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Case Western Reserve Law Review

Volume 46 | Issue 3

1996

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Recommended Citation

Larry Kramer, *What's a Constitution for Anyway--Of History and Theory, Bruce Ackerman and the New Deal*, 46 Case W. Res. L. Rev. 885 (1996)
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WHAT'S A CONSTITUTION FOR ANYWAY? OF HISTORY AND THEORY, BRUCE ACKERMAN AND THE NEW DEAL

*Larry Kramer**

What should we make of *United States v. Lopez*?[1] Initial reactions were largely of the Chicken Little variety and filled with dire predictions of renewed judicial shackles imposed on a hamstrung federal government. Sober second thoughts have been, well, sober, and many observers now say that *Lopez* may not be such a big deal after all. This could just be wishful thinking, or trying not to get one's hopes up (as the case may be). But if the discussion at this Conference is any indication, a growing number of experts have concluded that sweeping judicial revolution is unlikely.

So which is it? Is *Lopez* a sport, a judicial shot across the bow to remind Congress to take its responsibilities seriously? Or have the ghosts of Sutherland, Butler, Van Devanter, and McReynolds returned to haunt us after all? We can't possibly know—yet. Judicial decisions are not inherently revolutionary; they are not inherently anything. They are what we choose to make them. They may contain seeds—*Lopez*, for example, certainly could provide the jumping-off point for a new judicial assault on federal power. But whether a particular decision becomes a source of radical change or merely a note in the casebooks depends on what the Court makes of it afterwards, and *Lopez* could just as easily turn out to be another *Nollan v. California Coastal Commission*.[2]

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* Professor of Law, New York University Law School. I am grateful to participants in the NYU Legal History Colloquium and the NYU Constitutional Theory Colloquium—and especially to Larry Sager and Chris Eisgruber—for reading and commenting on an earlier draft. Thanks for comments also go to Richard Bernstein, Barry Cushman, Marty Flaherty, Michael Herz, Don Herzog, Larry Lessig, Rick Pildes, David Richards, and Reuel Schiller.

1. 115 S. Ct. 1624 (1995).

2. 483 U.S. 825, 831-42 (1987) (invalidating a California state commission's imposi-

All this debate about the meaning of *Lopez*, in other words, is not—cannot be—about what *Lopez* "really" means or "really" does. It is about what we should make it mean or do.

If the choice of meanings for *Lopez* is up for grabs, it will be powerfully influenced by the framework we use to give the decision its context. In his paper, Mark Tushnet asks whether Bruce Ackerman's theory of "constitutional moments" helps us to measure the significance of *Lopez*.[3] Tushnet concludes that it does, that Ackerman's theory may, in fact, "provide the best account" of recent constitutional developments.[4]

This is a surprising conclusion, if only because Tushnet never makes clear whether he agrees with or approves of Ackerman's framework. That Ackerman's theory might have something to say about *Lopez* is not surprising. Any reasonably comprehensive theory would have something to say about the decision, and if Ackerman purports to do anything, it is to be comprehensive. The question is whether what Ackerman's theory has to say is useful or desirable, and that depends on whether the theory is a useful or desirable way to think about constitutional developments.

In addressing this question, I want to focus particularly on Ackerman's proposal for interpreting the Constitution. This is, after all, the book's main point and most original contribution: Ackerman combines claims about the nature of American democracy with a story about American history to justify a particular way of understanding and justifying developments in constitutional law. It is this approach that Tushnet invokes to explore the possible meaning of *Lopez*.

Other commentators have discussed Ackerman's political theory, some of which is old hat, some highly controversial.[5] My point

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tion of an access easement condition on a building permit under the Takings Clause because the condition did not serve a public purpose).

3. Ackerman's theory is presented in 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991). Ackerman promises supporting details and additional historical evidence in volumes two and three, but the first volume lays his theoretical groundwork.

4. Mark Tushnet, *Living in a Constitutional Moment?* Lopez *and Constitutional Theory*, 46 CASE W. RES. L. REV. 845, 875 (1996).

5. *See, e.g.*, Symposium, *Bruce Ackerman's* We the People, 104 ETHICS 446, 446-535 (1994). In the category of "old hat" are Ackerman's discussion of human nature and his claim that American political practice has two tracks. As Ackerman himself recognizes, the insight that men and women are neither wholly virtuous nor utterly craven, that they cannot be expected to devote their lives entirely to the public good but can be expected to assume some civic responsibilities, is hardly new and was not so when *The Federalist* was written. Similarly, the notion that there are two kinds of law, one superior to the

is different: even if one grants Ackerman his claims about "dualist democracy" and normal versus higher politics, one should still reject the principles of constitutional interpretation that he urges follow from them. We need a different framework to make sense of a decision like *Lopez*.

The analysis starts by describing Ackerman's approach to constitutional interpretation. Most commentators focus on the "constitutional moment" as his key contribution. But the notion that constitutional moments occur, even that such moments amend the Constitution, is not, by itself, all that interesting or important. What matters is that, when a constitutional moment occurs, it establishes a new "constitutional regime." Constitutional regimes consist of broad principles that reflect the basic goals and priorities of fundamental law. Articulated by courts in the years after a constitutional moment occurs, these principles redefine, and to a significant degree restructure, the entire constitutional system. Hence, one who

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other, is at the heart of *The Federalist* No. 78 as well as Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and has been a universally accepted truism throughout American history.

The category of principles that are controversial includes, most notably, Ackerman's claim that the people can legitimately make whatever law they want so long as it is done in a way that makes clear that it is "We the People" who are speaking. Other commentators have pointed to problems with this premise: that certain rights are needed to make sense of the claim that what follows is democratic, that still other rights may be necessary to ensure adequate space for private citizenship, and so on. *See, e.g.*, Don Herzog, *Democratic Credentials*, 104 ETHICS 467, 468-71 (1994). Ackerman even concedes that his premise is problematic in strictly normative terms. Bruce Ackerman, *Rooted Cosmopolitanism*, 104 ETHICS 516, 517-20 (1994). But, he maintains, the absolute power of the people legitimately to make (or unmake) whatever law they want is, for better or worse, an underlying premise of our Constitution—shown by the fact that "from the Founding to the present, our Constitution has coexisted peacefully with grievous injustice." *Id.* at 518.

Ackerman's response here seems to me a clumsy sort of pragmatism. As Miriam and William Galston have pointed out, the Declaration of Independence is evidence (and only the most obvious evidence) of the Founding generation's belief that governments are instituted to protect certain natural rights and lose their legitimacy if they fail to protect these rights. Miriam Galston & William Galston, *Reason, Consent, and the U.S. Constitution: Bruce Ackerman's* We the People, 104 ETHICS 446, 455-56 (1994). Grant that the Founding generation failed to meet this ideal when it declined to abolish slavery—though I would hardly describe antebellum politics and the Civil War as a period of "peaceful coexistence." Grant, too, that the United States has since committed or permitted its fair share of injustice (still does). Why does it follow that any injustice the people choose to pursue is therefore legitimate? Why because we have not managed to perfect our constitutional order is it okay to make that order as imperfect, as unjust, as undemocratic as a mobilized majority chooses? Ackerman may be on firm ground in criticizing those who insist on treating the Constitution as a mandate for perfect justice. But his position is much weaker when he assumes that the alternative must therefore be substantively unconstrained majority rule.

embraces Ackerman's theory must ask whether a decision like *Lopez* is consistent with the existing constitutional regime, or (as Tushnet considers) whether it signals the creation of a new one.

Part II examines the motivation for engaging in this sort of interpretive enterprise, which turns out to be that it encourages a desirable attitude toward self-government, an attitude Ackerman sums up in the phrase "private citizenship." A private citizen, in Ackerman's nomenclature, is someone who lives a conventional private life most of the time, taking time out perhaps to follow important public issues and to vote, but who is willing to become more engaged in deciding what is best for the nation—to become more the kind of citizen imagined by civic humanists—when events make this necessary.

Part III questions whether this motivation adequately justifies the enterprise Ackerman wants to promote. Even conceding that private citizenship is worth encouraging, why should it be the foremost consideration in constitutional interpretation (as it is for Ackerman)? Aren't there other considerations of equal or greater importance? On closer inspection, the "constitutional regime" turns out to be a rather ham-handed interpretive device. It takes broad principles developed in one context and under one set of circumstances and recklessly engrafts these onto other problems under other circumstances, subverting or distorting many of the Constitution's particular aims along the way. Governing is complex business, and because governmental institutions are interdependent and sensitive, even small changes can have unforeseen effects; handled improperly, these can become very large. Ackerman's regime theory directs courts to restructure all sorts of institutional arrangements based on abstractions that were not developed for the purpose, and with no reason to believe these are suited for their new mission. Such imprudence is likely only to make any problems worse. Part IV illustrates, using some of Ackerman's own examples, in particular, Reconstruction, *Lochner*, and the New Deal.

I. CONSTITUTIONAL MOMENTS AND CONSTITUTIONAL REGIMES

How does Ackerman's theory tell us to think about a decision like *Lopez*? Like most commentators, Tushnet concentrates on Ackerman's argument that there are "constitutional moments" during which the citizenry is engaged in politics in an especially in-

tensive, civic-minded way.[6] At such moments, Ackerman says, "We the People" speak for ourselves in what James Madison once called our "highest sovereign capacity."[7] Tushnet asks whether we are now experiencing a constitutional moment, whether *Lopez* is part of one. But what if it is? Something is happening, but what is it supposed to mean?

One implication is that the Constitution is amended at such junctures. Certainly this is true if the moment is expressed through what Ackerman calls "the classical system" of higher lawmaking, viz, the procedures laid out in Article V of the Constitution.[8] But it's not news that the Constitution can be amended under Article V. Somewhat more novel is Ackerman's claim that such moments can produce an amendment outside Article V procedures,[9] and it is this possibility that Tushnet explores with *Lopez*.

Ackerman's proposal to have courts recognize amendments adopted outside Article V has provoked some negative rumblings from legal scholars, and certainly its logical and legal bases are contestable.[10] But even this is mostly just a debate about vocabulary. For Ackerman's system still calls for the Supreme Court first to make some sort of "switch in time" and then to codify the results by articulating the relevant constitutional principles in authoritative decisions,[11] which is pretty much how things already happen. True, Ackerman's theory technically *requires* the Court to make this switch if political events speak loudly and clearly enough. But we know already that the Court will invariably do so with or without Ackerman—a point captured in the adage about judicial decisions following election returns. As a practical matter, then, the only consequence of embracing Ackerman's theory is to relabel as "constitutional amendments" what formerly we were

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6. *See* Tushnet, *supra* note 4, at 847-52 (explaining that "although constitutional moments may occur, they may not be the only times when constitutional transformation occurs").

7. *See Madison's Report on the Virginia Resolutions, in* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 547 (Jonathan Elliot ed., 2d ed. 1888).

8. ACKERMAN, *supra* note 3, at 267.

9. According to Ackerman, this "modern system" of amending the Constitution has roots that stretch back to Jefferson's election in 1800 but "came into its own" and is best exemplified by the New Deal controversy of the 1930s. *Id.* at 267-68.

10. *See, e.g.*, Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENTARY 115, 140-44 (1994); Lawrence G. Sager, The Birth Logic of a Democratic Constitution 4 (Sept. 1995) (unpublished manuscript, on file with author).

11. *See* ACKERMAN, *supra* note 3, at 268.

content to call changes in established doctrine. Does the label really matter?

In theory, I suppose, the amendment label should make the Court's articulated principles harder to change. In practice, however, the Court can always find room to maneuver even when dealing with textual amendments adopted under Article V. I could cite the Due Process Clause for support here, though that may be unfair given its open-ended language and elastic purpose. So look instead at the Court's doctrinal flip-flops in interpreting the various provisions of the Fourth, Fifth, or Sixth Amendments—not to mention the long freeze it imposed on the Fourteenth Amendment in decisions like the *Slaughter-House Cases*,[12] *United States v. Reese*,[13] *United States v. Cruikshank*,[14] and the *Civil Rights Cases*.[15] True, labeling something an amendment makes overruling it outright technically impossible. But the likelihood of that happening even without the label is exceedingly low, particularly given the option to proceed by attrition through decisional law—low enough, at least, that this alone is not enough to make Ackerman's theory useful in measuring the significance of a decision like *Lopez*.[16]

Ackerman's unique, and potentially important, contribution comes from a different feature of the theory: his notion that constitutional moments give rise to what he calls "constitutional regimes." A number of commentators, myself included, have criticized Ackerman for unduly compressing the story of constitutional change.[17] Constitutional values, we have argued, are not always,

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12. 83 U.S. (16 Wall.) 36 (1872) (rejecting a Thirteenth and Fourteenth Amendment attack on a Louisiana statute granting a monopoly over the slaughterhouse business in the New Orleans area).

