Case Western Reserve Law Review

Volume 47 | Issue 3

1997

Arendt, Tushnet, and *Lopez*: The Philosophical Challenge behind Ackerman's Theory of Constitutional Moments

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ARENDT, TUSHNET, AND *LOPEZ*: THE PHILOSOPHICAL CHALLENGE BEHIND ACKERMAN'S THEORY OF CONSTITUTIONAL MOMENTS

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In his provocative article,[1] Mark Tushnet asks whether *United States v. Lopez*[2] signals a major constitutional shift in federalism—specifically in the allocation of political and regulatory power between State and Nation.[3] Tushnet uses the *Lopez* problem to test the adequacy of the political theory that Bruce Ackerman terms "dualist democracy,"[4] delineated in Ackerman's work in progress. Like many other reviewers,[5] Tushnet finds Ackerman's theory

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† Associate Professor of Law, Cleveland State University, John Marshall School of Law. This article is based on my address of the same name, presented at the Symposium, *The New Federalism After* United States v. Lopez, Case Western Reserve School of Law (Nov. 10-11, 1995). My thanks go first to a number of the finest thinkers on federalism issues today: Mel Durchslag, Jon Entin, Barry Friedman, Larry Kramer, Bill Marshall, Debby Merritt, and Bob Nagel, all of whom were involved in this superb Symposium; to Mark Tushnet for his challenge to Bruce Ackerman; and to George Taylor and James Wilson for helpful critical commentary.

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

2. 115 S. Ct. 1624 (1995) (holding that the Gun-Free School Zones Act exceeded Congress' commerce clause authority).

3. *See* Tushnet, supra note 1, at 846.

4. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS *passim* (1991).

5. *See, e.g.*, 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); Robert Justin Lipkin, *Can American Constitutional Law Be Postmodern?*, 42 BUFF. L. REV. 317 (1994); Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENTARY 115 (1994); William W. Fisher III, *The Defects of Dualism*, 59 U. CHI. L. REV. 955 (1992); Michael Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1992); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918 (1992).

wanting in crucial respects.

My response takes two tracks. First, I will argue that the import of Ackerman's theory is better understood and evaluated when it is considered more as a work of political philosophy and political theory rather than as a work of law or jurisprudence. Ackerman should be understood as participating in two distinct conversations: The first, at the core of political philosophy, is concerned with the possibility for human freedom. The second is central to political theory, namely, what kind of governmental structures and organization will permit the realization of particular philosophical commitments. I think Ackerman is making startlingly original and valuable contributions in both realms. In the first part of this commentary, I will situate Ackerman's theory most pointedly as a direct response to Hannah Arendt.[6]

After locating Ackerman's effort within the centuries old political philosophical debate over such questions as how best to structure a state that respects and expands human freedom, I will explicitly address the question Tushnet has posed,[7] and suggest what *Lopez* may signify within Ackerman's own categories. Exploring two of the multitude of possibilities, I suggest initially that a straight application of his categories may reveal that we are still in what Ackerman calls the "signaling" stage,[8] which may blossom into a transformation of our fundamental law, or might simply wither into another "failed constitutional moment."[9] However, in a different analysis, when the political implications of globalism, as represented by NAFTA[10] and GATT,[11] begin to have an effect on the political objectives of ordinary people, and on the regulatory power of our national, state, and local governments, our nation may undergo a transformational contest after which *Lopez* will not

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6. The Arendt work that has been clearly the most influential on Ackerman's thinking is HANNAH ARENDT, ON REVOLUTION (1963). My focus on Arendt does not imply that Ackerman is responding only to Arendt, and not to, for instance, Aristotle, Montesquieu, James Madison, or Alexander Bickel, who were also concerned with some of the same perennial philosophical and practical questions about how to structure the state.

7. Tushnet, *supra* note 1, at 852.

8. *See* ACKERMAN, *supra* note 4, at 272-85.

9. *See, e.g., id.* at 50-56 (describing the "Reagan Revolution" as a failed constitutional moment).

10. North American Free Trade Agreement, Dec. 8, 11, 14, 17, 1992, 107 Stat. 2057, 32 I.L.M. 289, 605.

11. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, T.I.A.S. 1700, 55 U.N.T.S. 194.

even register as a blip on the constitutional radar screen. In sum, whatever criticisms can be leveled at the technical aspects of Ackerman's theory, I think we will find that he provides us with a vocabulary and a set of conceptual categories that allow us to delve into a variety of interpretive possibilities, indicating again the richness of the theory for political, social, and legal interpretation.

