Constitutional Fidelity and the Commerce Clause: A Reply to Professor Ackerman

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CONSTITUTIONAL FIDELITY AND THE
COMMERCE CLAUSE:
A REPLY TO PROFESSOR ACKERMAN
Elizabeth C. Price†

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If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed.1

—George Washington's Farewell Address, Sept. 17, 1796

INTRODUCTION

Imagine, if you will, the following amendment to Article I, Section 8 of the Constitution:

The Congress shall have Power to promote and regulate the health, safety and general welfare of the people.

Such a "Twenty-Eighth" Amendment would, in effect, give to Congress something the Founders' careful enumeration of powers in Article I, Section 8, clearly did not envision: a general police power. Imagine further that this Twenty-Eighth Amendment is not reduced to words to which you can refer (such as those quoted above), but is instead implicit in a series of Supreme Court decisions which purport not to alter the constitutional text but merely to reinterpret it. Thus, although the Court does not explicitly acknowledge its role in ratifying this implicit Twenty-Eighth Amendment (and in fact, likely would deny it if confronted with the charge),2 its decisions have nonetheless legitimately amended the written Constitution.

"How is it," the astute reader may ask, "that without adherence to the procedures of Article V—i.e., explicit approval by two-thirds of

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2. See infra Part I. A.
Congress (or an amendment-proposing convention) and ratification by three-fourths of the states—such a Twenty-Eighth Amendment could be a legitimate part of our Constitution?" In order to answer this question, it has become fashionable, in recent years, for constitutional scholars to argue that the Constitution can be "implicitly amended" by means other than that provided by Article V. Perhaps the most notable and forceful proponent of this implicit amendment theory is Professor Bruce Ackerman, who posits that the Constitution can be (and indeed, has been) implicitly amended by a complex series of political events which culminates in an agreement among the three branches of the national government that the Constitution needs to be altered—although on paper it still looks the same.

Importantly, because any such implicit amendment is purported to

3. Article V states:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V.

4. See generally BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) [hereinafter FOUNDATIONS]; see also Bruce A. Ackerman, The Storrs Lectures: Discovering the Constitution, 93 YALE L.J. 1013 (1984) [hereinafter Storrs Lectures]; Bruce Ackerman, Higher Lawmaking, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 63 (Sanford Levinson ed., 1995) [hereinafter Higher Lawmaking]; accord Kent Greenawalt, Dualism & Its Status 104 ETHICS 480, 481 (1994) ("The text of the Constitution, with its formal amendment process requiring federal and state involvement and substantial majorities provides the ‘classic formula’ for higher lawmaking. However, despite common legal rhetoric to the contrary, the most important constitutional changes have not occurred according to that formula."); Stephen M. Griffin, Constitutionalism in the United States: From Theory to Politics, in RESPONDING TO IMPERFECTION: THE THEORY & PRACTICE OF CONSTITUTIONAL AMENDMENT 37, 50 (Sanford Levinson ed., 1995) ("[T]he federal Constitution underwent massive changes in the twentieth century, but... this happened, in the main, through non-Article V means."); Sanford Levinson, How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change, in RESPONDING TO IMPERFECTION: THE THEORY & PRACTICE OF CONSTITUTIONAL AMENDMENT 13, 26 (Sanford Levinson ed., 1995) ("Central to understanding the practice of American constitutionalism... is recognition, and concomitant theoretical assimilation, of the extent to which the Constitution has indeed been amended—been the subject of political inventiveness—by means other than the adoption of explicit text.").
be an *amendment* and not a mere interpretation, Professor Ackerman asserts that future generations of "We the People"—Justices, scholars and citizens alike—should pledge our fidelity to such implicit amendments to the same extent as the written Constitution.\(^5\)

Sound far-fetched? It should not. Broad judicial construction of the power to regulate commerce,\(^6\) particularly since the New Deal, has, in the eyes of many (if not most) legal scholars, effectively given Congress a general police power.\(^7\) Thus, although invisible to the untrained

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5. See *FOUNDATIONS*, *supra* note 4 at 288-89. Ackerman states:

[Leading government officials] must pledge to remain faithful to the new constitution solutions even when the People turn their minds to other public and private pursuits. No matter how powerful officials may be, they are not to allow the pressures of normal politics to erode the meaning of these constitutional solutions. And it is the special obligation of lawyers and judges to remind the powers that be that they are only the People's servants, not the spokesmen for the People themselves—unless, of course, the political leadership wishes once again to take the higher lawmaking path to win the mobilized citizenry's consent to another exercise in fundamental re-vision.

Id.