13. 92 U.S. 214, 216-17, 221 (1875) (striking down a federal penal statute addressing obstruction of voting rights as outside the constitutional powers of Congress).

14. 92 U.S. 542, 559 (1875) (overturning convictions under a federal voting rights penal statute).

15. 109 U.S. 3, 25 (1883) (striking down the Civil Rights Act of 1875 as outside the scope of congressional authority conferred in the Thirteenth and Fourteenth Amendments).

16. A colleague suggested in conversation that the importance of Ackerman's work may simply be that it reminds us to attend to the roots of constitutional lawmaking in expressions by the people. Constitutional theory had begun to drift very far from concern for popular sovereignty, and it may well have been worthwhile to draw attention back to these roots. But if embracing Ackerman's theory would not change anything about our actual practices, the fuss generated by his book hardly seems worthwhile.

17. *See, e.g.*, Michael Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 791 (1992); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 276

or only, made in cataclysmic political upheavals. They are shaped in smaller increments, by accretion. Developments take place in different areas at different times, in an ongoing, overlapping sequence: at some point, criminal procedure issues come to dominate the Court's docket and dramatic changes are made; while these are still being assimilated the Court shifts to equality issues, then to separation of powers, then back to equality; in the meantime, some older problems respecting the scope of federal power reappear; and so on. Within each of these areas, a doctrinal revolution of sorts may take place. Each controversy is dealt with as it arises, with resolutions that become embedded in our general constitutional sensibilities and contribute, in turn, to further evolution.

But the critics—and, once again, I include myself here—have been unfair. Ackerman knows that constitutional change happens all the time.[18] But, he says, there are moments and there are moments. Most instances of constitutional politics do not involve self-conscious choice by a mobilized citizenry—do not, in other words, involve constitutional lawmaking by the people acting in their highest sovereign capacity. Moments of this description are rarer; indeed, Ackerman says, we have experienced only three in our history: the Founding itself, Reconstruction, and the New Deal.[19]

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n.39 (1992); Terrance Sandalow, *Abstract Democracy: A Review of Ackerman's* We the People, 9 CONST. COMMENTARY 309, 324 (1992).

18. *See, e.g.*, ACKERMAN, *supra* note 3, at 196:

> If we turn to constitutional movements that have had an important, but somewhat less sweeping impact on constitutional values and structures, the causal story is richer. The civil rights movement of the modern republic, the women's suffrage movement of the middle republic, the Jeffersonian and Jacksonian 'revolutions' of the early republic all serve as important examples of successful constitutional politics.

19. Some critics argue that other constitutional innovations fit Ackerman's criteria of signalling, proposal, mobilized public deliberation, and codification—a point that, if true, renders Ackerman's notion of synthetic interpretation impossibly difficult and reduces the significance of any principles adopted. How about the election of 1832 and the question of a National Bank? Or the election of 1876 and the end of Reconstruction? Or the post-Watergate election of 1976? Mike McConnell goes so far as to suggest that there may be as many as eleven moments that satisfy Ackerman's criteria. McConnell, *supra* note 10, at 142-43. Although Ackerman has not yet addressed such claims directly, he apparently regards the quality of public engagement at these putative moments as less intense and less profound than during the three moments he defends. *See* ACKERMAN, *supra* note 3, at 40-41. This does not explain why the quality of public deliberation during other periods was not high enough to qualify, but here Tushnet provides an answer. The stringency of Ackerman's conditions, he suggests, can be justified on formalist grounds: to reduce the risk of politicians falsely claiming to speak for the people, Ackerman screens out all but the clearest examples of higher lawmaking. *See* Tushnet, *supra* note 4, at 858-62.

What makes these rare constitutional moments special is that they generate profound changes in bedrock constitutional principles—establishing, quite literally, a new "constitutional regime." A constitutional regime, according to Ackerman, consists of "the matrix of institutional relationships and fundamental values that are usually taken as the constitutional baseline in normal political life."[20] Such regimes should, he urges, constitute the "basic unit of analysis" for interpreting the Constitution.[21]

The constitutional regime, in other words, is an interpretive device for remaking constitutional law. It consists of general principles that reorganize doctrinal analysis across the whole spectrum of constitutional problems. The "middle republic" launched during Reconstruction stood, broadly speaking, for a profound commitment to freedom and equality, a commitment applicable to issues beyond slavery and civil rights—including, most notably, freedom of contract and the right to own property, and thus leading plausibly (if not inexorably) to *Lochner*.[22] Similarly, the "modern republic" inaugurated by the New Deal endorses a principle of activist government that demands rethinking constitutional relationships on matters reaching well beyond economic regulation and the social safety net—including, for example, our constitutional commitment to equality (hence *Brown*) and to individual autonomy (hence *Griswold*).[23] It is this notion that leads Tushnet, in the last section of his paper, to ask whether recent political developments, including the 1994 elections and Contract With America, as well as *Lopez*, stand for some general principle of evaporating government power.[24]

Note, however, that the normative propositions embodied in a constitutional regime are not themselves enacted, or even debated, as such. Constitutional moments are triggered by particular problems, and the process of ratification (whether or not carried out under Article V) consists of securing the acceptance of definite proposals placed before the people for their consideration. So far as the public at large was concerned, the issues on the table during the debate over the Fourteenth Amendment and the election of

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20. ACKERMAN, *supra* note 3, at 59.

21. *Id.*

22. *Id.* at 100-01.

23. *Id.* at 133-58 (discussing *Brown* and *Griswold*).

24. *See* Tushnet, *supra* note 4, at 869-75 ("[T]he present constitutional moment, if it is one, may involve the evaporation rather than the devolution of public power.").

1866 consisted of putting the South in its place (by disenfranchising former Confederate officials and repudiating the Confederate war debt) and securing basic civil rights for the newly freed slaves. Similarly, the controversy of the late 1930s involved persuading the Supreme Court to uphold legislation enacted during Roosevelt's Second New Deal, primarily laws regulating important national markets and establishing the Social Security system. The engaged public—the "We the People" Ackerman celebrates—was never asked to adopt the broad principles that come to define its new constitutional regime. Insofar as such principles were discussed (and obviously there was lots of talk about equality during Reconstruction and about state activism during the 1930s), it was in the context of these specific proposals.

The point is this: the people themselves, in the midst of the political upheavals that qualify under Ackerman's theory as genuine constitutional moments, did not think they were fundamentally restructuring their entire constitutional order. Many understood that something important was happening, that more was at stake than the kind of minor repair reflected in an Eleventh or Twelfth Amendment, but most or all participants saw their action as bounded by the controversy before them. Had a proposal to go beyond this been put to them directly, had "the people" been asked to authorize the sort of systematic reordering called for by Ackerman's regime theory, they most likely would have said no—a point Ackerman willingly acknowledges.[25]

So where do the principles come from? Who defines the scope, who creates the meaning, of a constitutional regime? Why courts (of course). According to Ackerman, judges extract a regime's underlying principles from the concrete proposals enacted by the people, "translat[ing] the rare successes of constitutional politics into cogent doctrinal principles capable of controlling politics into the indefinite future."[26] He elaborates with a metaphor:

> Think of the American Republic as a railroad train, with the judges . . . sitting in the caboose, looking backward. What they see are the mountains and valleys of dualistic constitutional experience, most notably the peaks of constitutional meaning elaborated during the [prior constitutional moments]. As the train moves forward in history, it is

25. *See* ACKERMAN, *supra* note 3, at 96-98.
26. *Id.* at 290.

> harder for the judges to see the traces of volcanic ash that marked each mountain's political emergence onto the legal landscape. At the same time, a different perspective becomes more available: as the second mountain moves into the background, it becomes easier to see that there is now a mountain range out there that can be described in a comprehensive way.[27]

This task of translating constitutional politics into normative principles consists of two steps: First, courts give meaning to the transformation that just took place, articulating appropriate "principles . . . capable of generalized application" by "abstracting the core constitutional doctrines from the mass of statutory material that has gained popular support."[28] Then, courts synthesize these principles with those from previous regimes, "integrat[ing] the new principles added by the last transformation into the older tradition."[29] "The task," Ackerman concludes, "is to develop the entire set of constitutional principles in a comprehensive way that harmonizes the deeper aspirations."[30]

It is this notion of a constitutional regime that gives Ackerman's theory its bite, that makes its adoption potentially meaningful. Without the regime feature, Ackerman's proposal is journalism, theory without meaningful consequences. With it, the conclusion that we're living in a constitutional moment has much more than journalistic significance. It authorizes—indeed, compels—courts to engage in a profound task of constitutional reinterpretation. It requires them to articulate a set of broad new principles and to integrate these with existing principles in a way that has implications across the entire constitutional firmament.[31]

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27. *Id.* at 98-99.

28. *Id.* at 98, 283.

29. *Id.* at 161.

30. *Id.* at 98. *See id.* at 92-94, 116, 127-29, 289-90 (explaining how the amendments "represented a good deal less than a comprehensive synthesis of the Founding and Reconstruction").

31. Given the court-centered nature of this theory, it is ironic to hear Ackerman tell us that we need "to move beyond the court-centered view that afflicts the modern professional narrative" and that lawyers and judges "must resist the temptation to make the Supreme Court the alpha as well as the omega." *Id.* at 59.

II. JUSTIFICATIONS AND MOTIVATIONS

An obvious question to ask at this point is, why engage in this interpretive enterprise of searching for constitutional moments, defining constitutional regimes, and synthesizing these over time? One could promote the theory on straight normative grounds and argue that viewing constitutional developments this way yields the "best" Constitution among available alternatives. But Ackerman does not make this defense, which is just as well given the sizeable leap of faith required to believe that an engaged, mobilized majority always makes the "best" law, constitutional or otherwise.[32] Instead, as Tushnet explains, Ackerman's theory can more easily be defended as an "interpretive one," i.e., a theory justified because it "provides an account of the way the people of the United States actually understand their constitutional tradition."[33]

Phrased this way, the case for Ackerman's theory still seems weak. An obvious challenge: why does that make it a good theory? One cannot promote the theory on popular sovereignty grounds without first defending the theory's premise that popular sovereignty ought to be determinative. Besides, at least as stated here by Tushnet, the premise seems patently false; Ackerman's theory does not describe "how the people of the United States understand their tradition." Just ask your non-law friends, or your parents, or your parents' friends, where they think constitutional law comes from. I am confident that the story you get back will not resemble Ackerman's. Certainly my mother and her friends don't think along these lines, and I'm pretty sure they are typical in this respect. If the average person thinks about problems of constitutional interpretation at all, he or she probably holds one of the conventional views: textualist or originalist or realist ("the Supreme Court makes it"). There is an awareness of the amendment process, but conceived in a wholly conventional way, with none of the underpinnings of Ackerman's "dualist democracy" and no sense of a "modern system" of extra-textual amendments.

For what it is worth, when Ackerman speaks of a collective understanding, he does not appear to mean that of the general

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32. Tushnet, *supra* note 4, at 852-54 ("[T]here is simply no good reason to accept that assertion or its supporting ground."). Think Nazi Germany for the extreme example, though Ackerman himself observes that "[i]t should not require the horror of a holocaust before Americans recognize that dualist democracy is *not* the best form of government available for modern society." Ackerman, *supra* note 5, at 533 (emphasis in original).

33. Tushnet, *supra* note 4, at 854.

population anyway. Rather, he privileges the professional narrative, the narrative constructed by lawyers and judges.[34] But I am even more certain that Ackerman's theory does not fit the understanding of this group. His book created a stir, after all, only because it did *not* conform to what this community already thought. (Nor would Ackerman want it any other way; I mean, who wants to write something that simply describes what everybody already thinks?)

So perhaps this is not the best way to understand Ackerman's theory either. At a later point in his paper, Tushnet suggests that Ackerman's approach may be desirable "because it supports or generates a normatively attractive vision of our national identity."[35] Tushnet never follows up the allusion, but it suggests something different from either a simple normative claim (that Ackerman's theory yields the best Constitution) or a simple positive one (that this is how people understand our constitutional tradition). It suggests a mix of both: that Ackerman's theory may provide the most normatively attractive account of our constitutional tradition that is also consistent (more or less) with the actual course of that tradition. Other readers have interpreted Ackerman this way, which is also consistent with his own subsequent description.[36]

Characterizing Ackerman's theory along this line enhances its plausibility, since most theorists would prefer an approach that is consistent with our historical tradition while being normatively attractive—indeed, many believe that whether a theory is consistent with historical tradition is part of what makes it normatively attractive.[37] But does Ackerman's theory do this? Is his, in fact, the

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34. ACKERMAN, *supra* note 3, at 38 ("While it has many interpreters—from professional historians to T.V. actors—I believe that the ongoing constitutional narrative constructed by lawyers and judges is entitled to a central place. This professional narrative has the most direct impact upon the ordinary lives led by all of us.").