I. ARENDT AND ACKERMAN

Hannah Arendt's work,[12] as Ackerman notes, has been far less influential among professional philosophers, political theorists, and legal scholars than it deserves to be.[13] An array of reasons may explain the neglect. Her writing is dense and grammatically complex, and it is pervaded with phrases in the original Greek, Latin, and French. She also did not locate herself within a preexisting paradigm of political theory (e.g., pluralism) or even within one discipline (e.g., philosophy), but blazed her own path that

12. Hannah Arendt published her work in both the popular and academic presses. A brief biographical sketch may illuminate the reasons for her early commitment to the public and not merely to the academic world. After earning her Ph.D. in philosophy at the University of Heidelberg, where she worked under Karl Jasper's supervision, Arendt was imprisoned in a German internment camp. Arendt escaped during a brief conflict between the guards and then went to Paris until she immigrated to the United States in 1941. Her first American book, THE ORIGINS OF TOTALITARIANISM (rev. ed. 1966) (first published 1951), was an interdisciplinary work which drew primarily from three distinct fields of inquiry: philosophy, history, and political science. Her major books include: THE HUMAN CONDITION (1958); EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (rev. & enlarged 1964); ON REVOLUTION (1963); BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT (reissue with additional text 1968) (including essays on the conflict between truth and politics on freedom); CRISES OF THE REPUBLIC (1972) (containing the essays *Lying in Politics, Civil Disobedience, On Violence,* and *Thoughts on Politics and Revolution*).

In her last work, Arendt returned to her existentialist and Kantian roots by pursuing a more purely philosophical inquiry than in her other books. I THE LIFE OF THE MIND: THINKING (1978) and II THE LIFE OF THE MIND: WILLING (1978), were intended to be the first two volumes of a three-volume work that also explored the faculty of judgment, but she had barely written an opening epigraph for the Judgment inquiry when she died. Thus, the two volumes THINKING and WILLING were published posthumously, and we lack her sustained views as to the faculty she considered the most political. Her lectures on judgment have been edited and published as HANNAH ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY (Ronald Beiner, ed., 1982).

13. Two decades after her death, Arendt's work is beginning to receive more sustained and respectful attention. *See, e.g.*, MARGARET CANOVAN, HANNAH ARENDT: A REINTERPRETATION OF HER POLITICAL THOUGHT (1992); HANNAH ARENDT: TWENTY YEARS LATER (Larry May & Jerome Kohn, eds., 1996); DANA R. VILLA, ARENDT AND HEIDEGGER (1996).

combined philosophy, political theory, ancient and modern western history, concern for contemporary politics, and common sense.

In addition to these intellectual obstacles to her work finding a larger audience, Arendt has also suffered under a variety of attacks. These range from the accusations that she was blaming the victim in her *Eichmann in Jerusalem: A Report on the Banality of Evil*[14] (though she herself had served time in a German internment camp) to the *ad hominem* fallacy currently in vogue, which suggests that her philosophical work should be deemed untrustworthy or unworthy of study because of her romantic relationship with the philosopher Martin Heidegger,[15] and her post-war friendship with him after he renounced Nazism.[16] Like Ackerman, I find Arendt's work enormously challenging and refuse to sidestep serious confrontation with it because of differences regarding her friendships or other matters.

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14. In EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL, supra note 12, Arendt evaluated the activities of Adolph Eichmann, a mid-level bureaucrat in Hitler's Third Reich who handled certain logistical responsibilities for the transportation of Jews to concentration camps. Arendt had been present at Eichmann's trial in Jerusalem, and published her articles in *The New Yorker*. She revised these articles and published them as a book, the title of which was greatly misunderstood; many presumed that she was suggesting that the activities of the Holocaust were banal. Rather, she was astounded to discover that Eichmann apparently did not *think* about what he was doing, *see id.* at 287-88, which led her to explore the relationship between everyday thoughtlessness and "monstrous" evil. *See id.* at 294. Arendt suggests that perhaps the worst evils are not committed by the ideologically committed, such as Hitler, but rather by the vast number of thoughtless functionaries without whom the ideologues could not commit their crimes. The book provoked a storm of criticism from Arendt's fellow Jewish immigrants, and caused the severing of numerous close friendships. She responded to the criticism in a postscript included as a portion of the revised edition, which was published in 1964. *Id.* at 292-98.

15. Heidegger was Arendt's first University-level mentor. He later became a prominent Nazi and persecutor of Jewish intellectuals. *See* ELISABETH YOUNG-BRUEHL, HANNAH ARENDT: FOR LOVE OF THE WORLD 48-61, 69 (1982).

16. In ELZBIETA ETTINGER, HANNAH ARENDT/MARTIN HEIDEGGER (1995), the author portrays Arendt as less worthy of serious study because of her purportedly uncritical relationship with Heidegger. Ettinger faults Arendt for being too willing to forgive Heidegger after the fall of the Third Reich, and suggests that Arendt accorded Heidegger a respect to which he was undeserving because of his Nazi activities. In reviewing Ettinger's book for the *New York Times Book Review*, Judith Shulevitz is equally harsh in her judgments about Arendt. *See* Judith Shulevitz, *Arendt and Heidegger: An Affair to Forget?*, N.Y. TIMES BOOK REV. Oct. 1, 1995, at 39. Yet, had Ettinger and her reviewer read THE HUMAN CONDITION, *supra* note 12, carefully, it would be apparent that Arendt had practiced what she had articulated as being an essential political ability to cultivate: forgiveness. *See id.* at 236-37 (discussing political action as inherently unpredictable and irreversible, and arguing in favor of forgiveness as a political virtue that should be cultivated and practiced as an antidote to its inescapable aspects).

