Living in a Constitutional Moment: *Lopez* and Constitutional Theory?

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By the time the justices met to discuss United States v. Lopez, the votes were already in. Republicans had gained control of both houses of Congress. Their Contract With America promised a substantial change in the national government’s role in the lives of many Americans. Under the circumstances, one might imagine the justices upholding the Gun-Free School Zones Act. Philip Bobbitt’s explanation for an occasional judicial assertion of the power to invalidate national legislation in the name of federalism remains the most persuasive: Congress periodically needs to be reminded that its powers are indeed limited to those enumerated in the Constitution. The Congress that would hear the reminder, however, was very different from the one that enacted the Gun-Free School Zones Act. The Contract With America showed that Republicans were already sensitive to the question of the relative role of nation and states. Why then should the justices have invalidated the statute? Perhaps they saw the elections in a different way. The 1994
elections, they might have thought, were the culmination of a long campaign of public education and reflection on constitutional fundamentals. For decades, Republican constitutional theorists had been revisiting the New Deal’s constitutional settlement. The Reagan Administration attempted to implement some aspects of a new settlement, but it had been thwarted by Democratic control of the House of Representatives. The 1994 elections provided the opportunity to complete the Reagan Revolution. They were, that is, a constitutional moment of the sort Bruce Ackerman has written about.6

I do not mean to assert that the 1994 elections and *Lopez* really *were* a constitutional moment,7 or that the justices themselves saw the elections in the way I have suggested. Instead, I want to use *Lopez* and the 1994 elections as a vehicle for exploring some aspects of Ackerman’s intriguing theory. In particular, I want to examine the two central metaphors in Ackerman’s analysis. The first is that of the constitutional moment itself, expressing the distinction between times of deep public reflection on constitutional fundamentals and times of ordinary politics. The second is the metaphor in which the Court’s role is to construct a constitutional vision that unites the choices made during each constitutional moment.

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7. The question mark in the title of this Article conveys a substantive point. As the other articles in the Symposium indicate, a substantial case can be made that *Lopez* need not have a significant impact on the overall structure of national legislative power. I think speculation about the possible broader meaning of *Lopez* remains valuable. One decision, to be sure, need not mean much, but a single swallow can herald the coming of spring. Or, as Justice Souter put it, “[n]ot every epochal case has come in epochal trappings.” *Lopez*, 115 S. Ct. at 1657.
I. PROBLEMS OF INTERPRETIVE FORMALISM

A. Introduction: Ackerman's Scheme and the Present Moment

I acknowledge at the outset that we cannot be in a constitutional moment in Ackerman's terms. For Ackerman, the higher law-making process has several stages. First comes a "signaling phase," when a revisionist movement "earns the constitutional authority to claim that . . . its reform agenda should be placed at the center of sustained public scrutiny." Next comes the stage of "proposal," when the movement offers "a series of more or less operational proposals for constitutional reform." Then comes "mobilized popular deliberation," when the proposals "are tested time and again within the higher lawmaking system." Finally, there is a stage of "legal codification," when the courts integrate the proposals into the overall body of constitutional law.

To Ackerman, higher law-making comes in two variants. He calls the formal amendment process the "classical system" of higher law-making. Congress signals the need for constitutional change by proposing amendments, and the People accept the changes through the supermajoritarian ratification process. Ackerman also describes a "modem system" of higher law-making, based on the New Deal model. Here, "the decisive constitutional signal is issued by a President claiming a mandate from the People. If Congress supports this claim by enacting transformative statutes that challenge the fundamentals of the preexisting regime, these statutes are treated as the functional equivalent of a proposal for constitutional amendment." The stage of mobilized deliberation occurs after "the Supreme Court invalidates the initial wave of transformative statutes and challenges the ascendant movement to

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8. This seems an appropriate point to note the standard observation about Ackerman's approach, that it is a work-in-progress, of which the first of three promised volumes has appeared. See, e.g., William T. Fisher III, The Defects of Dualism, 59 U. Chi. L. Rev. 955, 955 (1992) (book review) ("Because the project is not yet complete, it would be premature to venture a comprehensive evaluation of Ackerman's argument."). Later volumes may qualify the theory or address points made by Ackerman's critics.

9. ACKERMAN, supra note 6, at 266.

10. Id.
11. Id.
12. Id. at 267.
13. Id.
14. Id. at 268.
15. Id.
refine its vision and go to the People for another show of deep and broad popular support."

Which aspects of Ackerman's description of the modern process are essential to his theory? There seems to be no reason to insist that signals or proposals emanate solely from the President. Consider the present situation. The Republican party's reconstruction during the Reagan Administration almost certainly should count as the signal Ackerman requires. And the Contract With America seems to satisfy Ackerman's requirement of concrete proposals that challenge the fundamentals of the existing regime. What may be lacking, however, is the stage of "mobilized popular deliberation."

At that stage, Ackerman requires a reasonably well-focused public debate over the proposed transformation. The Supreme Court's resistance plays a key role in Ackerman's version of the modern system, because it provides the opportunity for what Ackerman elsewhere calls a "triggering election" in which the People deliberately consider whether to accept the constitutional transformation the President and Congress have proposed. But, presumably, resistance by the President to the proposals might provide the opportunity for a triggering election, this time in 1996. Further, Ackerman has recently suggested that mobilized popular deliberation can manifest itself in a triggering election even if no national institution has resisted the proposed constitutional transformation. Still, something like a triggering election is essential in Ackerman's scheme so that we can distinguish truly transformative moments from political change within a preexisting and preservationist framework. We cannot allow politicians to "assert that a normal electoral victory has given them a mandate to enact an ordinary statute that overturns the considered judgments previously reached by the People."

Within this scheme, the present situation cannot be a constitutional moment. The 1994 elections may have moved the nation

16. Id.
17. See id. at 81-83 (ambiguously describing the Reconstruction Congress and President Andrew Johnson as initiators of constitutional change after the Civil War).
19. See id. (referring to a "Constitutional Solution by the Unanimous Consent of Senate, House, and President"). The mobilization at issue occurred during war, which may be important in identifying when consensual transformations occur.
20. ACKERMAN, supra note 6, at 6.
21. Ackerman prefers to say only that a constitutional solution has not yet been arrived
through the proposal stage, but cannot be treated as the "triggering election" because public attention was insufficiently focused on the proposed constitutional transformation. In particular, the public could not know whether the Contract With America was mere campaign rhetoric—a standard campaign platform common to times of normal politics—or a serious transformational agenda. One side in the constitutional debate may have engaged in mobilized deliberation, but not the People as a whole.

Have events since the elections clarified the state of affairs? The Contract With America, and the Reagan Revolution more generally, can be broadly divided into two parts. The first part consisted of proposals for substantial structural change in the national government: restrictions on unfunded federal mandates, a constitutional amendment to balance the budget, and term limits for members of Congress. The first has been enacted. The balanced budget amendment and term limits were rejected. Congress and the President, however, are on a course to balance the budget within a decade. In Ackerman's scheme, such statutory developments can be part of a constitutional transformation. Finally, the Twenty-Seventh Amendment, barring salary increases for national legislators from taking effect until after an intervening election, expresses a structural concern about the degree to which members of Congress act as the peoples' representatives or on their own behalf.

The Contract With America's second part was a series of

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at. I use the term moment primarily because it is the one most commonly used in discussing Ackerman's theory, and does not in this context seriously mislead.