35. Tushnet, *supra* note 4, at 856.

36. *See, e.g.*, Ackerman, *supra* note 5, at 533-35; Kent Greenawalt, *Dualism and Its Status*, 104 ETHICS 480, 484 & n.9 (1994).

37. This is, for example, the central premise of originalism as well as a core feature of Ronald Dworkin's work. *See* RONALD DWORKIN, LAW'S EMPIRE ch. 7 (1986). Even scholars who purport to be skeptical about using history and past practice typically include it as an element of their analysis; the real disagreement is more about how, not whether, to take this consideration into account. *See, e.g.*, RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE ch. 10 (1990); CASS SUNSTEIN, THE PARTIAL CONSTITUTION ch. 4 (1993). Still, the point is not self-evident. Why should we be limited by past practice in thinking about what theory is best? Why shouldn't we develop a theory on purely normative grounds, treating departures from historical understandings as a practical problem of implementation rather than a potential constraint on the theory itself? Part III

most normatively attractive way to understand our constitutional tradition? This depends, first, on what "our tradition" is said to consist of; second, on what the alternatives are; and third, on what makes Ackerman's theory more normatively attractive than the alternatives.

Start with the problem of characterizing our tradition—an incredibly difficult task. At what level of generality should the inquiry be made? Which facts count and how much weight do they get? Don't we need a normative framework with which to organize the facts? Think of Burke condemning the nasty French Revolution and celebrating English balance while all but ignoring the regicide, religious persecutions, and sundry other massacres of the Interregnum.[38] Characterizing an American constitutional tradition is no easier. We have much to be proud of; much the United States has done has increased liberty and equality and made the world a better place. But what about slavery, racism, the genocide of Native Americans? How should we think about Know-Nothingism, McCarthyism, the movement to ban the Mormon church, the internment of Japanese-Americans? Where do we fit the tradition of anti-intellectualism that began with the Second Great Awakening, or the prissy intolerance and social bigotry that has characterized America from the Puritans to the Progressives to today's champions of political correctness (left and right)? Burke understood that describing a tradition means talking about particular practices. Aren't these all part of our tradition? How should they and myriad other facts, positive and negative, be integrated?

Ackerman ducks such questions by defining the tradition at a level of generality so high as to make comparative evaluation difficult. The defining principle of American constitutionalism, he declares, is nothing less—and nothing more—than a commitment to popular sovereignty: but popular sovereignty of a particular sort, which Ackerman labels "dualist democracy."[39] By "dualism" Ackerman means that, within the terms of a general commitment to popular government, we distinguish further between decisions made

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suggests one answer: because a theory developed without regard for past practice, and even more one developed in spite of it, is likely to be a bad theory. Beyond this, however, and even though I agree with Ackerman on this point, I want to put such questions aside; they require a lengthy discussion that would take us too far afield.

38. *See* Don Herzog, *Puzzling Through Burke*, 19 POL. THEORY 336, 342-59 (1991) (discussing the problem of characterizing tradition with specific reference to Burke and his selective choice of facts).

39. *See* ACKERMAN, *supra* note 3, at ch. 1.

by the people's representatives in the course of ordinary politics and decisions made by the people themselves during rare periods of mobilized deliberation.[40] Ackerman's theory of constitutional moments and constitutional regimes is designed to give maximum effect to this distinction—to recognize the value of decisions made in normal politics while remaining especially alert to decisions made by the people (and relying on courts to preserve the people's handiwork from erosion in the course of ordinary politics).

Ackerman is on shaky ground even at this high level of generality. Most obviously, he ignores an equally prominent natural rights strand in American constitutionalism (of which, more below). But why should we characterize tradition at this abstract level anyway? As suggested above, we won't be able even to begin thinking usefully about what our tradition "is" until we get beyond generalities and deal with the grubby details. Nevertheless, having noted this problem, I want to put it aside and concede that dualism is an important facet of a distinctively American constitutional tradition. To attempt more would simply mean a long discussion leading to the obvious conclusion that there are many competing, equally persuasive versions of "our" tradition.

This brings me to the question of alternatives. Ackerman discusses three, which he labels "monistic democracy," "rights foundationalism," and "Burkean historicism." He criticizes all three for ignoring the dualist foundation of the American Constitution.[41] "Monism," for example, is said to hold that courts should never set aside laws made by democratically elected legislatures. And, as thus stated, the problem from Ackerman's perspective is obvious: this theory enables politicians to subvert decisions made by the people through laws enacted when most citizens are detached from public affairs or thinking only of their own particularistic concerns.[42] "Rights foundationalism," in contrast, has a different weakness—insufficient rather than misplaced democratic sensibilities. As Ackerman describes it, this theory holds that certain rights always and necessarily trump majoritarian decisions, rights identified and justified on philosophical grounds, without regard for whether the people actually adopted them. Wrong, says Ackerman, for our Constitution is "democratic first, rights-protecting second":

40. *Id.* at 6-7.
41. *See id.* at ch. 1.
42. *Id.* at 7-10.

the rights existing to be enforced against legislative action are those (and only those) adopted by the people in their higher law-making capacity.[43] Finally, "Burkean historicism," which is really just another name for common-law adjudication, stresses the evolution of doctrine by increments—too much so for Ackerman, who maintains that the emphasis on gradualism unduly tames what the people create through constitutional politics.[44]

Anyone familiar with the theories Ackerman discusses can see that his criticisms exaggerate their "non-dualist" tendencies. None of these approaches is as dismissive of the idea of higher law made by the people as Ackerman pretends; each, in fact, recognizes the same distinction between decisions of the people and decisions of their representatives—though none handles this distinction in quite the same way as Ackerman does.

For example, none of the "monists" cited by Ackerman[45] (nor anyone else doing American constitutional law) has ever maintained that our Constitution embraces a principle of legislative supremacy. Nor did any of these scholars, except perhaps Woodrow Wilson, argue that it should. All of them, Wilson included, recognize that the Constitution establishes supreme law that cannot be contradicted by the political branches—where it speaks clearly. Those troubled by the so-called countermajoritarian difficulty simply believe that, where the Constitution is *not* clear, courts have no business overriding legislatures. In Ackerman's jargon, they follow a sort of "dualist clear statement rule": if the people have spoken clearly, as evidenced by the text (and, for some proponents of this view, the history) of the Constitution, the people's decision governs; if they have not spoken clearly, legislative judgments about what the people want are better than those of a court. There are, we know, problems with this view—problems examined endlessly during the almost forty years that this question has preoccupied constitutional theorists—but that it fails to recognize the superior power of the people to make higher law is not one of them.

Rights foundationalists also recognize the power of the people to make higher law—though not necessarily to quite the same extent or in quite the same way as Ackerman does. Start with the

43. *Id.* at 10-16.

44. *Id.* at 16-21.

45. Ackerman mentions Woodrow Wilson, James Bradley Thayer, Charles Beard, Oliver Wendell Holmes, Robert Jackson, Alexander Bickel, and John Hart Ely. *See id.* at 7.

narrowest version of this theory: that certain rights must be guaranteed before we can even call a decision democratic. Not only is this position consistent with Ackerman's dualism, particularly if the remainder of the field is left to the kind of democratic politics he champions, but (as other commentators have observed) it actually seems *required* by the theory—a point Ackerman has so far failed adequately to address.[46]

There are more robust versions of rights foundationalism. Yet even these do not deny the validity of dualism, only its exclusivity. One might, for example, want to defend a larger set of entrenched rights. But no one takes this claim so far as to argue that such rights exhaust the field—that no further rights may be created or denied. At most, this position entails a modest restriction on majoritarian rule. Ackerman insists, implausibly, that the American commitment to popular sovereignty is inconsistent with *any* such restriction.[47] Yet the Declaration of Independence is (pardon the pun) self-evidently based on a natural rights philosophy, and it merely restates commonly held views that were not repudiated during the critical years that followed and have persisted throughout American history.[48] Whatever else it may be, our tradition has always included, alongside popular sovereignty, a notion of inalienable rights—rights that government cannot take away, rights that governments are, in fact, established to protect. Yes, as Ackerman points out in trying to minimize the importance of this tradition, the acceptance of slavery stands as a big contradiction here. But a bloody war was fought to repudiate that contradiction, fought partly

46. *See, e.g.*, Galston & Galston, *supra* note 5, at 449 (explaining that "the very considerations that incline Ackerman to give weight to popular consent as a basis of legitimacy entail constraints on the content of popular will that Ackerman fails to recognize"); Herzog, *supra* note 5, at 468-69 (explaining "that some rights are required to make sense of the claim that whatever ensues is democratic"). Ackerman's response to this criticism was that "dualist theory [may not be] unalterably opposed to the protection of (a narrow set of) inalienable rights," but it does not require entrenched rights either: "if the people wish to commit suicide by stripping its members of their participatory rights, popular sovereignty has already died and elites would make matters worse by pretending that they could breathe life back into the corpse." Ackerman, *supra* note 5, at 531-32. But this response misses the point while, in effect, conceding it. To see why, consider the following question: If a proposal to repeal the First Amendment were made, could it be resisted at the outset, before it was adopted, on the ground that it is illegitimate, or merely because it is a bad idea?

47. ACKERMAN, *supra* note 3, at 13-15.

48. *See* DONALD MEYER, THE DEMOCRATIC ENLIGHTENMENT 111-12 (1976); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 588-89 (1995); *supra* note 5.

on the premise of fulfilling the natural rights tradition embodied in the Declaration.[49]

In any event, the most common use of arguments from moral or political philosophy—the use made by lawyers and judges who actually work with the Constitution—does not depend on entrenched rights or an unamendable Constitution. It doesn't need to, because the rights provisions already in the Constitution are sufficient for their purposes. Lawyers and judges face a more practical problem: figuring out how to interpret and apply existing rights provisions over time, as new circumstances arise and old ones change. Resort to moral or political philosophy in this context is a method of gap filling, "non-dualist" only if one assumes that the people disapprove of using such sources for guidance in interpretation. But there is no reason to assume that; certainly there is no reason to believe that "We the People" mind moral and political philosophy more than the generalizations manufactured by judges looking back from Ackerman's caboose.

Finally, nothing in the approach that Ackerman calls "Burkean historicism" says to ignore or subvert changes made by the people through constitutional politics. On the contrary, a judge who understates or repudiates such changes is acting improperly. A common-law approach emphasizes the need to incorporate new law into a preexisting framework, which may make its adherents less enthusiastic about abrupt changes than Ackerman would like. But a common-law or historicist approach in no way denies the validity or importance of constitutional politics and higher law. It simply encourages a different attitude toward integrating these products into existing law.

The point is, we are not choosing between a theory that accepts dualism and theories that reject it. We are, rather, choosing among theories that recognize the significance of higher law made

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49. Lincoln's argument for interpreting the Constitution in light of the Declaration of Independence is well known: seeing that the nation was not prepared to abolish slavery, he argued, the Framers instead set it on a slow road to extinction. *See* CREATED EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 82, 298 (Paul M. Angle ed., Midway Reprint 1985). Ackerman replies that Lincoln's views were "far more complex, and less foundationalist" than is typically assumed. Ackerman, *supra* note 5, at 518 n.4. I'm not sure what Ackerman means by this oblique comment, but Lincoln did not invent this argument anyway; nor was he the only person to make it. This was, in fact, a standard piece of antislavery rhetoric. *See, e.g.*, ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 76, 133, 228 (1970).

by the people, but identify, interpret, and integrate such law differently, or blend this consideration with other constitutional concerns. Nor, by the way, do we have to choose a pure version of any of these theories—or only one of them, for that matter. One can easily imagine hybrids that mix different approaches, and we may want to use more than one theory, depending on the issue.

I will return to these considerations in the next section. But, first, consider what this discussion reveals about why Ackerman thinks his theory is normatively superior to the others—the third question mentioned above. Ackerman's theory is not distinguishable on the ground that only it recognizes the "dualist" premise of higher law made by the people, but it does differ from these other theories in the extent to which it makes this consideration central; Ackerman's may not be the *only* dualist theory around, but it is the *most* dualist theory. Indeed, the whole interpretive apparatus described in part I—identifying constitutional moments, translating these into constitutional regimes, synthetically interpreting principles across regimes—is designed specifically to heighten the emphasis on facilitating dualist democracy.