What exactly are the Arendtian challenges that engage Ackerman in *We the People* and make it an inspired work of political theory? They are found in her study entitled *On Revolution.*[17] The first relates to her claim that, unlike the Russian or French Revolutions, the American Revolution "has remained sterile in terms of world politics."[18] She attributes its failure to influence others elsewhere to an intellectual omission: namely, the lack of post-revolutionary thought that condensed and distilled the revolutionary tradition within a conceptual framework that could be further elaborated on and exercised practically.[19] As a predicate to such a claim, she obviously does not find the commonly used concepts by which revolution, human freedom, and politics are explained adequate either to explain the American revolution or to identify its primary achievements and failures. Sadly, she observes, our intellectuals have permitted the French and Russian revolutions to dictate the terms under which the phenomenon will be understood,[20] terms which have also encouraged our nation and its foreign policy generally to greet revolutions elsewhere with suspicion and dismay.[21]

Very briefly, Arendt argues that *revolution* seeks to begin a new political order of a special type, a *republic*, founded on human freedom and citizen power.[22] *Politics* is the activity by which citizens manifest their political freedom by participating in discussion and action on issues that concern them.[23] The end or *telos* of any revolution is the founding of an enduring constitution that protects and provides the political space, and that integrates the everyday citizen into the affairs of the republic.[24]

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17. ARENDT, *supra* note 6.

18. *Id.* at 222. While Arendt would agree that ideas from the American Revolution influenced the French Revolution, her concern is not with the nation-building that occurred during the last portion of the eighteenth century. Rather, she focuses on ascertaining why the nations born between the second World War and the time of her writing in 1965 were more influenced by the Russian and French Revolutions than by the American.

19. *See id.* at 222, 234-35.

20. *See id.* at 49, 222; *see also id.* at 217-59 (discussing the French Revolution); *id.* at 259-70 (discussing the Russian Revolution).

21. *See* ARENDT, *supra* note 6, at 217-21.

22. *See id.* at 28, 127, 139, 140 (noting that "the end of rebellion is liberation, while the end of revolution is the foundation of freedom").

23. *See id.* at 25, 115, 221.

24. *See id.* at 121-22, 235.

Arendt contends that the intellectual failure to understand the American revolution was preceded by the Founders' failure to provide within the Constitution an institution within which the revolutionary spirit, and the opportunity for widespread citizen involvement in public affairs, could be safeguarded.[25] This claim constitutes the second major challenge for Ackerman.[26] Under Arendt's analysis, the Founders—and here she encompasses those involved not only in Philadelphia but also those active in the formation of the Bill of Rights—had provided an institution for every other human trait that was requisite to the functioning of the government; they had fashioned structures that inculcated judgment, opinion, reason, and political power; they protected individual liberties and other citizen rights; they had designed a complex system of structural checks and balances to circumscribe the threat of tyranny; they skillfully incorporated elements of monarchic, aristocratic, and democratic governments.[27] Yet, they had bypassed, presumably deliberately, the creation of any institution that would reserve space "for the exercise of precisely those qualities which had been instrumental"[28] in building the Republic—that is, widespread ordinary citizen political action, such as might have been available had the townships been dignified, Arendt suggests, with a constitutional status and set of delegated powers.[29]

In *We the People* and more recent work,[30] Ackerman can be understood to respond simultaneously to both challenges. He articulates a theory of politics and of constitutional structure which, interwoven, seeks to demonstrate that, contrary to Arendt, the Founders did not arrogate strictly to themselves the revolutionary spirit, nor did they fail to institutionalize The People's political possibilities. Rather, by understanding politics on a two-track or

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25. *See* ARENDT, *supra* note 6, at 234, 242.

26. *See* ACKERMAN, *supra* note 4, at 206.

27. *See* ARENDT, *supra* note 6, at 231, 234.

28. *Id.* at 234.

29. *See id* at 238-42, 242 ("Paradoxical[ly] . . . it was the Constitution itself, this greatest achievement of the American people, which eventually cheated them of their proudest possession.").