24. See, e.g., Todd S. Purdum, Clinton, GOP End Federal Shutdown; Both Sides Pledge Effort to Balance Budget in 7 Years, PLAIN DEALER (Cleveland), November 20, 1995, at 1A.
25. The Amendment was declared in force in 1992, after a ratification process that began in 1789. This anomaly intriguingly connects the present to prior constitutional moments, because of Ackerman's stress on the irregularities in the process by which the Constitution and the Reconstruction Amendments were adopted. ACKERMAN, supra note 6, at 41-42 (noting that in a sense "our very identification of the Founding as a Founding presupposes that the Philadelphia Convention acted without legal warrant"); id. at 44-45 (observing that "[t]he Reconstruction Amendments . . . would never have been ratified if the Republicans had followed the rules laid down by Article Five").
proposals aimed at reducing the national government's scope. Here too, the balanced budget proposal played a key role, because substantial reductions in federal non-defense expenditures were required to achieve a balanced budget. Proposals for regulatory reform and transformation of public assistance programs were similarly designed to shift regulatory authority from the nation to the states or, as with changes in the tort system, to individual contracting parties.

We can understand *Lopez* as one item in the transformation process. Without a Supreme Court decision limiting the scope of the national government, the Contract With America might only represent a policy decision to reduce that government, and not a structural conclusion that the national government lacks the constitutional competence to continue to do what it had been doing. Ackerman says that the modern process of higher law-making requires the Supreme Court to resist transformative proposals:26 *U.S. Term Limits v. Thornton*27 might be an example. Rejecting in strong and well-considered dictum the possibility that Congress could enact term limits by a transformative statute,28 the Court forced Congress to use only the classical system of higher law-making, which has so far proved inadequate. Within this framework, we might think *Lopez* was wrongly decided, at least in the descriptive sense that the Court failed to provide an occasion for a mobilized public to endorse a reduction in the national government's scope.

As Ackerman's more recent work suggests, however, the Supreme Court's role in the modern system of higher law-making need not be to resist transformative proposals and thereby allow a triggering election to occur. That description draws too narrowly on the precise circumstances of the New Deal transformation. Even within Ackerman's initial framework, there need only be some national institution that resists transformative change. It could be the Supreme Court, but it could also be the presidency. The Court therefore can ally itself with proponents of transformative change. *Lopez* would then be entirely consistent with the proposition that

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26. Id. at 268 (noting that in the phase of "mobilized deliberation," "the Supreme Court invalidates the initial wave of transformative statutes and challenges the ascendant movement to refine its vision and go to the People for another show of deep and popular support").
28. See id. at 1847-52.
we are experiencing a constitutional moment. Further, Ackerman
has now suggested that transformations can be consensual, in
which case the Court can straightforwardly endorse ongoing trans-
formations. In either event, Lopez can be rationalized as the
Court's way of participating in a reduction in the national
government's scope.

Congress has not yet enacted, and the President has not yet
signed, substantial aspects of either part of the Contract With
America. At the same time, however, substantial reductions in non-
defense expenditures are sure to be adopted. Something, in short, is
happening.

Without resistance from some national institution that helps
focus public attention on the proposed constitutional transformation,
without the consensual adoption of transformative statutes, and
without a triggering election that might be taken to endorse the
proposed transformation, we cannot yet say that a constitutional
moment has occurred. Still, the present situation provides a use-
ful occasion on which to examine Ackerman's theory. In particular,
we can explore the formalist elements—the requirement of a trig-
gering election, for example—in that theory. Constitutional transfor-
mation occurs when the People engage in the higher law-making
process. In that process, the People take proposals "with a serious-
ness they do not normally accord to politics" and discuss them
"time and again, in . . . deliberative fora" so that people "will
recognize that our so-called representatives are up to something
special . . . : a self-conscious challenge to our fundamental law."

Yet, although constitutional moments may occur, they may not
be the only times when constitutional transformation occurs. As
Larry Kramer has pointed out, the nation's constitutional values
develop over time, with individual proposals met with
counterarguments, deliberation in various public fora, and resolu-

29. Michael Klarman denies that transformations can be consensual. Michael Klarman,
Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of
Constitutional Moments, 44 STAN. L. REV. 759, 774 (1992) (review essay). For similar
criticisms, see Robert J. Lipkin, Can American Constitutional Law Be Postmodern?, 42
BUFF. L. REV. 317, 363-67 (1994). That may be a plausible reading of We the People,
but Ackerman's more recent work does allow for consensual transformations.
30. Perhaps the Democratic Congress's resistance to the Reagan Revolution should be
sufficient. If so, we are indeed experiencing the late stages of a constitutional moment.
31. ACKERMAN, supra note 6, at 6.
32. Id.
33. Id. at 285.
tions that get embedded in our constitutional sensibility. The pace of this development varies from issue to issue. As Michael Klarman suggests, for example, "[t]he gradual accretion of power in the presidency" resulted not from a "single dramatic transformation, but rather [from] a gradual drift." More broadly, constitutional transformations occur "as points along a continuum," sometimes arising from sharp and dramatic confrontations, but sometimes resulting from long-term shifts in public preferences. Regime shifts of the sort Ackerman describes may occur when a fairly large number of issues come together for resolution more or less simultaneously, and then we may experience constitutional moments. But, Kramer suggests, Ackerman has provided no strong reason to think that the only times when constitutional innovations occur is during such moments. Why should we insist on the formality of a triggering election and, if necessary, resistance that produces such an election? Why is not a judgment that sufficient deliberation has occurred enough?

B. The Interpretive Nature of Ackerman's Theory

The answers to those questions, if there are any, lie in the interpretive nature of Ackerman's theory. I wish to contrast an interpretive theory to a normative one, for one can easily reject Ackerman's theory if it were a normative theory. Ackerman distinguishes between the daily decisions made in "normal lawmaking," when ordinary interest-group politics holds sway, and higher lawmaking, which involves extraordinary deliberation and "a broad view of the public interest."

A normative theory would assert that decisions taken during constitutional moments were better than decisions taken during normal lawmaking. The ground for such an assertion would presumably be that representatives embedded in their daily life in

34. Klarman, supra note 29, at 791. For additional discussion of Klarman's point, see infra text accompanying note 138.
36. For the most extensive discussion of which I am aware that treats Ackerman's work as interpretive, see Lipkin, supra note 29, at 346-76. Lipkin describes Ackerman's theory as "an intriguing interpretive history of constitutional change." Id. at 346.
37. ACKERMAN, supra note 6, at 6.
38. Miriam Galston and William A. Galston attribute this normative claim to Ackerman, in my view mistakenly. Miriam Galston & William A. Galston, Reason, Consent, and the U.S. Constitution: Bruce Ackerman's We the People, 104 ETHICS 446, 452 (1994).
politics and responding to interest-group pressures are less likely to develop sound public policy than the People who, deliberating seriously about fundamental questions, manage to extract themselves from their immediate circumstances to design institutions for the longer run. But, to be blunt, there is simply no good reason to accept that assertion or its supporting ground.  

Why might representatives' decisions during ordinary politics be better than the People's during constitutional moments?  

Representatives in ordinary politics are deeply embedded in the realities of public life. Interest groups may make them acutely aware of the impact their proposals will have on the daily lives of their constituents. They are in a position to make intensely practical judgments about the likely outcomes that fundamental institutional innovations will produce. And, as Frederick Schauer points out, representatives acting behind closed doors, as they characteristically do in ordinary politics, might offer "some resistance to the demagoguery that might play better on the public podium." In contrast, the People during constitutional moments make disembodied judgments, standing apart from themselves and from those who will be affected by innovations. Making decisions in the abstract, they may misestimate the costs and benefits of the innovations, or the distribution of their effects.

I do not mean to claim that the judgments made by representatives in ordinary politics are necessarily better than those made by the People in constitutional moments. Of course, judgments in ordinary politics can be distorted when interest group pressures are themselves distorting, for the standard reasons offered by public choice theorists. Policy-making by anecdote may be defective,

39. For a short statement of the difficulty, see Klarman, supra note 29, at 765.

40. Note that what appears at first to be one distinction is actually two: between periods of ordinary politics and moments of high deliberation, and between representatives and the People. Don Herzog describes three distinctions embedded in Ackerman's scheme: between representatives and the People, between reflective and unreflective politics, and between "the pluralist pursuit of group interest" and "principle and the common good." Don Herzog, Democratic Credentials, 104 ETHICS 467, 471 (1994). As Herzog says, the connection among these distinctions is "utterly contingent." Id. I take Ackerman to be arguing, however, for a constructive interpretation of U.S. constitutional history according to which the distinctions converge rather than diverge.


