2001).

367. See, e.g., Schroeder, *supra* note 273, at 322; Whittington, *supra* note 339, at 493-94.

368. Balkin & Levinson, *supra* note 19, at 1052-61; Burnham, *supra* note 19, at 2273; Price, *supra* note 6, at 220-21. Over the six decades since the New Deal, the Court found more activities to have an effect on interstate commerce, despite increasing tenuous connections. For example, in *Perez v. United States*, 402 U.S. 146 (1971), the Court held that even though loan sharking at the local level was purely intrastate, it affected interstate commerce and thus fell under the jurisdiction of the Commerce Clause. Similarly, in *Daniel v. Paul*, 395 U.S. 298 (1969), the Court held that simply because a local county amusement park in the middle of Alabama had brought in from out of state some food, paddleboats and a jukebox, it had an effect on commerce.

369. See Burnham, *supra* note 19, at 1073; Price, *supra* note 6, at 220-21. The change in interpretation was in direct response to the changing nature of the American economy. See Price, *supra* note 6, at 203.

370. *Unites States v. Lopez*, 514 U.S. 549, 552 (1995); *id.* at 574-78 (Kennedy, J., concurring); Yarbrough, *supra* note 21, at 114; Stack & Campbell, *supra* note 21, at 102-04; see also Rossum, *supra* note 21, at 249-50 (using similar reasoning to that used three years earlier in *New York v. United States*, 505 U.S. 144, 156-57 (1992)). The Tenth Amendment states that, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

subsequent adoption of the Thirteenth, Fourteenth and Fifteenth Amendments after the Civil War, were all examples of such major constitutional change. The New Deal and, more importantly, its eventual acceptance by the Supreme Court, constituted another major shift in constitutional jurisprudence, changing the federal system by allowing the substantial growth of federal power. While such a mandate existed in the mid-1930s, the same is not true today. This modern revolution comes not from the People, but from the Court itself.

Today's political environment has only made this transformation easier for the Court to achieve. The other two branches have become increasingly weak throughout the past decade, with gridlock ensuring that little is even accomplished. As Robert Dahl noted, the Court is "most likely to succeed against a 'weak' majority; e.g., a dead one, a transient one, a fragile one, or one weakly united upon a policy of subordinate importance."³⁷¹ It is no surprise that in modern politics, where partisan disputes are commonplace, the Court is having an easier time exerting its own will over that of the People.

Assuming Ackerman is correct that the People drive change through mandates, they should be protesting the change that is occurring without their approval. The People are not reacting, however, for three main reasons. First, the Court's intrusion has been in areas of little general concern. While some constitutional theorists may have become alarmed, the same cannot be said of the average American. Second, the average American pays little attention to the Court. The Court's decisions do not affect them directly and the opinions themselves are not always clear. The media is unwilling to take the time to explain decisions that exceedingly few people are interested in, notwithstanding the People's ability to understand those decisions. The lack of media coverage only heightens this problem, creating a self-perpetuating cycle of ignorance. Highlighting this point is a survey that "found that only 12.8% of the American public was aware of even major Court decisions, accepted constitutional interpretation as a proper role for the Court, and regarded the Court as carrying out its responsibilities in an impartial and competent manner."³⁷² Third, the average American is not very concerned with government in general. The exponential growth of the administrative state is a small part of the reason. The actions of the government have become increasingly difficult to follow, and the media, with its

371. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 *Emory L.J.* 563, 571 (2001), honorary reprint from 6 *J. Pub. L.* 279 (1957).

372. Gerald N. Rosenberg, *The Road Taken: Robert A. Dahl's Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 50 *Emory L. Rev.* 613, 629 (2001) (quoting Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Change*, 2 *L. & Soc'y Rev.* 357, 359, 377-78 (1968)).

obsession with flashy headlines and sound bites, only exacerbates the problem.

Therefore, the Court must regain its faith in the safeguards inherent in the American political process and, in doing so, acknowledge that the ultimate safeguard is the American People.

Notes & Observations



Professor Joseph M. Perillo

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