And what's so great about dualism? With this question, we come at last to Ackerman's motivation. By making dualism our foremost consideration, Ackerman tells us, we shall encourage something he calls "private citizenship."[50] Private citizenship describes a particular attitude toward membership in a political community, one that strikes a realistic balance between full-time devotion to the common good and relentless pursuit of self-interest.

At first blush, one might think the goal ought to be to encourage a life devoted to serving the community. An admirable goal, perhaps, but hardly realistic. Most of us simply are not that good. We care about ourselves, our family, our friends, the people we touch, more than we care about strangers—even strangers with whom we share a conceptual bond of citizenship. Making citizens live up to the ideal of classical republicanism takes work, a lot of work—hence all that talk during the Revolutionary period about "converting men into republican machines,"[51] the totalitarian over-

50. *See, e.g.*, ACKERMAN, *supra* note 3, at 297 ("I will be exploring the way in which the dualist tradition gives life and substance to the American practice of private citizenship. This link, to my mind, will provide you with the single best reason for giving your conscientious support to the American Constitution.").

51. MEYER, *supra* note 48, at 196 (quoting Benjamin Rush, who also advocated public education as a way to make the "mass of the people more homogeneous, and thereby fit

tones of which are uncomfortably close to the fascism of a later day. And maybe this isn't such an admirable goal anyway. After all, a life devoted to politics means a life not devoted to other pursuits. It means a life without freedom as we have come to understand the term, and a world without many of the opportunities for excellence (dare I say virtue?) that make life satisfying.

On the other hand, a life devoted wholly to selfish interests isn't much better. Who thinks that Ebenezer Scrooge at the beginning of *A Christmas Carol* is an inspiring figure? Our lives and fortunes are interdependent, and sometimes we must attend to our role as member of a community, with all the responsibilities that entail. Failure to do so may, among other things, be one of the surest ways to lose our freedom, by making it easy for potential tyrants to seize control of government. As corny as it sounds, giving nothing, we risk losing everything.

"Private citizenship" denotes an intermediate position. It describes a world in which we are free, for the most part and most of the time, to pursue our own interests, a world in which we can choose to wear many hats. During ordinary times, we are asked to sacrifice our private lives only to a relatively modest extent, by voting and keeping abreast of important events. Every once in a while, however, issues arise that demand more active involvement. On such occasions, we must assume the full mantle of responsible citizenship. In this way, we can govern ourselves without losing ourselves to government.

This, then, is what motivates Ackerman's theory: to make a world in which private citizenship can flourish.

III. PUTTING THE "PRUDENCE" BACK INTO CONSTITUTIONAL JURISPRUDENCE

We can, I think, agree with Ackerman that "private citizenship" is a normatively attractive idea; it enjoins a reasonable version of civic responsibility while leaving room to investigate life's other possibilities. Is it the most attractive conception of citizenship in a republic, or even the most attractive one consistent with our history and tradition? We don't need to decide, because there are problems with Ackerman's prescribed method of interpretation even if it is.

Note, first, the disjunction between Ackerman's objective to encourage private citizenship and his proposal to have judges make

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them more easily for uniform and peaceable government").

constitutional regimes "the basic unit of analysis."[52] A constitutional moment happens: the people speak, they do something. This is good, Ackerman tells us; this is civically virtuous involvement by "We the People" on an issue that matters. But how is this involvement encouraged if, years or even generations later, judges deduce some abstract principle from what the people did and apply it in ways that "We" did not endorse and would probably have rejected?[53] Unless the idea is to encourage participation by goading the public to act, this seems positively perverse.

Put another way, aren't the demands of dualism and private citizenship satisfied so long as courts give enactments of "We the People" the force and meaning that was desired by the People when they were enacted?[54] For that matter, isn't reading such enactments to do more contrary to the premise of popular sovereignty and the goal of encouraging private citizenship? In his eagerness to create general principles and apply them to new problems, hasn't Ackerman undermined his own theoretical premises? Not that arguments cannot be made to justify looking to text for general principles that apply in ways unanticipated by those who enacted the law from which they are derived. But these arguments are not Ackerman's, and Ackerman's arguments cut against what he proposes to do.

There is a more important question lurking here than whether the needs of dualism and private citizenship can be met with something other than Ackerman's theory of constitutional regimes. For even conceding that private citizenship is worth encouraging, why should it be the foremost consideration in devising a method of

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52. *See supra* note 21 (citing ACKERMAN, *supra* note 3, at 59).

53. Consider in this light John Ferejohn and Barry Weingast's argument that a rational lawmaker, seeking to maximize the effectiveness of its laws, might prefer courts to update enactments in line with subsequent political preferences—which, if true, suggests an interpretive regime very different from Ackerman's. *See* John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992). Of course, even assuming the validity of Ferejohn and Weingast's premise—that courts and lawmakers pursue independent policy goals within a framework defined by economic assumptions about rationality—this theory would not apply in Ackerman's world. For "We the People" are not present, do not even exist, during normal politics, and "Our" preferences as higher lawmakers cannot be detected by asking what the majority favors at any particular moment. The argument nonetheless suggests how complex the relationship between political action and judicial interpretation can be.

54. Hence the inescapable element of originalism detected by others in Ackerman's theory. *See, e.g.*, Flaherty, *supra* note 48, at 580-81; Klarman, *supra* note 17, at 777-84; Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 924-27 (1992).

interpretation, as it plainly is for Ackerman? Here we see the import of some points made above, because this question becomes especially cutting once it is conceded that other approaches may serve this goal and that less than what Ackerman calls for is needed to do so.

So consider the question that provides the title to this essay: what's a constitution for anyway? For many things, of course. And while encouraging private citizenship may be one of them, we have no reason to think it is the most important purpose of a constitution, or even one particularly high on the list. Even more important for our inquiry, which is centered on the role of courts, we have no reason to believe—indeed we have reason to doubt—that the Supreme Court plays a particularly important role in shaping the attitudes of ordinary citizens toward their civic responsibilities.[55] And even conceding that what the Court does matters in this respect, we have no reason to believe that its role is substantial enough to justify subordinating other considerations that might go into a theory of constitutional interpretation. Which is precisely what Ackerman does: he takes one of the Constitution's objectives—a background aspiration really, the kind of consideration that ought to be a secondary or tertiary matter in deciding cases—and elevates it all out of proportion.

The point, we now see, is utterly conventional (which may explain why none of Ackerman's critics has made it): laws—and this includes constitutions—are adopted for reasons, and we ought to interpret them in whatever way best achieves their intendments. Ackerman selects one of the Constitution's missions, one to which courts make only a marginal contribution, and builds an interpretive system around it at the expense of other goals and purposes. As the remainder of this essay will attempt to demonstrate, adding such considerations into the mix leads in a different direction than generating interpretive "regimes"—and does so, for that matter, without sacrificing either the premise of dualism or the desire to encourage private citizenship.

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55. I'm going to cite GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991). I am aware of the criticism his book evoked, especially from within the legal community (though I am more impressed by the book than many others). But one needn't endorse Rosenberg's methodology or particular conclusions to recognize the force of his point and acknowledge that, outside a relatively narrow segment of the legal community itself, the Court's role in shaping attitudes toward politics and the responsibilities of citizenship is pretty marginal.

Start with a familiar example drawn from the discussion of alternative theories in part II. As explained there, the approach Ackerman calls "rights foundationalism" seeks to identify and protect individual rights thought to be preconditions for liberal democracy, a pivotal constitutional concern with a long pedigree.[56] Yet, as Tushnet explains,[57] Ackerman's theory is ill suited to address this concern—hardly a surprise since the theory was not conceived with this concern in mind and is largely indifferent to its underlying considerations. If such rights are protected at all in Ackerman's world, it is a mere fortuity. Rights foundationalists, in contrast, are far kinder to Ackerman's concern for dualism. As also mentioned in part II, the most common versions of this approach limit popular sovereignty in order to strengthen it, and even the more ambitious variants leave plenty of room for democratic self-expression of the kind Ackerman says is needed to support private citizenship.[58]

The problem of individual rights has preoccupied American constitutional scholars since the 1950s. It has not been the only problem on the table, but questions about the Bill of Rights and Reconstruction Amendments have largely driven the debate. I want to look at a different function of the Constitution, however, one more pertinent to a conference on *Lopez*—namely, the Constitution's role in establishing a framework for workable, and working, government.

It is, I take it, a truism that the chief task and first order of business in writing a constitution is to construct institutions for government's day-to-day operations. (Just look at our Constitution or read the Convention debates, which are overwhelmingly concerned with such matters.) Yet despite a recent surge of interest in the problem of institutional design, it is fair to say that questions of structure have received less care and attention than they deserve. And while the Constitution's structural components share many objectives with its individual rights provisions, they have peculiar features too. Questions respecting the powers of or relationships among governmental institutions need to be analyzed on their own terms and in light of their own purposes. And, once again, it would be surprising if Ackerman's theory of constitutional regimes

56. *See supra* notes 48-49 and accompanying text.
57. *See* Tushnet, *supra* note 4, at 859-60.
58. *See supra* notes 46-49 and accompanying text.

did this well, for it was developed with a quite different (and overly abstract) set of objectives in mind. In fact, Ackerman's theory turns out to be a very bad way to handle structural issues.

Unlike the argument about individual rights, this point may be less familiar and require elaboration. What sort of special considerations apply when we confront the Constitution's structural components? How should we think about interpreting the Constitution in its role of establishing a workable framework for government? Obviously, this is not the place to attempt articulating a comprehensive theory; nor would such a theory offer some startling new technique. Interpretation in this area, as in others, is mostly a problem of teleology, of discerning purposes and arguing about which choice suits these best; and the devil, as they say, is in the details. Nonetheless, when applied to problems of institutional design, the conventional model of purposive interpretation has some distinctive features that bear emphasizing, not least because they underscore drawbacks in Ackerman's regime theory.

The key characteristic is this: while the Constitution sets up or recognizes various departments of government and allocates power among them, this opening arrangement was neither expected nor intended to be permanent. It was a starting position—an initial distribution from which to begin, like the initial distribution of money in a Monopoly game. The Framers believed it was a fair and sensible arrangement, one suited to their circumstances as they understood them. But they did not think it was permanent.

How do we know this? In part, because to maintain otherwise is to treat the members of the Founding generation as if they were fools—for only someone thickheaded could have failed to appreciate that once a government this big, this complex, and this novel was up and running (and by 18th century standards, this was a big, complex, novel government), experience would reveal the need for adjustments big and small. This was not even the kind of point that needed to be made directly. It was, rather, a shared assumption among intelligent men, one revealed mostly in responses to other arguments. So, for example, irritated by the nitpicking, impractical perfectionism of some Antifederalist opponents of the Constitution, Madison querulously asked:

> Is it an unreasonable conjecture that the errors which may be contained in the plan of the convention are such as have resulted rather from the defect of antecedent experience on this complicated and difficult subject, than from a

> want of accuracy or care in the investigation of it; and, consequently, such as will not be ascertained until an actual trial shall have pointed them out?[59]

Bear in mind, moreover, that the political science and history read by the Founding generation was literally obsessed with problems of change over time—as a result of both changes in material environment (*fortuna*) and political maneuvering (corruption).[60] And it all pointed toward a mix of institutions that, through their mutual relations, could make adjustments as time passed without sacrificing the basic commitments to liberty, good government, and civic virtue. The Constitution is surely positive law, but it is more than that. It is an organic charter for an entity that was meant to grow and evolve.

What does this mean for the problem of interpretation, and what does it have to do with Ackerman? To answer these questions, I want to draw (somewhat sheepishly) on two rather hackneyed metaphors. First is the old pragmatist image of sailors rebuilding their boat at sea. This is usually offered to say something about how knowledge develops: that we're not in a position to rebuild our systems from scratch, that revisions are made on an incremental basis, and so forth. The image also underscores the point that, in deciding whether a problem exists or change is needed, we had better be sure we understand what we're dealing with. These are not just intellectual puzzles. We live with this stuff; mistakes matter. If we don't know what we're doing, we can make

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59. THE FEDERALIST No. 38, at 233 (James Madison) (Clinton Rossiter ed., 1961). The point was occasionally made directly. Hamilton begins The Federalist No. 82, for example, by noting:

> The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. 'Tis time only can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE.

Id. at 491.

60. Although one would never know it from reading the legal literature, this is the claim actually made by J.G.A. Pocock in THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975). Civic humanism, in his story, is a solution to the age-old problem of how a secular government existing in real time can prevent or forestall decay into undesirable forms. *See also* CAROLINE ROBBINS, THE EIGHTEENTH-CENTURY COMMONWEALTHMAN (1959) (describing the arguments of radical Whig polemicists who were influential in the colonies).

things worse. We can drown.