42. See Steven P. Croley, The Majoritarian Difficulty: Elective Judic peace and the Rule of Law, 62 U. Chi. L. Rev. 689, 706 (1995) (questioning why "Peter sober should be preferred to Peter drunk, or put differently, why a constitution is not Peter drunk and the electorate Peter sober").

43. For Ackerman's discussion of these distortions, see Bruce Ackerman, Beyond
for the standard reasons offered by cognitive psychologists who point out that people systematically overestimate the significance of dramatic events. And judgments made during constitutional moments can eliminate the distortions produced by a person’s self-interested judgments about how new policies will affect him or her personally in the short run.

The judgments made by representatives during periods of ordinary politics and by the People during constitutional moments are, in short, simply different judgments. They implicate different characteristics of situations of choice, but each characteristic is relevant to sound decision-making.

Responding to critics who mistakenly asserted that he was offering a normative theory, Ackerman pointed out that he was in fact offering an interpretive one. His claim is that his theory provides an account of the way the people of the United States actually understand their constitutional tradition, and for that reason alone, provides a normative basis for accepting the decisions the People make during constitutional moments. So, for example, we actually believe that the New Deal transformed our fundamental constitutional system even though the formal criteria for constitutional amendment were not satisfied.

We must distinguish this sort of interpretive claim from a different one that many of Ackerman’s critics have attributed to him. Suzanna Sherry and Michael Klarman argue that Ackerman’s claim is originalist, and fails to persuade as originalism.


44. See Aaron Tversky & Donald Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 SCIENCE 1124, 1127-28 (1974) (describing the “availability” heuristic, which leads people to weigh vivid, readily available information more heavily than general information).

45. The convenient escape hatch would allocate the characteristics making embedded judgments important to ordinary politics and the others to constitutional moments. I suppose the argument would be that decisions made during periods of ordinary politics deal with more short-term arrangements, as to which embedded judgments would be more important, while decisions made during constitutional moments deal with long-term, constitutional arrangements, as to which more abstract judgments would be more important. I have been unable to think of good reasons why this should be so. The high-toned citation for this proposition is THOMAS NAGEL, THE VIEW FROM NOWHERE (1986).

46. Bruce Ackerman, Rooted Cosmopolitanism, 104 ETHICS 516, 517 (1994).

47. See Klarman, supra note 29, at 777-84; Suzanna Sherry, The Ghost of Liberalism Past, 105 HARV. L. REV. 918, 924-27 (1992) (book review); see also Fisher, supra note 8, at 966 n.21 (suggesting an interpretive reading of Ackerman after criticizing Ackerman as originalist). Lipkin also criticizes Ackerman as an originalist, notwithstanding Lipkin’s more general understanding of Ackerman’s interpretive approach. Lipkin, supra note 29, at
Originalism claims that a decision made in the past gains normative force from the very fact that someone—the Founders, the Reconstruction Amendments' ratifiers—made it. In contrast, someone who offers an interpretive claim urges that the claim offers a plausible and normatively attractive narrative that connects the past to the present. As Robert Justin Lipkin puts it, "[a]n interpretive history which accurately depicts our constitutional universe, absent normative reasons against it, is normatively valuable just because it describes and explains our practice."48 Such a history overcomes the normative difficulty associated with explaining why we today should be bound by decisions made by people long ago, its proponent claims, by demonstrating how we today are in some important—though constructed—sense the very People who made those decisions.49 In Ackerman's words, "the narrative we tell ourselves about our Constitution's roots is a deeply significant act of collective self-definition; its continual re-telling plays a critical role in the ongoing construction of national identity."50 And, because national identity—or at least some supra-individual identity—is normatively valuable, interpretive narratives that create communities (beyond face-to-face exchanges) have normative weight.51

Ackerman's interpretive narrative may be overly celebratory.52 A criticism offered by Don Herzog is suggestive: according to Herzog, Ackerman's narrative fails "to explain the possibility of a binding unity in the face of deep cleavages over race, class, gender, and more."53 For Herzog, this undermines the validity of Ackerman's project.54 In contrast, I suggest, it simply opens for


48. Lipkin, supra note 29, at 375.
49. The usual citation for the constructed nature of national identity is BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (rev. ed. 1991).
50. ACKERMAN, supra note 6, at 36.
51. Using constitutional law as one vehicle for the construction of a national identity may be defended on the ground that a supra-individual identity is a basic human good and that constitutional law is one important domain for the development and protection of basic human goods.
52. For myself, I would not place as much weight on the normative value of national identity as Ackerman does. I agree with him, however, on the proposition that some narrative connecting each individual to some broader, though imagined, community is essential to the coherence of the self.
53. Herzog, supra note 40, at 475.
54. Ackerman hints that a principle of "charity in interpretation" justifies the version he presents. Ackerman, supra note 46, at 521. I agree with Herzog, however, that Ackerman's account, both in We the People and in the closing pages of Rooted Cosmo-
consideration the possibility that a more subtle narrative of national identity would be more inspiring and attractive precisely because it acknowledged the deep cleavages in our history.\(^{55}\)

Understood in this way, Ackerman offers readers a construction of constitutional history that, he hopes, will be adopted because it supports or generates a normatively attractive vision of our national identity.\(^{56}\) In this he differs from originalists, who hope that their accounts will be adopted because they are accurate representations of historical events or understandings. Why, though, is the narrative Ackerman offers normatively attractive? Ackerman's argument on this point is either weak or unfortunately truncated. Ackerman argues that his construction makes sense of the real practices of constitutionalism in the United States, and does so better than alternative constructions. In Ronald Dworkin's terms, it "fits" our experience better than alternatives.\(^{57}\) Further, it opens up the possibility of revising—reconstructing—our national self-understanding in ways that can be defended on independent normative grounds. A purely backward-looking originalism licenses such revisions, but only at the expense of treating them as arbitrary innovations rather than as part of the organic development of our national self-identity.\(^{58}\)

\(^{55}\) politanism, comes close to a "debased or vulgar" patriotism. See Herzog, supra note 40, at 479.

\(^{56}\) My personal hobby-horse on this point is what I take from the work of Eugene Genovese and Elizabeth Fox-Genovese, that the cleavages of race and gender in the antebellum South simultaneously bound whites and African-Americans, and men and women, together: White (and male) culture has been shaped by African-American (and female) culture, and vice versa, in ways that make it misleading to speak of white or male culture at all. See E. Fox-GENOVESE & E. GENOVESE, FRUITS OF MERCHANT CAPITAL: SLAVERY AND BOURGEOIS PROPERTY IN THE RISE AND EXPANSION OF CAPITALISM 197-98 (1983).

\(^{57}\) In consequence, the narrative inevitably offers a unified, and therefore relatively conflict-free, construction of "our" national identity, to ensure that there is a historically continuous People of whom we today are part. For a criticism of Ackerman's conflict-free vision, see Fisher, supra note 8, at 972-74 (arguing that Americans differ greatly as between members of different cultures.)

\(^{58}\) This is not to say that it is a precisely accurate account of our constitutional experience. No single-element construction like Ackerman's could possibly be accurate. But, Ackerman claims, it fits our experience better than its chief competitors, rights-foundationalism and democratic monism.

\(^{59}\) For this reason, Klarman errs in describing Ackerman's proposal to entrench fundamental rights in the Constitution as a "glaring" contradiction of his overall approach. See Klarman, supra note 29, at 763-64 n.37. As I understand his argument, Ackerman believes that his proposal is plausible precisely because it is consistent with the narrative of national identity he offers his readers. In addition, though Ackerman believes that rights-
I have no quarrel with Ackerman's claim in the form I gave earlier: that his theory provides an account of how we understand our constitutional tradition. Certainly the distinction between ordinary politics and constitutional moments is so much a part of our understanding that a scholar can write, "[a] constitution is Peter sober while the electorate is Peter drunk," almost off-handedly, correctly assuming that readers will understand the point.