30. For one foray into explaining American constitutional history of the twentieth history through his dualist political lens, see Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 804 (1995) (tracing the demise of compliance with the Treaty Clause's requirements when the United States enters international agreements, and positing this history further evidences the extra-textual method of constitutional amendment ACKERMAN advanced in WE THE PEOPLE, *supra* note 4).

dualist theory,[31] we can more accurately perceive how The People's political freedom has been preserved and how a republic is possible even within a large, heterogeneous country—a dilemma that vexed Montesquieu,[32] Madison,[33] Jefferson,[34] and even Aristotle.[35] To admire Ackerman's theoretical achievements is not to say that the technical features of the theory are sufficient, especially the rules of recognition for a constitutional moment. In fact, others have clarified that they require further refinement.[36] But it is to say that via Ackerman's work, and its building upon and response to Arendt's, we can finally explain how and why the Constitution is not primarily a reactionary document.[37] Acker-

31. *See* ACKERMAN, *supra* note 4, *passim*. The theory of dualist democracy contends that The People's lawmaking occurs in two separate modes. In periods of "normal politics," average citizens are content to be governed by their representatives, and generally are characterized by apathy and self-interest. *Id.* at 265. In the rare times of "constitutional politics," The People are roused from the slumber of their normal private lives to partake in widespread public debate and resolution about some central public issue; their activity is characterized by concern for the permanent interests of the community or the rights of citizens. *Id.* at 240, 272-74. The latter periods may mature into "constitutional moments," where the Constitution is effectively amended but not according to any of the methods specified by Article V. The theory of extra-Article V constitutional amendments has drawn particular censure, *see supra* note 5, despite Ackerman's claim that he is accurately portraying the constitutional impact of the New Deal.

32. *See* BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 126 (Nugent trans., 1949) (analyzing types of governments and proposing specific constitutional structures).

33. Madison's first essay, now identified as THE FEDERALIST NO. 10, rejected the theory propounded by Aristotle and Montesquieu that republics could persist in only small, relatively homogeneous geographical areas. Madison instead articulated a theory of the extended republic, whose diversity of interests helped to promote the republic's imperviousness to any one faction obtaining the control requisite to subordinate The People. *See* THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN JEFFERSON AND MADISON 1776-1826, at 448-50 (James Morton Smith, ed., 1995) (revealing the thoughts of Madison and Jefferson regarding politics, government, and other concerns); *see also* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 87 (1993) (seeking to recover the character and substance of the original structure of the nation and making sense of the American Revolution).

34. Although Madison sent Jefferson a copy of the first of his essays penned as "Publius," THE FEDERALIST NO. 10, Jefferson did not respond to Madison's theory of the extended Republic. In 1787, Jefferson was still committed to the ancient precept that republics could exist effectively only in a small territory. *See* THE REPUBLIC OF LETTERS, *supra* note 33, at 449-50, 450 n.54.

35. *See* 4 ARISTOTLE, POLITICS (Ernest Barker trans., 1958) (discussing what types of governmental structure are best suited for the varying size of states).

36. *See* McConnell, *supra* note 5, *passim*.

37. "Reactionary" in the sense of responding to the events of colonial and revolutionary America. By contrast, Ackerman self-consciously elaborates a theory that affirms the constitutionally generative capacities of the American people.

man's theory helps to clarify how we can in substance, and not merely in form, continue to claim to be a republic despite our nation's size and the lack of widespread, constant citizen political action.

How exactly does Ackerman meet these challenges? In the dualist political theory,[38] the ordinary citizen is descriptively recognized as not consumed with political matters during most of her life; she is generally a "private citizen."[39] Yet there are times and issues that elicit rapt attention and concern from such citizens, who otherwise generally acquiesce in representative government. In these unusual times, however we come to define their criteria, citizens come out of the shelters of their private lives and engage one another much more than normally on certain fundamental political questions, for a rather lengthy but unspecified period of time. Further, some national institution must reject initial efforts at revising the fundamental law so as to sharpen the debate and test The People's commitment to changing fundamental law.[40] Thus, in Ackerman's theory, citizens are not required to adopt an entire life of intense political activity in order to manifest their political freedom. Nor is broad-based political activity from average citizens a precondition for a government to be entitled to name itself a republic. Instead, so long as average citizens—The People—continue to maintain the latent power and channels by which they can emerge and force the creation of new principles on which their government will be structured, or of fundamental policies that their government will effectuate, in Ackerman's theory the government remains a republic.

Moreover, Ackerman answers Arendt that the Founders did *not neglect* to institutionalize everyday citizens' political freedom. They provided precisely the opportunities Ackerman has identified, though they differ for normal politics versus constitutional or foundation-changing politics. It is within this latter category that the revolutionary spirit of initiating a new foundation of some type can continue to be manifested.[41] In his theory, Ackerman not only

38. *See supra* note 31 and accompanying text.

39. *See generally* ACKERMAN, *supra* note 4, at 231-59 (discussing a dualist democracy and discovering the Constitution).

40. *See id.* at 285-88.