The image can also be useful in thinking about constitutional evolution, if I may play it out slightly tongue-in-cheek. The Founding generation had a problem, a series of problems really: they needed a government with "energy," a government capable of controlling affairs at home and dealing with other nations on an equal footing; at the same time, they wanted a government that would preserve liberty and property, respect the authority of states, conserve civic virtue, reduce internal frictions, and so on. Drawing from their own experience as well as the best political science available, they designed a government they hoped could do all this. And they launched it. But they were really just guessing what it would be like at sea, because no one had sailed this particular ocean before. And they knew that the needs of those aboard the "ship of state" (so to speak) would change over time. Still, they did the best they could.

We are the inheritors of that experiment, out at sea now for some 200-plus years. Much of the original blueprint turned out to be remarkably sensible. But with experience we found that all sorts of adjustments were needed—some from flaws in the original design, others from what we learned in actually sailing these waters. The result has been a regular custom of major and minor repairs. Indeed, repairs are still being made all the time—by formal amendment, by express legislation, by simple usage, or through the exercise of bureaucratic discretion. And the changes are cumulative, as each revision induces further adjustments (which may or may not be self-conscious) and alters the baseline for subsequent developments. As a result, the ship's structure today is radically different, and incredibly more complex, than it was at the outset.

Implications for interpreting and applying the Constitution seem obvious. First, as time unfolds and adjustments are made, we must not keep looking to the original design for answers. Whatever answers it has to offer are, more likely than not, inappropriate: once walls have been moved and new machinery installed, to act as if these changes had not been made is a recipe for disaster. Government is not a static abstraction; it consists of real institutions that have been operating for a long time now, and we need to understand how these work and how they came to look as they do if we are to keep them running properly. Otherwise, we risk making costly blunders from ignorance or partial vision.[61]

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61. Note how it also follows from this argument that, while we may not be able to

Which brings me to my second cliché: that government in a modern industrialized democracy, especially one that is federated, is like an ecosystem. It resembles an ecosystem in its complexity and in the interdependent nature of its components. There are many working parts, each with multiple connections to others, and what happens to one part produces ripples that affect other parts. As with any complex system, even small changes may have unforeseen effects; if handled improperly, these can become very large.

It does not follow that changes cannot or should not be made: as with nature itself, the only constant in government is change.[62] What this suggests, rather, is that we introduce changes with a certain modesty. It suggests that we stop evaluating the desirability of structural changes in the abstract or by reasoning from general propositions about human nature and simple-minded slogans about the meaning of complex historical events. It suggests learning as much as we can about the nature and history of the particular institutions in question—all of their history, too, not just their beginnings and not just a few critical moments. And it suggests inspecting proposed innovations carefully to make sure they are properly formulated and adequately justified in their particular context.[63]

We cannot avoid the risk of inadvertent distortion. We can, however, minimize it by studying how government works and avoiding carelessness in proposing to reform it. Hence, the title of this section: putting the prudence back into constitutional jurisprudence. The institutional infrastructure of American government has been unfolding for more than 200 years, and the interpreter's task must take the logic and experience of that unfolding into account

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turn to the original design for answers, we cannot ignore it either. This was, after all, our starting position, and its traces are still felt everywhere. A proper understanding requires a thorough knowledge of both the original design and the way it has evolved.

62. A useful summary of the new emphasis in ecology on shifts, redefinition, and readjustment may be found in Stevens, *New Eye on Nature: The Real Constant is Eternal Turmoil*, N.Y. TIMES, July 31, 1990, at C1.

63. Originalism is not the only culprit here. Far more common but just as troubling is the practice of looking only at the Founding, and then merely to establish that it does not provide an answer to a particular problem. Having thus "cleared space," the problem is treated as completely up for grabs, with no further obligation to consider past practice. This may be defensible in some contexts, but when it comes to questions of structure—federalism, separation of powers, the authority of different branches, and so on—it is risky and shortsighted. Problems that were not foreseen in 1789 may have come up later, and even if not, developments in other contexts may have altered the conceptual or prudential space within which to work.

as fully and realistically as possible.[64]

The problem with Ackerman's theory from this perspective seems pretty obvious. Recall how the theory works: it singles out particular moments at which proposals were adopted, calls for judges to wrest from these abstract principles capable of very broad application, and directs judges to use these principles to restructure the larger constitutional framework, including a process of synthesizing them with principles derived from earlier moments. Could there be a worse, a more reckless way to approach problems of structure? Rather than take institutions on their own terms and in their own context, Ackerman interjects doctrines and principles developed in other contexts and for other purposes. The principles defining each new regime may sound appealing. But that's in the abstract. Insofar as they are artificially manufactured without regard for their particular suitability for the problems to which they are now being applied, the most likely effect will be to introduce pernicious distortions. (The image that comes to mind is one of Court as Oedipus at the beginning of Sophocles's cycle, blundering into plague-ridden Thebes to boast that he will get to the bottom of the mess and only making things worse because he doesn't understand that he is responsible for it.)[65]

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64. This prescription may sound something like the approach Ackerman labels "Burkean historicism." *See* ACKERMAN, *supra* note 3, at 16-24; *supra* note 44 and accompanying text. But Burke did not invent the idea of prudence, and he gets undeserved credit for any suggestion that includes an element of relying on experience. Matthew Hale, David Hume, and many others made the same point just as effectively long before Burke. For Burke, moreover, tradition was a device to keep the "swinish multitude" from thinking too much about how it might want to govern itself (a restriction he did not think similarly bound him or others in his class). *See* Herzog, *supra* note 5, at 73. Be that as it may, what I am proposing differs in important respects from Ackerman's description of historicism. Ackerman assumes that the historicist is conservative in the strong sense of opposing innovation and seeking to minimize its effects. But change is fine, and we should not hesitate to act where things could be made better. All I am proposing is that we recognize the risk of unforeseen consequences that innovation poses and act carefully, which is not at all the same as acting conservatively.

65. Similar criticisms could be made of other constitutional theorists. Indeed, it may seem surprising to see this criticism applied to Ackerman, who seems so much more willing than most to dig in and study American history. But Ackerman's use of history turns out to be deceptive because it is attached to a theory as unpragmatic as the most ahistorical theorists. Whether or not Ackerman's historical claims are persuasive—and we must await the publication of volumes two and three to make that determination—they neither justify nor improve the interpretive undertaking he recommends.

IV. WRENCHES IN THE WORKS: THE PROBLEM OF REGIME THEORY ILLUSTRATED

The problem described here can be demonstrated easily enough. Below I present some examples drawn from Ackerman's work, though others may come to mind once the nature of the criticism is made clear. The discussion concludes with some observations on Tushnet's efforts to define a regime based on *Lopez* and other recent developments.[66]

A. Reconstruction, Lochner, *and the New Deal*

The centerpiece of Ackerman's story is the New Deal: its controversial introduction and ultimate triumph present, for Ackerman, both the fundamental puzzle of modern constitutional law and the paradigmatic example of higher lawmaking by the people outside Article V. One might have thought the legitimacy of the New Deal settled, by acquiescence if nothing else, but Ackerman remains troubled by (what he says is) the conventional explanation for the Supreme Court's switch from opposing to embracing FDR's administrative program. According to Ackerman, the "dominant professional narrative" teaches that the Federalists and their allies on the Marshall Court established all the doctrinal components of a modern welfare state in the early nineteenth century. A century later, this work was ignored by a misguided Supreme Court hoping to stymie progressive reform and impose its own laissez-faire agenda on the nation. For a while, it looked as if these justices might even succeed. But in 1937, under considerable pressure from a frustrated President and public, the Court rediscovered the original principles and executed its dramatic switch.[67]

Ackerman dubs this story "the myth of rediscovery." "In any other field but law," he says, "it would be laughable to assert that Alexander Hamilton and John Marshall did all the really tough work in elaborating the constitution of the modern welfare state, and that Franklin Roosevelt and the New Deal Congress were basically acting out a version of active national government *already* fully established by the People in the aftermath of the American

66. By way of disclaimer, this section reports findings from historical research I am presently doing on the evolution of federalism in the United States. Although I am fairly confident about the conclusions, space constraints preclude full documentation here. In this paper, therefore, I confine myself to describing basic events to illustrate the kinds of distortions Ackerman's theory can be expected to produce.

67. ACKERMAN, *supra* note 3, at 61-62, 114.

Revolution."[68] In place of this myth, Ackerman offers a different version of events—one he prefers, among other reasons, because it explains what happened without having to disparage the Supreme Court's early twentieth century jurisprudence.

In a nutshell, Ackerman's story is that the Founding generation established a decentralized republic but that a new constitutional regime was established during Reconstruction. In synthesizing this new regime with the old one, the Court established two principles: (1) contract and property rights should receive enhanced constitutional protection (i.e. *Lochner*); and (2) other limits on federal power should be reaffirmed. Both principles operated legitimately to impede legislative reform until they were repudiated by "We the People" during the New Deal controversy of 1935-37.

Let's examine this story more closely to see how well it holds up and what it tells us about the utility and desirability of Ackerman's theory. According to Ackerman, the Founders neither accepted nor rejected a modern welfare state they could not even have conceptualized. What they established was "a decentralized republic—in which American citizens could expect only limited assistance from the national government in protecting their personal freedoms against state politics."[69] This emphasis on limited national government and the primacy of states was reaffirmed during the Jacksonian era. But then came the Civil War and "the Republican assertion of a more nationalistic Union that would no longer tolerate the enslavement of any American by a dominant state majority but insisted on equal protection of the laws."[70]

At this point, the Court faced a problem: it had to determine what this change meant and synthesize it with the remains of the earlier regime. Nor was it enough, Ackerman says, for the Court simply to take these amendments on their own terms, which were already pretty broad. The Court had to find a deeper meaning and work out its more general implications. "Given Reconstruction," Ackerman tells us,

> it was perfectly appropriate for courts to insist that the nation was now committed to the guarantee of fundamental rights in a deeper way. Surely it is hard to fault the courts

68. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 491 (1989).

69. ACKERMAN, *supra* note 3, at 100.

70. *Id.*

> of the *Lochner* era for taking this step; indeed it is hard to see how any serious effort at synthesis could have moved to a different conclusion.[71]

The problem, of course, was in choosing a direction for the new constitutional synthesis. By definition, this task fell to courts, since the mobilized public that adopted the Reconstruction amendments addressed only the problems it addressed. One possible solution was to give heightened protection to contract and property rights generally. Although such protection was not specifically contemplated when the amendments were ratified, contract and property were among the fundamental concerns of the Founding generation, and the Civil War itself was about nothing so much as a free labor market. At first, to be sure, the Court resisted moving in this direction, refusing to read the new amendments so expansively in the *Slaughter-House Cases*.[72]

> As time moved on, however, more Justices began taking such generalizing questions more seriously. To put the synthetic point in a single line: if the early republic gave *limited* protection to the fundamental right of *white men* to exercise their freedom through *property and contract*, shouldn't the Reconstruction amendments be interpreted to require *equal* protection to the fundamental rights of *all* Americans to exercise their freedom through *property and contract?*[73]

The jurisprudence of the "bad old Court," of *Lochner* and laissez faire, we thus learn, was not problematic at all. The Court was simply engaged in an Ackermanian project of generating and synthesizing norms to define the scope and meaning of a new constitutional regime. The Court was right, in fact, to strike down all that legislation.

> It is anachronistic for the modern myth of rediscovery to portray the *Lochner* Court as if it were abusing the idea of constitutional interpretation by imposing its own idiosyncratic and reactionary views on a polity yearning for the New Deal. Like the courts of the early republic, the *Lochner* Court was exercising a preservationist function,

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71. *Id.*
72. 83 U.S. (16 Wall.) 36 (1872).
73. ACKERMAN, *supra* note 3, at 101 (emphasis in original).

> trying to develop a comprehensive synthesis of the meaning of the Founding and Reconstruction out of the available legal materials.[74]

Let's pause here for a moment. Ackerman is obviously pleased about finding a way to vindicate the *Lochner* Court's foray into regulating what is permissible social legislation. He is doubly pleased because his solution enables him to say not only that *Lochner* was right, but that so too was *West Coast Hotel Co. v. Parrish*,[75] which finally laid it to rest. (*Parrish* was correctly decided because the synthesis of the post-Reconstruction Court was "decisively repudiated by the New Deal Democracy that brought the middle republic to an end."[76]) By adopting Ackerman's approach to constitutional history and interpretation, we don't need to repudiate anything the Court has done. It is the Court's critics who are wrong—narrow-minded and anachronistic.