The difficulty, however, is that Ackerman's own exposition makes it clear that there are alternative interpretive accounts of our constitutional tradition. One set of criticisms of Ackerman's account offers variants of the claim that it improperly discounts the importance of what he calls rights-foundationalism as an interpretive rather than a normative account of U.S. constitutionalism. Similarly, the tradition Ackerman calls monism, placing heavy though not conclusive normative weight on the judgments made by perhaps transitory democratic majorities, is plainly an important strand in U.S. constitutionalism. Yet problems arise for Ackerman's overall theory if dualism, the theory of constitutional moments, is only one of several elements in an interpretive account of our constitutionalism.

foundationalism is not currently available to the American People, and is therefore an inappropriate basis for contemporary constitutional decision-making, I take his suggesting a constitutional amendment as indicating how the People can transform our constitutional identity. For a suggestion supporting this analysis, see Frank Michelman, Always Under Law?, 12 CONST. COMMENTARY 227, 243-45 (1995), which notes that a hypothetical amendment "would plainly be meant as an alteration in the country's concretely operative scheme of higher law."

59. Stephen Holmes, Precommitment and the Paradox of Democracy, in CONSTITUTIONALISM AND DEMOCRACY 195, 196 (Jon Elster & Rune Slagstaad eds., 1988). Holmes attributes the concept and the phrase to Hayek. We are both convinced, however, that it goes farther back. Frank Michelman gives a variant attributed to Francis Bacon. Frank Michelman, Foreword: Traces of Self-Government, 100 HARV. L. REV. 4, 61 n.320 (1986).

60. See, e.g., Galston & Galston, supra note 38, at 455-57; Schauer, supra note 41, at 1189-91. Ackerman's response to his critics takes them to be asserting that rights-foundationalism is the best normative justification for constitutionalism. Ackerman, supra note 46, at 517. He may be correct in his reading of his critics, but at least some can also be taken to be making an interpretive claim. See, e.g., James Fleming, We the Exceptional American People, 11 CONST. COMMENTARY 355, 364 (1994) (arguing that "the idea of inalienable rights is far more congenial to the American constitutional tradition than to the German" (emphasis added)).

61. Ackerman's dualism incorporates both rights-foundationalism and monism, but in the process comes close to eliminating them as vibrant elements in an interpretive narrative of constitutionalism. I take his critics' point to be that his dualism transcends rights-foundationalism at excessive cost.
C. The Tension Between Ackerman’s Interpretivism and Ackerman’s Formalism

The problems arise because a multi-element interpretivism sits uncomfortably with Ackerman’s schema of signaling-proposal-deliberation-codification, which injects formalism into the account. Indeed, we can see the tension with Ackerman’s formalism in several ways.

Perhaps the most obvious derives from the very fact that Ackerman would have us identify constitutional moments. These are times when the People, either directly or through their representatives, mount “a self-conscious challenge to our fundamental law” and consider the challenge “with a seriousness that they do not normally accord to politics.” Why interpose the formalist schema of signaling-proposal-deliberation-codification here? Why not simply and directly examine whether some events did indeed involve the appropriate challenge and seriousness of deliberation? This would accommodate Kramer’s concerns as well, allowing us to identify discrete constitutional transformations even if they are not part of an overall regime change.

Ackerman’s critics have pointed out another difficulty arising from his formalism, and examining it may help explain why concerns like Kramer’s may not squarely address Ackerman’s position.

62. Cass Sunstein uses the term “formalism” to describe a somewhat different aspect of Ackerman’s account. Focusing on Ackerman’s argument that constitutional interpretation requires a synthesis of the substantive decisions made during each constitutional moment (which I discuss below, see infra text accompanying notes 82-90), Sunstein points out that “any particular view about the right synthesis will have to partake of the judgments of the synthesizer.” CASS SUNSTEIN, THE PARTIAL CONSTITUTION 370 n.21 (1993). Asserting that this “is hardly a decisive objection,” Sunstein says that Ackerman’s account “thus far” does not address the “nonhistorical dimension” of “the task of interpretation.” Id.

63. ACKERMAN, supra note 6, at 285.

64. Id. at 6.

65. Some of Ackerman’s critics have been misled, albeit understandably, by a further formalist specification that comes in Ackerman’s description of the New Deal constitutional moment. See, e.g., Klarman, supra note 29, at 768. Klarman argues that “Ackerman fails to abide by his own criteria” in discussing “the existence of other, ‘lesser’ constitutional moments.” Id. at 769. Yet, in discussing those other moments, Ackerman applies his basic formalist criteria, not the more specific versions he locates in the New Deal moment.

66. Such a direct judgment need not be unguided. The person making the judgment would rely on evidence of popular activity, and such evidence might well include items in Ackerman’s formalist list, but the person making the judgment could conclude that a constitutional moment had occurred even if not a single one of Ackerman’s elements had occurred.

67. See supra text accompanying note 34.
Ackerman's formalism leads him into the characteristic difficulties of any formalism. Ackerman's schema is both over- and under-inclusive with respect to the underlying account of dualist democracy. Michael McConnell argues that the repudiation of Reconstruction in 1876 satisfies Ackerman's formal criteria for identifying a constitutional moment, yet Ackerman does not treat it as a constitutional moment. I have suggested, more briefly, that post-Watergate political reforms might also reflect the kind of public deliberation that characterizes constitutional moments even though Ackerman's formal criteria had not been satisfied in the 1970s. The particular examples are unimportant, however. The basic point is that formal criteria by definition cannot precisely identify all and only constitutional moments.

The difficulty is compounded if the U.S. constitutional tradition is pluralist. Because we regard ourselves as rights-foundationalists, Ackerman's critics are troubled by his assertion that we could amend the Constitution to eliminate its fundamental human rights guarantees because Article V contains no significant substantive limitations on permissible constitutional amendments. To pursue an example Ackerman offers, imagine a structural constitutional amendment establishing Christianity as the American state religion, adopted by statute after the formal processes of signaling, proposal, and deliberation. Suppose as well that a case challenging the statute's constitutionality comes before a judge who fully accepts Ackerman's account of a dualist tradition in U.S. constitutionalism that is independent of our rights-foundationalist tradition. It is not hard to imagine that judge invalidating the statute, relying on the rights-foundationalist tradition. This example involves a decision-maker invoking one strand of our traditions against another: The judge exercises her judgment to choose among the strands.

68. See, e.g., Klarman, supra note 29, at 770 (discussing over-inclusiveness); Schauer, supra note 41, at 1194 (citing examples of Ackerman's under-inclusiveness).
70. MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 286-87 (1988).
71. ACKERMAN, supra note 6, at 320-21. For criticisms, see Fleming, supra note 60, at 369-78.
72. ACKERMAN, supra note 6, at 14-16. Ackerman uses the example of a real, textual constitutional amendment adopted through the classical system.
Ackerman might reject this form of judgment by defending his interpretation of U.S. constitutionalism as better than a pluralist account. I doubt that this position could be sustained as an interpretive matter. In light of the strong elements of rights-founding and democratic monism in our tradition, rejecting pluralism on interpretive grounds would not be a better interpretation of the U.S. constitutional tradition than pluralism.