41. Although Ackerman proposes a theory by which to answer Arendt's concerns about the American Constitution and the loss of the authentically revolutionary tradition, he could be challenged as not providing a sufficient answer. It is not the project of this brief

answers Arendt and Montesquieu, among others, but also poses concomitantly a direct challenge to those like myself who have argued, for a variety of reasons, in favor of maintaining meaningful regulatory and political power at the local and state levels.[42]

II. THE MEANING OF *LOPEZ* AND THE FUTURE OF FEDERALISM

Now let me turn, in the second part of my response, more directly to *Lopez* itself. Does *Lopez* demarcate a constitutional moment? Robert Nagel and his respondents resoundingly demonstrated the inadequacies of both that case, and of the Court more generally, spearheading a fundamental transformation in the allocation of power between State and Nation.[43] To speak in the language of Ackerman, the Court is charged institutionally to preserve The People's fundamental law and not with any "prophetic" role by which it unilaterally decides where the nation's fundamental law should be headed.[44]

But *Lopez* is the first case since the New Deal where the Supreme Court invalidated a federal statute as beyond the interstate commerce power where the Tenth Amendment was not involved.[45] Surely this means something more than Jonathan Macey

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commentary, however, to evaluate the legal, political, and philosophical sufficiency of Ackerman's theory. Instead the goal of this commentary is to contextualize his project as primarily philosophic.

42. *See, e.g.*, S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685 (1991) (discussing reasons for a revitalized federalism and the essential factors and concerns for public participation in determining government policy).

43. *See* Robert F. Nagel, *The Future of Federalism After* United States v. Lopez, 46 CASE W. RES. L. REV. 643 (1996); Jesse Choper, *Did Last Term Reveal "A Revolutionary States' Rights' Movement Within the Supreme Court"?*, 46 CASE W. RES. L. REV. 663 (1996) (hesitating in finding such); Melvyn R. Durchslag, *Will the Real Alfonso Lopez Please Stand Up: A Reply to Professor Nagel*, 46 CASE W. RES. L. REV. 671 (1996) (arguing that the evidence that the Supreme Court is repackaging the same commerce clause test in *Lopez* is far more opaque and important than Professor Nagel suggests); Deborah Jones Merritt, *The Fuzzy Logic of Federalism*, 46 CASE W. RES. L. REV. 685 (1996) (focusing on the tension between the constitutional theory of a limited central government and the reality of enumerated politics).

44. *See* ACKERMAN, *supra* note 4, at 139:

> The prophetic vision of the Court is flatly inconsistent with the principles of dualist democracy. Even if judges could successfully gain popular acquiescence, this kind of top-down transformation is the opposite of bottom-up transformations prized by dualist democrats. It is not the special province of the judges to lead the People onward and upward to new and higher values.

See id.

45. *See* New York v. United States, 505 U.S. 144 (1992) (ruling that both the Tenth

suggested, that the Court was merely blowing a whistle to remind players that it has a role to play in determining the meaning of the commerce power.[46] But *Lopez*'s meaning, when evaluated through the Ackerman prism of interpretive categories, is not self-evident. This lack of interpretive determinacy can function as a wedge for criticizing Ackerman's theory, as Tushnet has, or we can use the very malleability of the theory's categories to promote critical thinking about the intersection of the law, politics, and culture of our times along a number of disparate paths. Such an engagement with and critical analysis of the political and legal events of our time, and the variety of potential answers yielded thereby, need not be construed as evidence of the theory's holes but rather of its interpretive fruitfulness.

In the brief space that follows, I would like to explore two of the multiple thought paths that Ackerman's theory opens for us. One involves a more uncritical application of Ackerman's categories and analytic moves, and considers Lopez as attempting to "spark" a constitutional moment. The other sketches the portent of a much more challenging period that may lie in our Nation's future.

A. Lopez *as a "Sparking" Effort*

Lopez can be viewed as attempting to catalyze public attention to a particular set of lost principles, analogous to *Brown v. Board of Education*.[47] In *Brown*, the principles were drawn from the Reconstruction Amendments;[48] in *Lopez*, from the understanding of

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Amendment and the Interstate Commerce Clause had been violated by the statute at issue there, because of their purportedly being "mirror images" of one another).

46. *See* Jonathan Macey, Comment at *Symposium: The Future of Federalism After* United States v. Lopez, Case Western Reserve School of Law (Nov. 10-11, 1995) (videotape available in Case Western Reserve Law School Library). Yet Suzanna Sherry suggests that the case indeed may be nothing more than an example of the Court's occasional bite, in an effort to have others take its generally unenforced bark (regarding the supposed limits of the commerce power) seriously. *See* Suzanna Sherry, *The Barking Dog*, 46 CASE W. RES. L. REV. 877 (1996) (asserting that *Lopez* will join a list of cases that seem to suggest major change at first but are subsequently ignored).

47. 347 U.S. 483 (1954).