The instinct to show how all the cases were rightly decided in context is familiar to lawyers schooled in the common law tradition. But constitutional theory involves more than apologizing for the Court, especially for its bad decisions. Why should Ackerman be pleased that his theory justifies *Lochner*, which was a terrible decision? Surely I don't need to rehash these well-worn arguments. *Lochner* was terrible not because the welfare state is definitely a good idea, but because the decision about whether it is needs to be debated in the ordinary political arena, not removed from normal politics by judges.[77]

This much, at least, is not anachronistic: *Lochner* was as substantively undesirable in 1905 as it was in 1937 or is today. There is an old myth (speaking of myths) that the United States lagged behind Western Europe in developing modern social policies, that capitalists here were left free to do their worst until the 1930s. It is a myth that Ackerman obviously believes, as evidenced by his description of the political landscape when *Lochner* was decided.

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74. *Id.*

75. 300 U.S. 379 (1937).

76. ACKERMAN, *supra* note 3, at 101.

77. My claim is not that *Lochner* was as obviously wrong when it was decided as it has subsequently come to seem. There was, in fact, a respectable case to be made for the Court's position at the time. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE, chs. 1-3 (1993). The case was far from inevitable, however, and its undesirable consequences for progressive reform were glaringly apparent from the start.

According to Ackerman, 1905 was a time of laissez-faire triumphant, a time when activist government had been decisively repudiated together with Populism and William Jennings Bryan:

> In 1905, the Justices were not confronting a New Deal Congress and a President who had just won decisive popular majorities in support of a decisive break with constitutional laissez-faire. To the contrary: the Justices had just lived through the failed Populist effort to mobilize the American people against the evils of laissez-faire capitalism—a movement that climaxed with the nomination of William Jennings Bryan as the Democratic candidate for the Presidency in 1896. Rather than leading to a Rooseveltian transformation, Bryan's nomination served only to catalyze a decisive popular counterreaction on behalf of William McKinley and the Republican Party.[78]

Seen in this light, the Court's decision to constitutionalize economic libertarianism seems almost natural and certainly not the glaring anomaly it has since come to be.

But the welfare state did not spring full grown from the forehead of Franklin Delano Roosevelt in 1933. On the contrary, as Theda Skocpol has documented, the United States pioneered the development of social welfare programs in the years after the Civil War.[79] And as she, Stephen Skowronek, and others have shown, a substantial body of economic and social legislation was enacted at both state and national levels between Reconstruction and the New Deal.[80] Remember the Progressives? In rejecting Populism, the

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78. ACKERMAN, *supra* note 3, at 101.

79. *See* THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS (1992) (examining the creation of pension systems and custodial institutions to aid Civil War veterans, which served as a form of welfare for the elderly, as well as the widespread adoption by states of social spending, labor regulations, and health education to help American mothers and children along with working women who might become mothers); THEDA SKOCPOL, SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE, chs. 1-5 (1995); Ann Shola Orloff, *The Political Origins of America's Belated Welfare State, in* THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 37-80 (Margaret Weir et al. eds., 1988) (same).

80. *See supra* note 79; STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920 (1982) (examining the creation and expansion of the civil service and federal administrative agencies, the reconstitution of the army, and the regulation of railroads); *see also* Daniel J. Elazar, *Federal-State Collaboration in the Nineteenth-Century United States, in* COOPERATION AND CONFLICT: READINGS IN AMERICAN FEDERALISM 83, 96-107 (Daniel J. Elazar et al. eds., 1969) (describing joint state-federal programs during the years 1848-1913).

public may have rejected a particular brand of government activism, but it hardly rejected the idea of using government to improve the lives of citizens. It is more than ironic that Ackerman refers here to the absence of a "Rooseveltian transformation" in 1905, meaning Franklin, while missing the dramatic changes adopted at this very time by Cousin Teddy and his Progressive allies.

The point is, *Lochner* was an unwarranted drag on democratic politics from the start. And it provoked plenty of opposition, too—though not so much as later, because the Court applied the doctrine unevenly and did not, in fact, present a serious obstacle to Progressive reformers.[81] To the extent the Court was even a small hindrance, however, why should we defend it? It would be one thing if the people really had adopted the *Lochner* principle in a constitutional amendment, or if economic due process was unavoidably implied in the amendment they did enact. But Ackerman does not, cannot, make these claims. The Court is, rather, extending what the people did to a new problem (in a way they probably would have rejected). And why? Not because economic due process is so normatively attractive, but only because Ackerman's theory requires the Court to give some sort of broader meaning to amendments adopted during constitutional moments, and this was the best the justices could do.

It's not bad either. If a generalization had to be wrested from

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81. Hence, Charles Warren could write an article in 1913 entitled *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294 (1913), in which, after canvassing both state and federal legislation and the Supreme Court's decisions, he criticized those who claimed that the Court "stands as an obstacle to 'social justice.'" According to Warren, "[t]he years 1887 to 1911 inclusive have constituted the period most productive of progressive and liberal—even radical—social and economic legislation in the United States," and "so far from being reactionary, [the Supreme Court] has been steady and consistent in upholding all State legislation of a progressive type." *Id.* at 294-95. Other contemporary commentators made the same argument. *See, e.g.*, Robert E. Cushman, *Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737 (1922); Louis M. Greeley, *The Changing Attitude of the Courts Toward Social Legislation*, 5 U. ILL. L. REV. 222 (1910); Charles M. Hough, *Due Process of Law—To-day*, 32 HARV. L. REV. 218 (1919).

After 1918, the Court became considerably more aggressive and less progressive, striking down many more statutes on due process grounds than before. See Roy A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 944 (1927) (observing that the Court invalidated more legislation in the years 1920 to 1926 than in the previous half century). But even at its height in the 1920s, *Lochner* never posed an insuperable impediment to Progressives. *See* ROBERT G. MCCLOSKY, THE AMERICAN SUPREME COURT 104-05, 151-52 (1960); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 Y.B. OF THE SUP. CT. HIST. SOC'Y 52.

the Fourteenth Amendment, I agree with Ackerman that *Lochner* was a plausible choice in context. Here, then, is a good example of Ackerman's theory working properly. And that's the problem.

Having created this problem, Ackerman isn't terribly troubled, because his theory also purports to solve it. The *Lochner* Court's synthesis of Founding and Reconstruction principles, Ackerman tells us, was "decisively repudiated" in the New Deal.[82] One might, to be sure, quibble with this characterization: the Court seemed to abandon economic due process before the great public controversy, in 1934's *Nebbia v. New York*;[83] and it is not clear that substantive due process (as opposed to federal power) was a key issue in the national election. But let's concede the point. What if the election results in 1936 had been more ambiguous? Would the Court have been wrong to abandon *Lochner* in 1937? Under Ackerman's theory, once courts create these principles, getting rid of them requires an extraordinary political consensus. But why should so much effort be needed to undo judicial mistakes that never should have been made in the first place, and why should we be stuck with these mistakes unless we can surmount a very high political barrier?

This point can be seen more clearly in Ackerman's treatment of what he calls the "second element" of the post-Reconstruction Court's constitutional synthesis, which limited "national interventions in state affairs where [the] fundamental rights [protected by *Lochner*] were not threatened."[84] Modern lawyers deride the efforts of judges in this period to impose principled limits on the reach of Congress's power under the Commerce Clause. But the original Constitution "had refused to grant plenary power to the national government, doling out only a limited set of enumerated powers—a localist bias reinforced by the constitutional politics of the Jacksonian era" and "[t]his textual strategy would have been pointless if one of the enumerated powers—over interstate commerce—was read so expansively as to embrace the whole."[85] Hence, Ackerman concludes, "it was *reasonable* [his italics] for the middle-republican Justices to deny that Reconstruction had radically displaced the Federalist-Jacksonian law on these matters":

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82. *See* ACKERMAN, *supra* note 3, at 101.

83. 291 U.S. 502, 539 (1934) (upholding a state price control statute as not violating the due process clause of the Fourteenth Amendment).

84. ACKERMAN, *supra* note 3, at 102.

85. *Id.* at 102-03.

> Although the enumerated power strategy was finally repudiated by the American people, this happened in the twentieth century, not in the eighteenth or nineteenth, and we are wrong to condemn the Republican Justices for failing to use the right crystal ball. Though we may properly quibble with the precise way the Justices drew their lines around interstate commerce, they were not wrong on the main point; before the New Deal, the People had never self-consciously reallocated plenary power over the economy from the states to the national government.[86]

It's hard to disagree with the statement that nothing about Reconstruction implied a transfer of plenary power over the economy from the states to the federal government. Of course, the same thing could be said about *Lochner*: nothing about Reconstruction implied a limitation on the power of the states to regulate their economies either, apart from ensuring that everyone had the same basic civil rights. Both moves entail a stretch—and the same kind of stretch, too. For the Fourteenth Amendment most definitely transferred *some* power from the states to the federal government. And while the transfer contemplated in 1868 may have been limited in scope, it does not require a whole lot more effort to extend this to other powers than it did to extend the scope of the rights protected from those originally contemplated to those protected under *Lochner*.

More important, it is far from clear that a change in constitutional law, as such, was either sought or required to uphold the federal legislation in question. The need to prevent interstate externalities had always been among the most straightforward arguments for exercising federal power under the Commerce Clause.[87] As originally conceived, this argument may have envisioned mostly laws that were overtly protectionist, since the economies of the states were largely independent in nature.[88] Between the Civil War

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86. *Id.* at 103.

87. As James Wilson explained to the Pennsylvania ratifying convention:

> [w]hatever object of government extends, in its operation and effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States. Whatever object of government is confined in its operation and effect, within the bounds of a particular state, should be considered as belonging to the government of that state . . . .

4 Elliot, *supra* note 7, at 424.

88. *See, e.g.*, RICHARD MIDDLETON, COLONIAL AMERICA ch. 8 (1992); EDWIN J.

and World War I, however, the states' economies became functionally integrated, and by 1930 practically everyone consumed or produced goods bought and sold in other states. As product, labor, and capital markets became nationally integrated, externalities became commonplace, and the scope of the commerce power under this traditional conception necessarily expanded.[89] At first, the Court seemed inclined to accept this change in status.[90] Only later did it pull back, fabricating distinctions like "commerce versus manufacture" and "direct versus indirect" to preserve some semblance of the original distribution of powers.

It is at least questionable, in this light, whether the post-Reconstruction Court really was "preserving" the balance struck by the Founding generation. There are, after all, and always have been, two sides to federalism: not just preserving state authority, but also enabling the federal government to act where national action is desirable. If circumstances changed in a way that enlarged the number of problems falling within the purview of Congress, an interpretation that limited federal power to deal with them was every bit as problematic as one needlessly expanding federal power.[91]

Be that as it may, Ackerman's story is that the original Constitution limited the power of the federal government to regulate the economy, that the Reconstruction Amendments did nothing to alter this decision, that the Court was therefore correct in the years after Reconstruction to squelch federal efforts to extend national power, and that "We the People" finally repudiated this judgment by changing the Constitution in the late 1930s. The Court was right to resist the New Deal in 1935-36, but also right to reverse itself in 1937.

Yet this conclusion begs the same "what if?" questions as *Lochner*. What if Roosevelt's reelection in 1936 had been closer? What if concern about the rise of fascism had diverted public attention to foreign affairs? Would lawyers then have been wrong

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PERKINS, THE ECONOMY OF COLONIAL AMERICA (2d ed. 1988); Richard B. Sheridan, *The Domestic Economy, in* COLONIAL BRITISH AMERICA: ESSAYS IN THE NEW HISTORY OF THE EARLY MODERN ERA 43-85 (Jack P. Greene & J.R. Pole eds., 1984).

89. *See* Lawrence Lessig, *Translating Federalism*, 1995 Sup. Ct. Rev. 345, 357-65.

90. *See, e.g.*, Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1, 9 (1877) (stating that powers granted under the Commerce Clause "are not confined to the instrumentalities of commerce" but "adapt themselves to the new developments of time and circumstances").

91. This problem is thoroughly explored in Lessig, *supra* note 89.

to condemn the Court for striking down federal legislation regulating national markets? Unless I completely misread Ackerman, the answer must be yes, lawyers who made this argument would have been wrong: "We the People" had limited federal power, and only "We the People" could enlarge it. It may be that the limits were hopelessly outdated by 1935, but the only way they could be altered was through constitutional politics.

The problem with this argument is that it overlooks what actually happened during the sixty years between Reconstruction and the New Deal. As suggested above, the originally limited national government hardly remained unchanged until the modern welfare state suddenly emerged fully grown in the New Deal. Recall the metaphors from part II; government institutions simply do not develop this way. And an interpretive system that acts as if they do—that gives artificially exaggerated significance to a few moments while understating or distorting what happens in between—leads to precisely the sort of troubling conclusions that Ackerman reaches.