Ackerman’s single-element interpretation might be better according to some normative theory because it might transcend, while it incorporates, the elements of a pluralist theory. It might offer a better fit with our tradition than a pluralist interpretation, where the criterion for determining goodness of fit is normative rather than interpretive. As Cass Sunstein has suggested, however, Ackerman’s work to this point does not identify this normative criterion.\footnote{Sunstein, supra note 62, at 370 n. 21.}

The more general problem of formalism’s under- and over-inclusiveness also implicates questions of judgment, and Ackerman sketchily suggests his intention to invoke the standard defense of formalism against this problem. Instead of relying on Ackerman’s formal criteria, why should not a decision-maker ask directly whether the People have acted in an appropriately serious way? To quote the key passage again, Ackerman writes that “the dualist Constitution prevents elected politicians from exaggerating their authority. They are not to assert that a normal electoral victory has given them a mandate to enact an ordinary statute that overturns the considered judgments previously reached by the People.”\footnote{Ackerman, supra note 6, at 6.} If politicians are authorized to make the direct judgment that the People have acted in a constitutional moment, they will err too frequently. In particular, they will claim that a constitutional moment has occurred when it actually has not.

Ackerman’s formal criteria will bar politicians from making these erroneous claims. Because the formal criteria are under-inclusive, they will also bar them from making correct claims of serious popular deliberation and the like, when such deliberation has occurred even though the formal criteria have not been satisfied.\footnote{The problem of over-inclusiveness is less serious. Satisfying the formal criteria sometimes allows politicians to assert that a constitutional moment has occurred when in fact it has not. But, on Ackerman’s account, politicians are likely to make such assertions anyway. The only cost of the formalist criteria might be to lend legitimacy to those assertions.}
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Ackerman’s formalism is defensible if it rules out more erroneous than correct claims that a constitutional moment has occurred. I wonder whether it does. The difficulty, I believe, is that Ackerman’s formal criteria may not be formal enough. As he writes, “[a]ssessing such matters does not, of course, allow for sharp yes/no answers.” He sometimes provides additional, even more formal criteria.

Note finally that Ackerman’s formalism is aimed at restraining the rhetoric of politicians. He suggests plausibly that they have incentives to over-claim that constitutional moments have occurred: As he points out, politicians too frequently claim they have a “mandate” from “the People” for their ordinary legislative programs.

Consider, however, the present situation, suggested by Lopez. Ackerman’s formal criteria for constitutional moments have not yet been satisfied. Imagine a judge who accepts Ackerman’s theory and who makes a direct judgment that a constitutional moment has indeed occurred. Should that judge act on her judgment, or should she wait for the triggering election and the like? Unless the judge’s direct judgment is likely to be distorted—presumably for reasons different from the ones that account for the distortions of politicians’ judgments—I see no reason in Ackerman’s account to bar a judge from making a direct judgment rather than relying on

76. Another common criticism of Ackerman’s criteria is that they do not really help identify a limited set of constitutional moments. See, e.g., McConnell, supra note 69, at 142-43. To the extent that this criticism is accurate, it shows that the formalist criteria Ackerman offers do not do the job they should, but it does not impugn the more fundamental argument for some formalist criteria.

77. ACKERMAN, supra note 6, at 272.

78. See, e.g., id. at 274-75 (“A dualist Constitution should demand that a movement have the deep support of 20 percent of the citizenry, and the additional support of 31 percent of private citizens, before it may place its initiative on the higher lawmaking agenda.”). To the extent that his schema still requires an intervening triggering election, that is another more formal criterion. See also Bruce Ackerman, Transformative Appointments, 101 HARV. L. REV. 1164, 1172-73 (1988) (arguing that “transformative nominations have been seriously considered only after a President has won decisive reelection on the basis of a political program advocating fundamental change in reigning constitutional principle”).

79. For an examination of the history of one version of this rhetoric, see Richard J. Ellis & Stephen Kirk, Presidential Mandates in the Nineteenth Century: Conceptual Change and Institutional Development, 9 STUDIES AM. POL. DEVELOPMENT 117 (1995), which explains the history and institutionalization of the mandate concept. See also Robert A Dahl, Myth of the Presidential Mandate, 105 POL. SCI. Q. 355, 370 (1990) (suggesting that the myth of the presidential mandate contributes to the “pseudodemocratization of the presidency” (emphasis omitted)).
Ackerman’s formal criteria. In sum, Ackerman’s formalism may be justified in the way all formalism probably must be, by identifying the characteristic institutional flaws of different decision-makers to determine whether, all things considered, outcomes will be better justified if they make a direct judgment or if they are confined by formalist criteria. With reference to Lopez in particular, it appears that a justice who found the 1994 elections and the Contract With America good evidence that the People had indeed deliberated seriously about fundamental institutional change could rely on that judgment in deciding Lopez.

II. PROBLEMS OF CHARACTERIZATION

According to Ackerman, the Supreme Court must resolve “The Problem of Synthesis.” Each constitutional moment transforms our constitutional culture, yet the Court must “synthesize the great contributions” of each moment. The judges, he writes, sit “in the caboose” of a railroad train, “looking backward.” They must describe what they see “in a comprehensive way.” For example, the problem after the New Deal was two-fold: “How to reconcile the Founders’ affirmation of limited national government with the New Deal’s legitimization of ongoing bureaucratic intervention in economic and social life? . . . How does the affirmation of activist government in the twentieth century require a reinterpretation of

80. Ackerman expresses some nervousness about “rely[ing] so heavily on judges” in “the informality” of the modern system of constitutional transformation. ACKERMAN, supra note 6, at 284. He does not, however, explain why judges are likely to err in their judgments, and points out that “even the classical system relies heavily on the courts” to interpret the verbal “formulae” embedded in the Constitution. Id. I would make the same point about Schauer’s argument that formal criteria are needed to avoid the possibility that “courts would see themselves as constrained only by the operation of an external political process, doing whatever they could get away with.” Schauer, supra note 41, at 1195.

81. As Ackerman has suggested in conversation, it may be important to distinguish between a constitutional moment and a constitutional solution. This distinction suggests that it would be wrong for a judge to decide Lopez on the ground that by 1994, the People had already arrived at a constitutional solution and had inaugurated a new constitutional regime. But, because courts can participate in constitutional transformations when some other institution provides the resistance that triggers popular mobilization, a judge could properly conclude that we are now in a constitutional moment, when the constitutional solution remains unknown.

82. ACKERMAN, supra note 6, at 86.

83. Id. at 89.

84. Id. at 98.

85. Id. at 99.
the meaning of Republican Reconstruction?"\(^{86}\)

As Ackerman's formulation suggests, the problem of characterization has two parts. Judges must understand the most recent constitutional moment, and they must describe the prior ones in ways that allow them to synthesize all the constitutional moments in a unified, comprehensive narrative of U.S. constitutionalism. The problem of characterization necessarily entails judgment: just as Ackerman himself offers an interpretive history of U.S. constitutionalism, so in characterizing prior constitutional moments judges offer their interpretive accounts.\(^{87}\)

At this point, Ackerman offers another reason for us to reject the proposition on which my discussion depends, that his theory can illuminate contemporary constitutional issues. Lopez, the 1994 elections, and the Contract With America indicate that we might be in a new constitutional moment. But, Ackerman argues, during and shortly after a constitutional moment, courts can do no more than provide what he calls particularistic syntheses of the present and the past.\(^{88}\) They will see recent events as "the culmination of something concrete and particular."\(^{89}\) As those events recede into memory, the details of the particular struggles that became crystallized in the constitutional moment fade, thereby enabling judges to provide the appropriate comprehensive synthesis.\(^{90}\)

I have already suggested that Ackerman's skepticism may well be appropriate, by offering alternative middle-level characterizations of the present considered as a constitutional moment. If a new constitutional regime emerges in the next decade, perhaps after a triggering election, will it differ from the present one in the government's scope or in its structure?