48. *See* ACKERMAN, *supra* note 4, at 141; *see also* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1132 (1995) (arguing the *Brown* Court erred in basing its decision ahistorically and primarily upon social science when the decision could have been more soundly grounded if the Court had used an originalist interpretive methodology and historical sources showing that framers of the Fourteenth Amendment intended its reach to extend to segregation); Robert L. Hayman,

the federal government as having limited powers—"few and definite" as Publius put it.[49] In its "sparking" function, the Court's role is not prophetic or visionary, but rather one where it seeks to hold a mirror to The People, to invite them to consider whether the moribund principle should be reinvigorated. This sparking activity of the Court, to which the political branches or The People themselves may respond, is a legitimate function within Ackerman's theory.[50]

Lopez indeed sparked a political response. This included not only a new version of the act that the Court had ruled unconstitutional,[51] but arguably aspects of other legislation during the 104th Congress.[52] Substantial regulatory changes, for example, have now occurred in federal welfare benefits law.[53] Taking an incremental-

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Jr., *Re-Cognizing Inequality: Rebellion, Redemption, And the Struggle for Transcendence in the Equal Protection of the Law*, 27 HARV. C.R.-C.L. REV. 9, 55 (1991) (exploring the import of two ideal types of thinking concerning race and inequality, and examining their role in *Brown* and other Equal Protection decisions).

49. The constitutional principle of enumerated federal powers, as Nagel demonstrates, is one horn of the persistent constitutional dilemma of federalism. *See* Nagel, *supra* note 43, at 649.

50. *See* ACKERMAN, *supra* note 4, at 139.

51. In the 102nd Congress, Congress enacted a new version of the Gun-Free School Zones Act, now codified at 18 U.S.C. § 922(q) (1994). In an attempt to redress the Court's concern about the lack of findings regarding the relationship between interstate commerce and the purposes of the Act, the new version codified nine separate findings relating to the interstate movement of guns and ammunition, drugs, and criminal gangs, and the negative effects of this activity on the quality of education. *See id.* at § 922(q)(1). It specifically found that "decline in the quality of education has an adverse impact on interstate commerce. . . ." *Id.* at § 922(q)(1)(G). In its ninth finding, Congress declared: "Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools. . . ." *Id.* at § 922(q)(1)(I).

52. One early bill concerned with revitalizing the federal structure, the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995), was a response to the sparking activity of *New York v. United States*, 505 U.S. 144 (1992). Cass Sunstein has recently suggested that the House of Representatives of the 104th Congress pursued a legislative program in which the role of government at every level was reevaluated, including the most foundational commitments of the New Deal. *See* Cass Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 250 (1996) (exploring regulatory reform efforts of the 104th Congress as evidence of the attempt to reevaluate government's role at all levels). Although Sunstein contends little was ultimately achieved in the form of enacted legislation, and most of that was "crude, unimaginative, and . . . procedural," he was writing before the end of the session. *Id.* Welfare and immigration reform bills were enacted, amid commentary that they signaled the demise of the New Deal.

53. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA or Welfare Reform Act), Pub. L. No. 104-193, 110 Stat. 2105 (1996) (revising

ist view of how a new constitutional regime is achieved, *Lopez*, conjoined with two other cases reasserting the constitutional vitality of federalism, *New York v. United States*[54] and *Seminole Tribe of Florida v. Florida*,[55] can be considered one portion of the Court's current movement toward reconceptualizing both the scope and structure of federal government powers.[56]

B. The Global Economy/Republic?

Assuming that *Lopez* is at most a way station or intermediate step toward a transformation of some fundamental constitutional relationships, let me draw back from specific discussion of that case to accept Ackerman's broader Hegelian invitation to speculate on where we stand in the sweep of constitutional history and to prognosticate about what lies ahead.[57] Evaluating our larger politics, culture, and international economic position, we can ask, are we nearing the creation of a new constitutional regime? If so, with regard to changing which fundamental legal principles and why? As I suggested earlier, I do believe we are entering a dangerous time, although its ultimate conclusion cannot be predicted.

We are living in a paradoxical period, the resolution of which might become the new post-New Deal constitutional regime. In the 1990s, the competing pressures of economic globalism and a return to what can be called political localism—the latter an outcome Arendt would praise—have embedded within them conflicting structural values. Economic globalism presses a nation to make decisions more in conformity with other nations' policies and preferences than with its own people's.[58] A government's accountabil-

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numerous aspects of the historic federal public assistance programs, including the elimination of a federal entitlement to public assistance on the basis of economic need and imposition of strict work requirements for recipients). For a critical assessment, see Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC MONTHLY, Mar. 1997, at 43.

54. 505 U.S. 144 (1992) (invalidating under the Tenth Amendment a federal statute that sought to impose an expensive federal regulatory program upon the states).

55. 116 S.Ct. 1114 (1996) (holding federal acts passed pursuant to the Indian Commerce Clause cannot abrogate States' Eleventh Amendment immunity to federal court jurisdiction).

56. *See* Tushnet, *supra* note 1, at 863.

57. At the Association of American Law Schools Workshop on Constitutional Law, held in June 1993, Ackerman characterized himself as a "weak Hegelian." Some might find this an understatement.