With a more nuanced understanding of historical developments, we can see how a position that was compelling in 1795 or 1835 could become less so by 1895 and much less so by 1925. By 1935, the Court was facing a *fait accompli*: the federal government had already grown up, and it no longer made sense to insist on outdated views about limited national government. The New Deal called for a significant expansion of federal authority, to be sure, but from a constitutional perspective, the increase was quantitative rather than qualitative.

I cannot elaborate all the details of this argument here, but the highlights should suffice to establish the point. During the 1830s, America had stumbled into a political system that located power in state and local party organizations operating on a spoils system.[92] National parties existed, but were "little more than coalitions of state parties formed intermittently to capture the presidency."[93] This decentralized party structure bound the national government to

92. On the developments described in this paragraph and the next, see generally PAUL KLEPPNER ET AL., THE EVOLUTION OF AMERICAN ELECTORAL SYSTEMS (1981); PAUL KLEPPNER, THE CROSS OF CULTURE (1970); THE AMERICAN PARTY SYSTEMS: STAGES OF DEVELOPMENT (William N. Chambers & Walter D. Burnham eds., 1967); RICHARD MCCORMICK, THE SECOND AMERICAN PARTY SYSTEM (1966); ROY NICHOLS, THE INVENTION OF THE AMERICAN POLITICAL PARTIES (1967); SKOWRONEK, *supra* note 80.

93. Austin Ranney, *Parties in State Politics*, *in* POLITICS IN THE AMERICAN STATES 61, 61-99 (Herbert Jacob & Kenneth Vines eds., 1965).

each locale by making national officials thoroughly dependent on state and local political organizations. State parties organized internal government operations. They facilitated working relationships within and among the branches and between different levels of government. They controlled federal administration through patronage and spoils rotation, providing personnel to staff local federal post offices, land offices, and customhouses. National officials were, in effect, representatives of state party machines, and federal patronage appointees became the ether connecting national government to the states.

This unusual political system[94] was quite durable. Sectional conflict produced both Civil War and a major realignment in party coalitions, but it scarcely disturbed the basic organizational pattern. Indeed, the period after Reconstruction may have been the high watermark of this system of governance.

One consequence of concentrating political power at the state and local level was to limit the size and scope of the national government. After early, ambitious efforts to control things from the national level (like Hamilton's "Report on Manufactures" and Henry Clay's "American System"),[95] there was a marked diminution in federal activity. Apart from wartime measures and the smattering of civil rights legislation enacted during Reconstruction, Congress seldom flexed its muscles or tested the limits of its power.

By the late nineteenth century, a variety of changes in material circumstances gave rise to increasing demands for action at the national level. To list but a few of these, the close of the frontier, the rise of the city, the accentuation of class divisions, the end of U.S. isolationism in foreign affairs, the decrease in electoral competition after 1896, the industrial revolution, improvements in communication and transportation, the national integration of labor and capital markets, and so on, all put pressure on the national govern-

94. Unusual, at least, by comparison to contemporaneous European states. Hegel, in fact, decided that the United States was not a "Real State" at all, arguing that it lacked the national governmental forms needed to distinguish state from society. GEORG FRIEDRICH HEGEL, THE PHILOSOPHY OF HISTORY 84-87 (Dover ed. 1956). Marx, in contrast, inverting this along with the rest of Hegel, saw the United States as "the most perfect example of the modern state" because of the way it reflected the bourgeoisie's impulse to balance democracy and capitalism in a single order. *See* KARL MARX & FREDERICK ENGELS, THE GERMAN IDEOLOGY 80 (C.J. Arthur ed. 1970).

95. These and other efforts are described in FRANK BOURGIN, THE GREAT CHALLENGE: THE MYTH OF LAISSEZ-FAIRE IN THE EARLY REPUBLIC (1989).

ment to provide services that were difficult to offer under existing political arrangements.

The result was a familiar kind of transformation, in which pressures for reform were relieved first through established political structures, producing hybrid forms that destroyed those structures and led to their replacement by an independent, professional, federal bureaucracy. Stephen Skowronek details these developments in his marvelous book, *Building a New American State.*[96] Focusing in particular on the creation of a civil service, the professionalization of the army, and the adoption of railroad regulation, Skowronek documents this transformation through the McKinley, Roosevelt, Taft, and Wilson Administrations. "A state organized from the bottom up," he explains, "had to be reorganized from the top down":

> A state tied together by the procedures of spoils appointment had to be reoriented around the procedures of merit appointment. A state operated in the interests of party workers and party managers had to give way to the interests of a permanent civil service and a new intellectual cadre of independent professionals. The challenge of constructing a new governmental order informed every stage of the process of administrative modernization.
>
> The organizational, procedural, and intellectual determinants of the new American state crystallized around 1920. New overhead machinery for the supervision of an expanding arm of national administration had been put in place. Over 70 percent of the executive civil service was in the merit system. The new intellectuals had made themselves indispensable in and around the high councils of government. Viewed in these terms, Progressive state building appears a paradigm of successful modernization achieved through the gradual evolution of appropriate governmental forms and procedures.[97]

The New Deal was undoubtedly a significant event. It heralded an incursion by government into the private sector previously unheard of in scope. But against the background of these earlier developments, the New Deal appears less the introduction of an unprece-

96. SKOWRONEK, *supra* note 80.
97. *Id.* at 209-10.

dented new constitutional form than the enlargement of an existing one. "The major constructive contribution of the New Deal," Skowronek concludes, "lay in the sheer expansion of bureaucratic services and supports."[98]

Rather than recapitulate this story, the details of which needn't concern us here, let me offer several measures to support its bottom line. Approximately eight to ten administrative agencies were created during the New Deal (depending on whom one asks). This nearly doubled the previously existing number. But nearly doubling means that a significant number of agencies already existed—all created in the decades after the Interstate Commerce Commission in 1887 and many regulating important formerly private markets. These include the Federal Trade Commission (1914), the Tariff Commission (1916), the Commodities Exchange Authority (1922), the Federal Radio Commission (1927), the Water Power Commission (created in 1920 and replaced in 1930 by the Federal Power Commission), and the Food and Drug Administration (1931).[99] Regulation of markets through federal administrative agencies was hardly new in 1933.

Number of agencies, however, may not be the best measure, since most administration is performed by employees in the various cabinet departments or by intermediate bodies that do not qualify as directly regulating entities. Hence, a better measure may be the number of federal employees (excluding military personnel). Once again, the numbers show a meaningful rise during the New Deal years, but nothing all that startling when measured against the previous fifty years of bureaucratic growth. In 1881, for example, the federal government employed 100,020 people.[100] By 1891, that number had grown to 157,442. The next three decades saw an enormous expansion: to 239,476 in 1901, 388,708 in 1910, and 655,265 in 1920. On the eve of the New Deal, in 1930, this number had dropped slightly, to 601,319. During the decade that followed, the federal bureaucracy increased by another 60%—to 780,582 in 1935, 895,993 in 1937, and 953,891 in 1939—nothing to snort at, certainly, but statistically less dramatic (even controlling for population) than the growth in previous decades.[101]

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98. *Id.* at 289.

99. Congressional Quarterly Federal Regulatory Directory 6-8 (7th ed. 1994); Center for the Study of American Business, Directory of Federal Regulatory Agencies (3d ed. 1982).

100. The figures in this paragraph are drawn from 1 BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 1102-03 (1989).

101. Evidence of another sort in support of this thesis may be found in the plaintive

And where was the Supreme Court through all this? Present, of course, but playing a part that scarcely resembles the unswerving opposition of legal legend. The pattern of decisions suggests, rather, uncertainty—about both what was happening and how to respond. The Court had clear misgivings about Progressive legislation, but also qualms about acting too aggressively to derail governmental experimentation. Prior to 1935, at least, and despite unyielding antagonism from some Justices, the overall picture is one of indecisive, unsteady, skeptical, grudging acceptance.

We have already seen this pattern in our discussion of *Lochner* and substantive due process:[102] there, the Justices certainly voiced reservations in striking down a substantial amount of legislation. But the Court sustained more regulations than it invalidated by many orders of magnitude, and it declined to review even more.[103] In 1934, on the eve of the New Deal crisis, the Court went so far as apparently to repudiate economic due process altogether, in *Nebbia v. New York*.[104]

The same pattern emerges if we examine other doctrines. Take, for example, the problem of regulating railroads, perhaps the single most important American industry of the late nineteenth and early twentieth centuries. The Court's initial reaction to governmental regulation, which began at the state level, was to affirm the broad authority of states to regulate under their police power.[105] That decision, in turn, played a prominent role in prompting Congress to enter the field in 1887 with the Interstate Commerce Act. But now the Court reversed directions—accepting the constitutionality of the Act while rejecting virtually everything the Interstate Commerce Commission did and practically reducing the agency to gathering

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cries of opponents of administrative government, who began complaining noisily long before the New Deal. The most determined, and perhaps most prestigious, member of the opposition may have been Roscoe Pound. *See, e.g.*, Roscoe Pound, *Do We Need a Philosophy of Law*, 5 COLUM. L. REV. 339 (1905); Roscoe Pound, *Executive Justice*, 46 AMER. L. REG. 144 (1907); Roscoe Pound, *The Administrative Application of Legal Standards*, 44 A.B.A. REP. 445 (1919).

102. *See supra* notes 79-81 and accompanying text.

103. For discussions of the of the Court's decisions, see WILLIAM SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY (1969), BENJAMIN WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 153-68 (1942), THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 1643-1709 (Lib. of Cong. rev. ed. 1973), Urofskey, *supra* note 81.

104. 291 U.S. 502, 532 (1934).

105. *See, e.g.*, Munn v. Illinois, 94 U.S. 113 (1877) (upholding state regulation of grain warehouses under the Fourteenth Amendment); Chicago, B. & Q.R.R. v. Iowa, 94 U.S. 155 (1877) (same for railways).

statistics.[106] This, in turn, provoked a political backlash from the Roosevelt Administration, leading to passage of the Hepburn Act in 1906, which overruled many of the Court's interpretations and increased the powers of the Commission.[107] The Court then backed down, restricting the scope of judicial review of agency orders and opening the way for more aggressive federal regulation.[108]

Similar stories may be told in other areas, as the Supreme Court made room for activist government in a variety of ways prior to 1937. During the same year that *Lochner* was decided, for example, the Court in *Manigault v. Springs*[109] interpreted the Contract Clause narrowly and permitted a private contract to be avoided through an exercise of the state's police power. *Manigault* merely presaged the Court's much more dramatic interpretation in *Home Building & Loan Association v. Blaisdell*,[110] which effectively removed this clause as a limitation on state regulation. Similarly, two of the administrative state's main support beams—*Crowell v. Benson*[111] and *Humphrey's Executor*[112]—were decided prior to the political crisis of 1936-37, and the Court left standing a very modern looking federal grant-in-aid program as early as 1923.[113] Even the commerce cases reflect nothing so

106. *See, e.g.*, ICC v. Alabama Midland Ry., 168 U.S. 144 (1897); Maximum Freight Rate Case, 167 U.S. 479 (1897); ICC v. Alabama, 164 U.S. 144 (1897); Import Rate Case, 162 U.S. 197 (1896). These developments are discussed in WILLIAM Z. RIPLEY, RAILROADS: RATES AND REGULATION (1912) and A.M. Tollefson, *Judicial Review of the Decisions of the Interstate Commerce Commission*, 11 MINN. L. REV. 389 (1927).

107. Hepburn Act of 1906, 34 Stat. 584; *see also* JOHN MORTON BLUM, THE REPUBLICAN ROOSEVELT (1954) (discussing Theodore Roosevelt's desire to regulate transportation inequities, resulting in the Hepburn Bill); ARI HOOGENBOOM & OLIVE HOOGENBOOM, A HISTORY OF THE ICC: FROM PANACEA TO PALLIATIVE 46-52 (1976); GABRIEL KOLKO, RAILROADS AND REGULATION, 1877-1916, at 155-76 (1965); Tollefson, *supra* note 106, at 504 (discussing the effect of the Hepburn Act on judicial review of ICC decisions).

108. ICC v. Illinois C.R.R., 215 U.S. 452 (1910) (upholding ICC authority to regulate railway rates and practices); SKOWRONEK, *supra* note 80, at 259-67; Tollefson, *supra* note 106. The short-lived and ill-fated Commerce Court was a further product of the Court's misconceived effort to stymie railroad regulation.

109. 199 U.S. 473 (1905).

110. 290 U.S. 398 (1934).

111. 285 U.S. 22 (1932).