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86. *Id.* at 141.
87. See Ackerman, supra note 46, at 528-29 ("By re-presenting the constitutional meanings of the past, and giving them modern significance in concrete cases, the courts hold up a mirror to the present generation . . . . By focusing attention on a reflective understanding of the past, the Court encourages a more reflective stance from present-day constitutional movements."); cf. Lipkin, supra note 29, at 354 n.112 ("To interpret the past, one must interpret it terms of the present and the future.").
88. ACKERMAN, supra note 6, at 97.
89. *Id.*
90. I doubt that *Lopez* can be understood as an ordinary revision of the post-New Deal synthesis, resulting from the fact that newer Justices see the New Deal receding even farther into the distance. Such an account of *Lopez* would leave unexplained why a revision of the synthesis is appropriate, or what its content ought to be.
A. Recharacterizing the New Deal

The immediate reaction to *Lopez* and other cases in the 1994 Term was that they foreshadowed a repudiation of the New Deal constitutional settlement. In particular, they appear to have required a sharp reduction in the national government’s scope. I suggest, however, that the present constitutional moment, if it is one, may concern that government’s structure more than its scope.91

One version of the constitutional synthesis arrived at several decades after the New Deal is that the Constitution required the national government to exercise its expansive powers (acquired during the New Deal constitutional moment) in the service of individual rights (defined as a special constitutional concern at the Founding and during Reconstruction). Cass Sunstein, for example, stresses the description in *West Coast Hotel v. Parrish*92 of low wages as “a subsidy for unconscionable employers.”93 He argues that in a constitutional regime that combines expansive national powers and individual rights with that understanding of private decisions, the conclusion that the government must act to remedy these “abuses,” as the Court called them, flows naturally.

Some aspects of Ackerman’s account of *Brown v. Board of Education*94 and *Griswold v. Connecticut*95 fit with this broad understanding of the post-New Deal settlement. The Supreme Court is itself an institution of the expansive and activist national government. *Brown* and *Griswold* show the national government acting aggressively, and by what the Court claimed was constitutional compulsion, to protect individual rights.96

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92. 300 U.S. 379 (1937).
93. SUNSTEIN, supra note 62, at 50.
95. 381 U.S. 479 (1965).
96. I think it worth noting that Ackerman’s defense of *Griswold*, which is more innovative than his defense of *Brown*, is, as I read it, quite tentative. His final words on the case are, “Granted, when the Founders thought about personal freedom they used the language of property and contract; given the New Deal repudiation of this language, doesn’t the language of privacy provide us with the most meaningful way of preserving these Founding affirmations of liberty in an activist welfare state?” ACKERMAN, supra note 6, at 159. I do not regard this is a purely rhetorical question, but as an invitation to critics to provide an alternative synthesis of the New Deal and Founding constitutional moments.
Elsewhere, Ackerman offers a narrower and more traditional understanding of the immediate aftermath of the New Deal transformation. After 1937, the Court "finally accepted" "an activist, regulatory state . . . as an unchallengeable constitutional reality." The national government, that is, was permitted—but not required—to act. But, Ackerman argues, this understanding does not fully synthesize the New Deal with Reconstruction. That occurred in *Carolene Products Co. v. United States*, where the Court, in "[t]he text," as Ackerman puts it, "denies once again that activist intervention into the economy endangers fundamental constitutional values," but in footnote 4 "proposes a new area of life as the centerpiece of egalitarian concern . . . [] the structure of politics." The courts would ensure the fair operation of the political system and then validate its outcomes.

The Court abandoned the broader version of the post-New Deal synthesis, if it ever had adopted it, in the 1970s. By treating public assistance laws as social and economic legislation subject to low-level rationality review, the Court rejected arguments that the New Deal settlement, understood in light of our entire constitutional history, required the government to provide minimum guarantees of individual welfare.

For two decades, constitutional scholars have been comfortable with the proposition that the New Deal settlement did not require affirmative legislative action to protect individual rights. *Adarand Constructors, Inc. v. Pena* shifts the ground entirely. Now, the government is not even permitted to exercise its power to promote one legislatively determined set of individual rights. This might not be quite so striking but for the fact that the rights at stake were those at the heart of the Reconstruction constitutional transformation. This is not to say that Congress lacks power to define any rights related to race, although I believe a credible legal case can be made that *Adarand* casts doubt on Congress's power to ban

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97. ACKERMAN, *supra* note 6, at 40.
98. 323 U.S. 18 (1944).
99. ACKERMAN, *supra* note 6, at 120.
100. *Id.* at 128.
101. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (holding that a social welfare statute does not violate the Equal Protection Clause if it has some reasonable basis); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973) (refusing to analyze the Texas *ad valorem* tax on property under strict scrutiny because no suspect classification was created and no constitutionally protected rights were impinged).
racial discrimination by private employers. 103 If Congress cannot define individual rights related to race, one might think, what rights can it define and then protect? 104

In this sense Lopez and Adarand are apt companion cases. Adarand denied the national government the power to protect one legislatively determined set of rights. Lopez denied it the power to advance a legislatively determined vision of the general welfare even when individual rights were not directly implicated. 105 Together, the cases might be taken to repudiate both the broad understanding of the post-New Deal constitutional synthesis, in which the national government was required to act, and a narrower understanding, in which it was permitted to act.

Such a reading of the cases poses severe difficulties within Ackerman's theory. For, according to Ackerman, the courts' job is to synthesize all our constitutional moments. They can hardly do so if one constitutional moment is best understood as rejecting an earlier one.

In a provocative paper, Sharon Swingle suggests that we can continue to understand the Court's recent decisions within Ackerman's theory by recharacterizing the New Deal constitutional moment. 106 The recharacterization, in turn, leads to a different understanding of the Court's decisions. Instead of dealing with the national government's scope, they deal with its structure.

According to Ackerman, in the immediate aftermath of a constitutional moment, the courts provide what he calls a particularistic synthesis. In the early 1940s, the justices understood what had happened in 1937 as the triumph of the New Court over

103. Such statutes are facially neutral statutes with a disparately favorable impact on racial minorities, an impact ordinarily intended by the legislature. One can read Adarand to subject such statutes to strict scrutiny: Under Washington v. Davis, facially neutral statutes with a disparate adverse impact on racial minorities, intended by the legislature, are subject to strict scrutiny. See Washington v. Davis, 426 U.S. 229 (1976). According to Adarand's principle of "consistency," under which the standard of review "is not dependent on the race of those burdened or benefited by a particular classification," 115 S. Ct. at 2110, strict scrutiny should be applied to facially neutral statutes with an intended beneficial impact on racial minorities (I am indebted to L. Michael Seidman for his help in getting me to see this point.).


105. One might note here that crime-control measures can sensibly be defended on the ground that they protect the individual rights to life and liberty of law-abiding people.

106. Swingle, supra note 91.
the Old Court, a repudiation of what they understood to be judicial activism on behalf of an order that had lost legislative power but retained allies in the courts. Relying on their recollection of the events immediately surrounding the crisis of 1937, the justices' first synthesis was a general theory of judicial restraint, articulated most forcefully by Felix Frankfurter.

Even at the time, however, they understood the synthesis of the New Deal with the Founding and Reconstruction in somewhat broader terms. The theory of judicial restraint did not float freely, independent of concern for other government institutions. Rather, the justices justified it on the ground that legislative decisions generally deserved respect because they were the product of democratic processes. In Ackerman's own account, Carolene Products is the key. Judicial restraint was justified as part of a democratic system, but if democracy functioned badly because obvious prerequisites like free access to the ballot box were absent, the reason for restraint disappeared.

The jurisprudence of Carolene Products focused on what I have called formal obstacles to democratic decision-making. The next stage in the synthesis expands the focus to include informal obstacles. Swingle suggests that Adarand and Lopez concern such obstacles. John Hart Ely, the modern expositor of a Carolene Products approach, defended affirmative action programs on the ground that they involved whites imposing disadvantages on themselves. Understanding the politics of affirmative action differently, Justice Scalia saw it as the product of interest group deals benefiting some African Americans at the expense of working-class whites. Adarand shows that the Court agrees. Interest group deals as such are hardly defects in democracy, but, on this version of the post-New Deal synthesis, they do threaten to generate public policy that a majority would in fact repudiate. Swingle argues persuasively that the Court has attempted to domesticate what it sees as the pathologies of interest group politics by confining the

107. Tushnet, supra note 70, at 72-73.
108. Swingle, supra note 91, at 34-45.
110. Antonin Scalia, The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race", 1979 Wash. U. L.Q. 147, 147 (suggesting that the Supreme Court decisions on affirmative action seem to be "tied together by threads of social preference and predisposition").
scope of interest group politics to "social and economic interests." Similarly, Swingle argues, the statute invalidated in *Lopez* resulted from a defect in democratic decision-making because the Gun-Free School Zones Act allowed members of Congress to claim credit for fighting street crime when substantive federal legislation has little effect on such crime.  