58. *See* Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1479 (1994) (stating that incentives toward a global economy undermine local com-

ity to its people is weakened, thereby resulting in a less effective representative republic.[59] The manner by which these values are harmonized, or the conflict transcended, may provide the new constitutional norms requisite to the creation of a new constitutional regime.

Intense political pressures have recently arisen to restore the power and dignity of local and state governments, yet at the same time Congress has approved the most far-reaching international economic accords. Under these new international agreements, specifically the Uruguay Round Agreements of the General Agreement on Tariffs and Trade, other nations are permitted to challenge aspects of our domestic law that they consider inconsistent with the Agreement.[60] Barry Friedman has explored the potential impact of the Uruguay Round on the laws of our states, observing that GATT seeks to harmonize into a unitary international regulatory law significant aspects of state legislative power.[61] He concludes by noting that "the process of harmonization suggests an even smaller, not greater, role for the states."[62]

State and local governments provide the mechanism by which citizens participate most directly in developing governmental policy. As now, when citizen antipathy toward the federal government is high, these subnational governments provide an alternative focus for citizens' political efforts and hopes. We can identify some of the public concerns triggering this antipathy and the consequent refocus on less remote governmental units. In the past two decades, there has been growing sentiment that the federal government is characterized by overweening arrogance and concomitant condescension toward its average citizenry.[63] It is also criticized for its

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munities interests in favor of international ones).

59. Consider Justice O'Connor's parallel concerns about attenuated governmental accountability resulting from unfunded federal mandates. *See* New York v. United States, 505 U.S. 144, 168 (1992) (stating that decreased accountability to the electorate results when states are compelled to enact regulations promulgated by the federal government).

60. One example of this is the final Uruguay Round of GATT negotiations. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994 MTN/FA (1994) [hereinafter 1994 GATT Final Act]. The portion of the federal legislation authorizing United States participation in the dispute panel process is codified at 19 U.S.C. § 3533 (1994).

61. Friedman, *supra* note 58, at 1447-59.

62. *Id.* at 1459.

63. *See* Sunstein, *supra* note 52, at 249 (referring to "widespread popular dissatisfaction with government"); Randy E. Barnett, *Foreword: Guns, Militias, and Oklahoma City*, 62 TENN. L. REV. 443 (1995) (examining the concerns of the politically disaffected within

extraordinary waste of resources and remoteness from people—except when ordering them to do or to refrain from doing something. It is assailed for the degree of control it exerts over everyday life of citizens and businesses, and for the perceived impotence of many citizens to effect meaningful change of its policies. These are the perceptions that Speaker of the House Newt Gingrich and his followers were able to tap into to foment their party's resurgence, and especially its majority control of Congress, for the first time in several decades. But these sentiments were tapped opportunistically, as the failure of federal campaign finance reform illustrates.[64]

The various reform efforts sought at the national level may pale once the citizenry begins to understand the impact of the new trade agreements on their various governments, and more precisely, on their own political power. In his article, Mark Tushnet writes of public power's disappearance because of its "evaporation."[65] When considering GATT, the federal government should rather be viewed as having effectively *transferred* or, better, *surrendered*, potentially vast amounts of regulatory power formerly held at federal, state, and local levels to the international commercial arbitration panels.[66] Once the new arbitration systems are fully operational, they have the effective capacity to constrict the amount and finality of power traditionally vested and potentially exercised by our governments, even though the federal legislation mandating U.S. participation ostensibly attempts to protect against such an outcome.[67] The

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the United States, including those in the militia groups).

64. *See* Adam Clymer, *Many Proposals, Few Supporters, on Campaign Law*, N.Y. TIMES, Apr. 6, 1997, at 1; Eric Schmitt, *Senate Rejects Amendment on Financing of Campaigns*, N.Y. TIMES, Mar. 19, 1997, at A14.

65. *See* Tushnet, *supra* note 1, at 869 (arguing that the decrease in the power of the federal government has not resulted in a corresponding increase of power at the state and local level).

66. *See* 19 U.S.C. § 3533 (1994) (mandating United States participation in the dispute panel process for conflict resolution).

67. The Uruguay Round Agreements Act's, 19 U.S.C. § 3501 (1994), approach to the survival of State law merits some attention. A State is given the right to consult and advise the trade representative when one of its laws is challenged, § 3512(b), and the legislation explicitly forecloses the ability of an international arbitration panel to invalidate a challenged State law. § 3512(b)(2)(A). Rather, that power is vested exclusively in the United States § 3512(c). No private party or other nation may challenge the State's law (or that of its political subdivision) on the basis that it violates the most recent phase constituting the GATT agreement, known as the Uruguay Round Agreements. The legislation additionally seeks to protect State policy making by expressly stating that even where

Uruguay Round agreements may reduce our governments' effective power to the point that they may simply "float" various regulatory measures—be they for food and drug safety, environmental protection, or other public-regarding ends—for international commercial approval.[68] While the ultimate legal validity of this domestic legislation resides in our own courts, the United States has agreed to take reasonable measures "to ensure observance of GATT by regional and local governments."[69] Especially in light of the international objective of seeking a unitary international regulatory standard, it is hard to conceive how the regulatory discretion of our state and local governments will not be vastly constricted, and their traditional role as laboratories of policy innovation greatly impaired.