112. Humphrey's Executor v. United States, 295 U.S. 602 (1935).

113. Congress relied on its spending power under the General Welfare Clause to enact the Sheppard-Towner Maternity Act of 1921, 42 Stat. 224. This Act provided states with federal funds to promote maternal health, and it was challenged by Massachusetts on the ground that Congress had invaded powers reserved to the states. The Court refused to entertain the argument, holding in Massachusetts v. Mellon, 262 U.S. 447 (1923), that

much as the Court's uncertainty about how to handle the emerging regulatory state, as every *Hammer v. Dagenhart*[114] has its corresponding *Lottery Cases*,[115] and for every *E.C. Knight*[116] there is a *Shreveport Rate Case*.[117]

By no means am I suggesting that the Supreme Court was in the forefront of liberal reform in this period. But neither was it the relentless and implacable foe assumed in the law's mythology. The Court acted, rather, as a braking device—uncertain, skeptical, vacillating. Here, as in *Lochner*, however, the Court left standing more than it struck down, and while the Justices may have halted a few initiatives, they did relatively little to prevent the emergence of a modern state in the years prior to the New Deal.

So what happened in 1935 and 1936? The Court, in a word, panicked. After all, the New Deal may not have been an entirely new form of government regulation, but it was still pretty dramatic in terms of sheer volume and breadth (particularly when viewed against the background of developments in Europe), and it reflected a very different political and economic sensibility. The President and Congress thus asked an apprehensive Court to put all its misgivings aside and swallow a very large mouthful of innovative social legislation all at once. Making matters worse, the first New Deal statutes to reach the Court were poorly drafted and even more

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Massachusetts lacked standing to sue. Justice Sutherland's reasoning in reaching this conclusion turns on the state's consent, the same ground the Court would later use to uphold New Deal spending legislation:

> In the last analysis, the complaint of the plaintiff state is brought to the naked contention that Congress has usurped the reserved powers of the several states by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question . . . is political, and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power.

Id. at 483.

114. 247 U.S. 251, 276 (1918) (striking down a statute prohibiting interstate transportation of goods manufactured by child labor).

115. 188 U.S. 321, 363 (1903) (upholding a federal statute regulating interstate transportation of lottery tickets under the Commerce Clause).

116. United States v. E.C. Knight Co., 156 U.S. 1, 16-17 (1895) (refusing to apply antitrust laws to monopolies at the end points of the stream of commerce).

117. Houston E. & W. Tex. Ry. v. United States, 234 U.S. 342, 360 (1914) (permitting the Interstate Commerce Commission to regulate wholly intrastate transportation on the ground that it affects interstate commerce). For more detailed discussions of the many cases here, see DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 22-30, 93-101, 173-181 (1990) and Barry Cushman, A *Stream of Legal Consciousness: The Current of Commerce Doctrine from* Swift *to* Jones & Laughlin, 61 FORDHAM L. REV. 105, 108-27 (1992).

poorly defended by government lawyers who were themselves not convinced that the legislation was constitutional.[118] The Court reacted, as one might have expected, by pulling back—which in this case meant selecting from the inconsistent strands in existing precedent those that limited federal power.

At the risk of sounding flip, perhaps the best way to understand what happened is to say that the Court experienced what lovers call "commitment problems." As in any new relationship where one party is uncertain, the Court had been letting things develop slowly, feeling them out—not committing wholeheartedly, but also not saying no. But when the President and Congress suddenly presented the Court with the whole package and forced it to choose, the Justices[119] found that they were not yet ready to say they loved the welfare state, much less to marry it. Several years later, with more time to reflect, further pressure, and a new wave of statutes that were better drafted and argued,[120] the Court relented.

The point is, the judicial reaction of 1935-36 was exceptional and inconsistent with the gradual trend of the previous half century toward judicial acquiescence in the emerging American regulatory state. Note, by the way, how this understanding helps to make

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118. *See* Cushman, *supra* note 117, at 131-32.

119. References in this paragraph to "the Justices" or "the Court" could, perhaps, be replaced by "Justice Roberts."

120. See Cushman, *supra* note 117, at 139-46, for a discussion of the greater care that went into drafting and arguing the statutes of the Second New Deal. In a forthcoming book entitled "The Structure of a Constitutional Revolution," Cushman builds on his earlier work and takes strong exception to descriptions of the Supreme Court's decisions during the New Deal era as self-consciously political. Cushman argues that the constitutional developments were driven by doctrinal considerations and can be explained as a matter of conventional legal evolution. Responding to my particular analysis, for example, he said (in conversation) that the Court was not having "commitment problems" but was, rather, "finicky about how suitors pressed their suits"; in other words, the Justices were responsive to certain kinds of arguments, and choices among these explain the results.

Cushman is surely right that we have failed to study the doctrinal arguments carefully enough and been too quick to attribute political motivations to the Court. It is, nonetheless, implausible to explain these developments entirely as a product of internal legal debate. Competing arguments and conflicting lines of authority were always available, and (as the progressive lawyers pointed out when the legal realists were still in diapers) choices among these can only be made by looking outside the legal briefs. The Justices still lived in the world, after all, and their sense of which arguments were or were not attractive at any given time was obviously shaped by it. Cushman's argument is still important inasmuch as it helps us to understand how movement occurred, why it took the direction it did, and why it may not have presented the severe problems of illegitimacy assumed by sloppier critics.

sense of details that stories like Ackerman's either overlook or fail satisfactorily to explain. It makes sense of inconsistencies in the decisions prior to 1937, which accounts like Ackerman's tend to suppress or ignore. More important, it does not overlook the significant strides toward activist government that were taken in the late nineteenth and early twentieth centuries. Ackerman may be right to describe as "laughable" the claim that Alexander Hamilton and John Marshall did all the hard work to establish the welfare state. The same thing cannot be said about the work of Theodore Roosevelt and Woodrow Wilson (among others). Equally laughable is pretending that all the hard work was done by Franklin Roosevelt and the New Deal Congress.

This explanation also makes better sense of the Court's decisions in the years 1935-37. What else but an overwrought backlash can explain *Morehead v. New York ex rel. Tipaldo*,[121] which ignored *Nebbia's* plain intent to retire economic due process? What better than panicky overreaction explains *Railroad Retirement Board v. Alton Railroad*,[122] in which the Court went *farther* than it ever had in holding that Congress could not establish a retirement system even for railroad workers indisputably engaged in interstate commerce? And consider the opinion in *NLRB v. Jones & Laughlin Steel Corp.*,[123] which upheld the Wagner Act and signalled the Court's final acceptance of government's new direction. As Barry Cushman has already observed (in an excellent article too little noted), the opinion is a classic example of common law reasoning, in which the Court draws together the numerous precedents favoring federal power that had accrued over the previous three decades and reformulates them into a new rule.[124] Rather than declare the creation of a new constitutional principle, the Court looked back at its own prior decisions and found that this principle had already taken hold. But for the reactionary decisions of the previous two years, this would have been unexceptional.[125] As it was, the Justices merely resumed an odyssey they had begun many years earlier.

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121. 298 U.S. 587 (1936).

122. 295 U.S. 330 (1935).

123. 301 U.S. 1 (1937).

124. *See id.* at 34-41; Cushman, *supra* note 117, at 146-49. *See also* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-27 (1949) (discussing the line of precedents leading to the Court's formulation of a rule).

125. Cushman, *supra* note 117, at 156.

Ackerman is right to jeer at the "myth of rediscovery," but he is wrong to replace it with his own version of Creationism: No more than the world was the welfare state created in seven days, or even 100. It evolved over at least a half century of political and judicial turmoil. The New Deal marked a dramatic acceleration, but it succeeded only because the institutional foundations had already been laid.

From the perspective of law and constitutional interpretation, then, we are not faced with a choice between saying that the welfare state was established in 1789 and saying that it was created by constitutional amendment in 1937. Neither statement is true. Something that would have been unconstitutional (as well as unthinkable) in the early nineteenth century became more plausible (and more thinkable) by the early twentieth century and compelling by the time of the New Deal. The Constitution was "amended," for those who insist on such positivistic language, through a slow process of political and institutional evolution—exactly the kind of development that Ackerman's theory obscures or distorts. By 1936, the Court was on weak ground in taking the position it did, and we should not have needed a constitutional "moment" to reverse it. Amendment obviously remains one way to get past an obstreperous Court, but a theory that leaves no other option because it ignores the full progression and maturation of governmental institutions leaves much to be desired.

B. Living in a Constitutional Moment? Tushnet on Lopez

I have argued that the hazards peculiarly associated with Ackerman's theory of constitutional interpretation are imprudence and hyperopia—imprudence because it tells judges to employ abstract principles without sufficient regard for whether these are needed or suited to make sense of the particular constitutional provision to which they are applied, hyperopia because it gives exaggerated weight to particular events at a distance while overlooking or obscuring events closer up. As such, the theory poses a high risk of error; we get decisions like *Lochner*, or we miss the gradual but legitimate emergence of new forms through incremental evolution. Tushnet's application of Ackerman's theory to *Lopez* provides another illustration of these problems.

It is, of course, too soon to say we are now experiencing a constitutional moment in Ackerman's terms—a point Tushnet ac-

knowledges and explains in some detail.[126] The 1994 elections were provocative, but cannot be treated as the sort of "triggering" election required by Ackerman; the Contract With America might satisfy Ackerman's requirement of a "proposal," except it is not clear that people were yet paying sufficient attention. And the wavering course of political events since the '94 elections are too ambiguous to be called a political transformation. Things could go that way, but we'll have to wait and see.

Let us nonetheless suppose, Tushnet muses, that this were the sort of political revolution that qualifies as a constitutional moment for Ackerman. What would it mean? We would, of course, have to wait a number of years for judges to acquire sufficient perspective to provide "the appropriate comprehensive synthesis."[127] But Tushnet invites us to join him in a thought experiment by considering what such a synthesis might look like. At the very least, he says, this may help us gain insight into how Ackerman's theory works.[128]

On the surface, today's political activity looks like a movement to devolve power from the federal government back to the states. But this is too obvious, too narrowly focused on the details of *Lopez* and the Contract With America. We must consider these events against a broader political background that includes other notable developments of the day—developments like the accelerated pace of deregulation, the reduction of a social safety net through budget restrictions, increasing privatization in international trade, and so forth. When we do this, Tushnet urges, we begin to discern a deeper principle:

> [T]he present constitutional moment, if it is one, may involve the evaporation rather than the devolution of public power. That is, power may not be flowing from Congress to state and local governments, but rather going into thin air—or, more precisely, to private institutions, both in the United States and elsewhere.[129]

Tushnet never spells out the implications of this interpretation, one frequently offered by critics of limiting national power. But if

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126. *See* Tushnet, *supra* note 4, at 848-50 (arguing that "the present situation cannot be a constitutional moment").

127. *Id.* at 863; *see also* ACKERMAN, *supra* note 3, at 96-99.

128. Tushnet, *supra* note 4, at 846.

129. *Id.* at 869.

the next regime were understood to reflect a principle of privatism, the Court would presumably redefine government power in a variety of areas to limit state action in favor of private power. We can't say exactly what this would look like, or what Tushnet thinks it would look like, but the general idea seems clear enough.

This is, I think, a fair application of Ackerman's theory. It looks beyond today's particulars to the broader background in a way that is certainly plausible. Yet one needn't be an unregenerate New Dealer to recognize that government serves useful purposes and that we don't want needlessly to constrict its power to act. The people may choose to do so, of course, in which case their decision should be respected. But what does that have to do with waiting a generation, looking back on today's events, finding a general principle of dissolution, and using it to make government power in other areas "evaporate"?

Perhaps Tushnet has simply generated a bad principle and future interpreters will do better. But the risks seem high, and the only reason Ackerman offers for taking them is that we need to respect the voice of the people. Of course we do. But respecting what the "People" did today does not require instructing the judges of tomorrow to create broad principles that limit the people of tomorrow in ways that "We" today never envisioned or desired.

V. CONCLUSION

Ackerman focuses on generalities and abstractions at the expense of the particular and the concrete. He constructs a method of interpretation around one of the Constitution's most general ideals—that of preserving civic virtue by encouraging citizens to take their responsibilities as constitutional lawmakers seriously—without paying sufficient attention to its more particular goals. He pursues this ideal by instructing judges to articulate and apply broad abstractions without sufficient regard for the particular institutions to which they are applied. The Founders were not afraid of abstractions, Ackerman protests, so why should we be different?[130] We shouldn't. But the Founders did not wield their abstractions recklessly, and they never invoked them just for the sake of invoking abstractions.

Think of it this way: the hammer can be understood as an expression of man's capacity to create and to control his environ-

130. ACKERMAN, *supra* note 3, at 20.

ment. But we use it to hammer nails, and when it comes time to do some hammering, we would do best to focus on that. For if we do our hammering by thinking about how the hammer represents our ability to improve the world we inhabit, the only thing we're likely to get is a sore thumb.