This account of the post-New Deal synthesis arguably deepens the Roosevelt Court's concern for ensuring that public policy results from a well-functioning democratic system while preserving the products of such a system from aggressive judicial review. At the same time, it seems somewhat divorced from the realities of the Court's decisions, and perhaps unnecessarily apologetic in constructing a rationale for decisions that may be indefensible. Conceding that the post-New Deal Court might properly be understood as attempting to police the operation of a deeply democratic system, we might wonder whether the defects the Court purports to have identified, on this reading, are either real defects or the ones deserving its most urgent attention. For present purposes, I think it worth noting only that this is a question that arises within Ackerman's framework, and does not make the framework itself any less interesting.

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111. Swingle, *supra* note 91, at 34-42; *see also* Miller v. Johnson, 115 S. Ct. 2475, 2490 (1995) (referring to "the fractured political, social, and economic interests within the Eleventh District's black population").

112. Swingle, *supra* note 91, at 42-45. As Vicki Jackson pointed out to me, such provisions also provide opportunities for federal prosecutors to take over some high profile cases without being responsible for prosecuting the more routine cases that have greater impact on the way in which people experience crime. *See also* New York v. United States, 505 U.S. 144, 161-66 (1992) (describing diffusion of political responsibility when Congress "commandeers" state legislatures).

113. In this, the argument bears an uncomfortable resemblance to the accounts of *National League of Cities v. Usery* in Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 Harv. L. Rev. 1065 (1977), which argues that the Court may not be restricting personal rights, but that it may be taking a step signifying the recognition of affirmative rights necessary to a constitutional order, and Frank Michelman, *States' Rights and States' Roles: Permutations of Sovereignty in National League of Cities v. Usery*, 86 Yale L.J. 1165 (1977), which argues that "the NLC decision proves unsupportable except as it depends on a perception that 'states as states' under the Constitution are imbued with affirmative duties towards their citizens." *Id.* at 1194.

114. I believe that the same can be said about the almost universal skepticism critics have expressed about Ackerman's account of *Brown v. Board of Education* and *Griswold v. Connecticut*. *See, e.g.*, Kent Greenawalt, *Dualism and Its Status*, 104 Ethics 480, 494 (1994); Klarman, *supra* note 29, at 765, 785-91 (arguing that Ackerman does not simply describe our regime, but prescribes it); Sandalow, *supra* note 35, at 334-36 (suggesting
The Court's present position, as I have constructed it, remains concerned with constitutional structures rather than with the government's scope. Does this account of the Court's recent decisions imply that the Court has accepted the proposition that we are now in a new constitutional moment? In one sense, no: all the Court has done is recharacterize the post-New Deal synthesis. In another sense, yes: the reason for the recharacterization is to allow the Court to synthesize the 1994 elections and the Contract With America with the New Deal's constitutional transformation.

B. Characterizing the Present

My argument so far has been highly speculative, as it must be given the uncertainties about the significance of \textit{Lopez} and the events and decisions with which I have connected it. I will conclude on an even more speculative note, returning to the question of government's scope. Enthusiasts of state and local power have heralded \textit{Lopez} and some aspects of the Contract With America as embodying a well-deserved devolution of power from nation to state and local governments.

Despite the clear tenor of most discussions of recent political developments, I suggest that the present constitutional moment, if it is one, may involve the evaporation rather than devolution of public power.\textsuperscript{115} 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.\textsuperscript{116} As British scholar James Anderson puts it, "sovereignty, having been 'bundled' into modern territorial states, is now

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\bibitem{Ackerman} Ackerman has not resolved the question of whether the individual freedom of \textit{Griswold} includes sexual freedom). Although, as indicated above, see \textit{supra} text accompanying notes 53-55, I find elements of Ackerman's account more plausible than many of his critics do, one could fully accept the criticisms and nonetheless think Ackerman's theory worthwhile. The accounts of those cases are, after all, only particularized case-studies within Ackerman's framework, and even the creator of such a framework may do better at the general level than on a more particularized one.

\bibitem{Strange} The term \textit{evaporation} is used in Susan Strange, \textit{The Defective State}, \textit{Daedalus}, Spring 1995, at 55, 56, (suggesting that state authority has leaked away or evaporated), although I had come up with it before reading her article.

\bibitem{Cable} For a thoughtful overview of these and related developments, see Vincent Cable, \textit{The Diminished Nation-State: A Study in the Loss of Economic Power}, \textit{Daedalus}, Spring 1995, at 23, 23-24, which notes that "the nation-state has 'lost' power to regional and global institutions and to markets but has also acquired new areas of control in order to promote 'national competitiveness.'" The idea here is related to, but different from, the proposition that the current moment involves a reduction in the national government's scope. Power that evaporates is actually transferred to private institutions.

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I am quite tentative here, and so offer only a short list of developments suggesting the evaporation of public power.

(1) The increased pace of deregulation: Deregulatory efforts on the national level might leave matters to state law. Recently, however, deregulatory proposals have been combined with broader forms of preemption. As a result, neither national nor state governments can displace the privately negotiated solutions worked out by employers and employees, or by sellers and buyers. The best examples come from the quite powerful preemptive effect of federal pension law, but recent decisions regarding consumer protection law have a similar though somewhat weaker effect. These decisions preserve what might be called the background state common law, but even here efforts to deregulate by displacing common-law rules of medical malpractice by statute and punitive damages both by statute and constitutional interpretation suggest the transfer of power from the public to private actors.

(2) The transformation of the "social safety net": Public assistance programs will soon take the form of block grants of federal funds to state authorities. On their face these represent only the devolution of national power. If, as seems likely, state governments

118. A recent court of appeals decision invalidating a federal statute authorizing the Secretary of the Interior to acquire property to be held in trust for Indians as an unconstitutional delegation of legislative power, South Dakota v. Department of Interior, 69 F.3d 878 (8th Cir. 1995), may be reconciled with this argument if we assume that Congress will fail to replace the statute with one providing guidance to the Secretary. In that event, Native Americans will be left to their own devices in their efforts to obtain a secure economic basis for their communities.
119. For an overview, see David Gregory, The Scope of ERISA Preemption of State Law: A Study in Effective Federalism, 48 U. Pitt. L. Rev. 427 (1987), which suggests that ERISA preemption of state employee benefit law is extensive. Id. at 429.
121. See, e.g., American Airlines, Inc. v. Wolens, 115 S. Ct. 817, 820 (1995) (holding that the Airline Deregulation Act preempts "state-imposed regulation" but allows "court enforcement of contract terms set by the parties themselves"); see also Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031 (1992) (concluding that a taking occurs when all economically viable use is destroyed unless owner's activity is barred by "common-law principles" of nuisance).
122. By this formulation, I do not mean to deny the standard Legal Realist point that the powers exercised by private actors ultimately rest on public decisions to allocate power to those actors.
find themselves fiscally constrained by a combination of balanced-budget requirements in state constitutions and a political system that makes tax increases extremely difficult to enact, the social safety net will unravel further.\textsuperscript{123} Private charity will assist some. Off-the-books employment at sub-minimum wages may help others. Still others will be left to their own resources. In all its variants, the new social safety net relies on private actors rather than public power.

(3) \textit{Constitutional innovations in international trade}: The so-called globalization of the U.S. economy has already generated some constitutional innovations.\textsuperscript{124} Laurence Tribe argued, for example, that "the legal regime put in place by the Uruguay Round [of trade negotiations] represents a structural rearrangement of state-federal relations of the sort that requires ratification . . . as a Treaty."\textsuperscript{125} No such ratification occurred.