The raw facts of this bargain—the trade of central features of self-government for greater economic power in the international economy—were not presented to The People for their debate and approval. Rather, for the most part, they were discretely sidestepped.[70] But the deal among economic and political elites, by

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the United States files a legal challenge to the State law on the basis of its inconsistency with the Uruguay Agreements, no deference is to be accorded any decision of a trade panel, and the United States must shoulder the burden of proof as to State law inconsistency. 19 U.S.C. §§ 3512(b)(2)(B)(i)-(ii) (1994). Whether the legislation is an effective framework for protecting both political self-determination and realizing an international economic regime awaits implementation of the scheme. The involvement of States could become merely *pro forma*, with State law routinely invalidated because of purportedly national economic interests. If prior federal preemption decisions are any guide, it would be folly to assume that the States' role as generative lawmakers would receive sustained judicial protection. *See generally* Hoke, *supra* note 67.

68. For adjudicating Technical Barriers to Trade, which are mandatory provisions governing products, their production process, and their packaging, the standards that GATT explicitly incorporates are existing international standards. If a government wants to exceed that standard, or to impose a standard where one has not previously existed, the government must shoulder a high burden of proof. *See* 1994 GATT Final Act, MTN/FA, II-A1A-6, Art. 2.4 (embodying the requirement that where international standards exist dictating technical regulations, they must be used unless it can be shown they are ineffective or constitute inappropriate means of achieving GATT objectives); *see also* Katherine Tammaro, *Why States Should Worry about GATT*, *in* CENTER FOR POLICY ALTERNATIVES, POLICY ALTERNATIVES ON THE ENVIRONMENT: A STATE REPORT 7-9 (Aug. 1992); Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1421-31, 1433-34 (1994) (discussing the impact of the global trade agreement on federalism principles embedded in the Dormant Commerce Clause).

69. Tammaro, *supra* note 68, at 13.

70. Larry Kramer has suggested that The People are generally not involved in molding and approving the transformative principles underlying a new constitutional regime. *See* Kramer, *supra* note 5, at 893-94. Rather, they perceive themselves as problem-solving in a

which they may have gained significantly more political and economic power over We the People, will not remain secret forever. At some point, perhaps after several arbitration decisions adverse to American regulatory law,[71] the deal and its effects upon their political power will become clear in terms The People can understand. Then our nation will undeniably face a series of critical questions, politically and constitutionally.

The globalization movement poses a range of questions, but I focus on only one set here, those that would raise concerns for Arendt. Have these agreements fashioned a system by which state and local governments—indeed also our federal government—will be transformed into mere shadows of self-government? More precisely, when the Uruguay Round Agreements are fully operational and widely utilized, will our state and local governments persist as effective government units? Will a different version of the nondelegation doctrine surface? Will globalization kindle a return to some form of enclave federalism, where not only certain state, but national, powers will be listed that are constitutionally immunized from international commercial arbitration? To use Ackermanian nomenclature, these agreements are going to force not only a period of constitutional politics, but also of difficult intergenerational constitutional synthesis.[72] And it will be not only these agreements but The People's response to them that may generate the constitutional crisis. I fear that the conditions are rife for the worst sort of demagoguery, and potentially fascistic appeals. In my own writings I have argued that to preserve a republican polity we must protect against federal encroachment spaces at the local and state level in which The People can effectively engage in political participation and debate.[73] How much more necessary are these spaces when the voices of The People are challenged by

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particular controversy. *See also* ACKERMAN, *supra* note 4, at 96-98 (citing as an example of this proposition that the rebellion against slavery began with grassroots activities and was not initially a judicially or legislatively developed notion).

71. The United States has lost its final appeal in its first major case pursuant to the dispute resolution apparatus created as part of the Uruguay Rounds. In this case, regulations the Environmental Protection Agency issued under the Clean Air Act were found to have discriminated against foreign oil refiners. *See* David E. Sanger, *U.S. Defeated in Trade Case*, N.Y. TIMES, Apr. 30, 1996, at D1.

72. *See* ACKERMAN, *supra* note 4, at 86-104 (discussing the Supreme Court's role to forge a synthesis between the divergent principles underlying the constitutional regimes).

73. *See* Hoke, *supra* note 42, *passim.*

international forces such as GATT and NAFTA. If triangular synthesis was a problem—that of interweaving the Founding, Reconstruction, and New Deal understandings of the Constitution—just wait for cubular synthesis, which requires the addition of GATT-style globalism. My hope is that our next constitutional moment will be adequate to this extremely large challenge. Under this analysis, *Lopez* recedes into insignificance rather than forming the basis of a new constitutional moment.