Tribe's position rests on a contestable interpretation of the Constitution, and the process by which the United States became part of the World Trade Organization (WTO) may not be a constitutional innovation at all. More interesting, perhaps, is a proposal that emerged during the deliberations over the WTO. Concerned that WTO decisions would unduly affect U.S. sovereignty, Senator Robert Dole has introduced the WTO Dispute Settlement Review Commission Act.\textsuperscript{126} The Commission would review reports by WTO dispute settlement panels to determine whether the WTO has "exceeded its authority . . . added to the obligations of or diminished the rights of the United States . . . acted arbitrarily or capriciously . . . [or] deviated from the applicable standard of review."\textsuperscript{127} If the Commission makes three such findings in a five-year period, Congress may enact a resolution withdrawing the United States from the WTO.

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\textsuperscript{124} Ackerman and Golove examine what they regard as the constitutional innovations associated with the manner in which NAFTA became law. Ackerman & Golove, supra note 18. For a contrary view, see Laurence Tribe, \textit{Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation}, 108 \textit{Harv. L. Rev.} \text{1221} (1995), which rejects the "free-form" method of Ackerman and Golove's analysis of NAFTA. \textit{Id.} at 1227.
\textsuperscript{127} \textit{Id.}
\end{footnotes}
Senator Dole’s proposal is unremarkable except for the way in which the Commission is to be composed. Its members are to be five federal circuit court judges, appointed by the President after consultation with the congressional leadership.128 This may well go beyond Mistretta v. United States.129 There, the United States Sentencing Commission could plausibly be described as doing something judicial. The Sentencing Reform Act of 1984 revised the old sentencing process, and, as Justice Blackmun put it, the Commission aggregated in a single body the sentencing power previously dispersed throughout the federal judiciary.130

In one sense, the WTO Review Commission would be acting judicially: Its charge would be to examine whether the WTO’s panels have acted in a manner consistent with the law they are to administer. And presumably the Act proposes to use federal judges because they are more likely than any other appointees to be free from the pressures of interest groups associated with trade disputes. The relation between the Review Commission’s reports and congressional action, however, evokes the specter of Hayburn’s Case,131 where the Justices said that they could not be required to perform extra-judicial activity. Such activity has come to be defined as activity subject to revision by the President or Congress.132 If the proposed Act becomes law, we may have to rethink some fundamentals about federal courts.

International trade law has already produced a constitutional innovation in the dispute settlement procedure under the United States-Canada Free Trade Agreement, carried over into NAFTA.133 United States law provides for trade sanctions if a

128. Id.
130. Id. at 387.
131. 2 U.S. (2 Dall.) 409 (1792).
132. For a recent reaffirmation of this principle, see Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1457 (1995), which notes that “Congress can always revise the judgment of Article III courts in one sense. When a new law makes it clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.”
133. Many commentators have discussed these provisions. See, e.g., Jim C. Chen, Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement, 49 WASH. & LEE L. REV. 1455, 1457 (1992) (concluding that the free trade agreement violates both Article III and the Appointments Clause of Article II); Demetrios G. Metropoulos, Constitutional Dimensions of the North American Free Trade Agreement, 27 CORNELL INT’L L.J. 141, 142 (1994) (concluding that the binational review system violates Article III); Thomas W. Bark, Note, The Binational Panel Mechanism for Reviewing United States-Canadian Antidumping and
foreign trade practice causes "material injury" to U.S. producers. The question of whether a trade practice does cause such an injury is a question of U.S. law: what do the statutory terms mean, what did Congress intend in enacting them, and the like. Under the Trade Agreement and NAFTA, however, this question of U.S. law is not resolved by a U.S. court with judges appointed under Article III. Instead, it is to be determined finally and unreviewably by a binational panel, composed of two U.S. members, two Canadian (or Mexican) members, and a fifth member chosen by those four.134

Again, there is nothing remarkable about judges without Article III status determining U.S. law. I suspect that foreign judges do so with some regularity. What is remarkable is finding a decision-maker appointed under the authority of the United States determining questions of federal law without any possibility of review by an Article III judge. The constitutionality of such an arrangement has been one of the most contentious issues in the law of federal courts, with a rather strong consensus that such unreviewability is of dubious constitutionality.135

As with the proposed WTO Review Commission, the exigencies of globalization may have induced the resolution of constitutional questions that earlier generations found extremely difficult. In a decade or so, U.S. constitutionalists may look back and see that a constitutional transformation occurred in the 1990s. "Globalization," according to a British observer, "is largely private sector driven. It represents . . . a shift in the locus of decision-making not only from the nation-state to transnational actors but also from

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135. For citations to the literature, see ERWIN CHEMERINSKY, FEDERAL JURISDICTION 172-73 nn. 3-6, 181-84, 186 n. 1 (2d ed. 1994).
national governments to the private sector."\textsuperscript{136} It would have been accompanied by the transfer of national power to private entities in the United States and elsewhere. As British political economist Susan Strange puts it, "[government] authority has leaked away, upwards, sideways, and downwards. In some matters, it seems even to have gone nowhere, just evaporated."\textsuperscript{137}

In Ackerman's schema, however, the question is whether the evaporation of national power can be connected to popular sovereignty in some way. If these developments connected to international trade are rationalized by interpreting the Constitution to accommodate them, constitutional development would occur in the normal way: A prior act of popular sovereignty—Article III, the Constitution's treaty-making provisions—licenses the courts to modify constitutional arrangements without a present act of popular mobilization.

Ackerman's schema is designed to connect large-scale constitutional transformations—regime-shifts—to popular mobilizations. Ackerman's discussion of the transformation of foreign policymaking authority after World War II acknowledges that a large-scale change did occur.\textsuperscript{138} The popular mobilization during the War created the conditions for consensual endorsement of that change. I find Ackerman's account unpersuasive as an interpretive account of national identity. Klarman's assessment of the accretion of presidential power, for example, seems more accurate. But, if Ackerman is wrong, we may already have experienced a regime-transformation without popular mobilization. That might well make impossible a celebratory account of national identity. But it may be what is now occurring, or, more precisely, what is continuing to occur. Perhaps in a few decades, constitutionalists will call the 1990s a constitutional moment that occurred behind the backs of the People. That conclusion, of course, disconnects regime-transformation from popular sovereignty. It may nonetheless better characterize modern constitutional developments than Ackerman's theory.

These developments open up a deeper question about Ackerman's theory. As I have argued, its normative force comes from its focus on the construction of an American national identity,

\textsuperscript{136} Cable, supra note 116, at 37.
\textsuperscript{137} Strange, supra note 115, at 56; see also Cable, supra note 116, at 38 (concluding that "[n]ational economic sovereignty is being eroded, slowly and differentially, not eliminated").
\textsuperscript{138} Ackerman & Golove, supra note 18, at 689-96.
because supra-individual identity is a basic human good. Why, however, is the most important supra-individual identity a national identity? Globalization suggests that we might more profitably think about the constitutional implications of transnational identities.\textsuperscript{139}

III. CONCLUSION

It is too early to tell whether something happened in the 1994 Term of the Supreme Court.\textsuperscript{140} If it did, however, I believe that Ackerman's theory of constitutional moments may provide the best account. In any event, I hope to have shown that Ackerman's theory sheds light on recent constitutional developments even if it does not fully explain them.

\textsuperscript{139} Such identities can be those commonly discussed in contemporary identity politics—race, gender, sexual orientation—which are, to their proponents, significantly transnational. Or, they might be transnational identities of an earlier time—the international working class, for example.

\textsuperscript{140} I do here intend the allusion to Joseph Heller's\textit{Something Happened}, where the reader does not learn what happened until well into the book. See Joseph Heller, \textit{Something Happened} (1974).