6. See U.S. CONST. art I, § 8, cl. 3.

7. See Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 253 (1996) ("In the 1930s the powers of the national government were expanded in an extraordinary way, in favor of a system that exercised something close to general police powers."); Lee Epstein & Thomas G. Walker, *Constitutional Law for a Changing America: Institutional Powers & Constraints* 316 (1992) ("Justice Clark's opinion [in *Heart of Atlanta Motel v. United States*] gives Congress broad powers to use the Commerce Clause as authority to regulate moral wrongs that occur in interstate commerce. In this way, the Commerce Clause became one of the most powerful weapons in the federal government's arsenal not only to regulate the economy but also to use as a police power.") [hereinafter Epstein & Walker]; Jesse Choper, *Did Last Term Reveal "A Revolutionary States' Rights Movement Within the Supreme Court?*," 46 CASE W. RES. L. REV. 663, 669 (1996) ("[S]ome of the powers given, particularly the Commerce Clause, at least as interpreted, are broad enough to allow Congress to regulate virtually all aspects of human affairs."); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987) ("My conclusion is clear enough. I think that the expansive construction of the [Commerce] Clause accepted by the New Deal Supreme Court is wrong, and clearly so . . . . The commerce power is not a comprehensive grant of federal power. It does not convert the Constitution from a system of government with enumerated federal powers into one in which the only subject matter limitations placed on Congress are those which it chooses to impose upon itself.") [hereinafter Epstein]; Joseph Lesser, *The Course of Federalism in America—An Historical Overview*, in *FEDERALISM: THE SHIFTING BALANCE* 1 (Janice C. Griffith ed., 1989) ("The reinterpreted Commerce Clause has provided Congress with a national police power. When used in conjunction with the Supremacy Clause, this police power can preempt any state regulation that deals with a subject on which Congress has acted."); Donald H. Regan, *How to Think About the Federal Commerce Power & Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 554 (1995) ("[W]e have a collection of doctrinal rules that, if we take them seriously, allow Congress to do anything it wants under the commerce power.").
eye, the Twenty-Eighth Amendment may exist, just as surely as if it had been penned by the Framers themselves. There are, of course, those who disagree that the expansion of the commerce power is tantamount to an implicit constitutional amendment, and instead insist that the expansion merely reflects the natural evolution of a vague text to meet the challenges of a changing economy and society. 8 Although this idea will be explored, my point in this article is not to take sides between these two views, but rather to examine one view—namely, Professor Ackerman’s contention that the New Deal Commerce Clause decisions did amount to an implicit amendment—and determine whether, assuming arguendo he is correct, his theory of implicit, extra-Article V amendment is normatively desirable.

Why does Professor Ackerman insist that the New Deal Court Commerce Clause jurisprudence is tantamount to an implicit constitutional amendment rather than merely an altered interpretation? Why, in short, does it matter whether we characterize the New Deal Court’s Commerce Clause decisions as an implicit amendment rather than merely interpretive evolution? After all, Professor Ackerman argues, his theory of implicit constitutional amendment is intended merely as an interpretive theory, not a normative one. 9 The answer is that it does matter; it matters a great deal. By labeling the New Deal Court “switch in time” an implicit constitutional amendment rather than simply an altered interpretation, Professor Ackerman effectively insulates the New Deal Court’s Commerce Clause jurisprudence from future, judicially-instigated alteration. Thus, under Professor Ackerman’s thesis, if the present Supreme Court were to change its mind about the broad New Deal vision of the commerce power, and such a change were not the culmination of the same sort of “higher lawmaking” which preceded the New Deal Court’s “switch in time,” such a change would be a countermajoritarian usurpation of the political will of “We the People” and hence, illegitimate. 10 It would be countermajoritarian, furthermore, be-

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

10. See FOUNDATIONS, supra note 4, at 284. Ackerman states that [T]here is danger involved in the informality of the process by which the New Deal translated constitutional politics into constitutional law. Given the precedent
cause Professor Ackerman’s thesis asserts that implicit amendments such as the Twenty-Eighth Amendment are the product of majoritarian political will—"higher lawmaking"—as evidenced by political events preceding the implicit amendment’s adoption.\footnote{11}

Furthermore, if we accept Professor Ackerman’s theory, our acceptance says something about the concept of constitutional fidelity which may—indeed should—make us uncomfortable. Specifically, to what should we, as citizens, jurists and lawmakers, pledge our fidelity if we embrace Professor Ackerman’s theory? The ineluctable answer is that, if we accept that there may be (or are) legitimate, implicit constitutional amendments, the Constitution to which we pledge fidelity necessarily extends beyond the written text to inchoate, unwritten policies, the outer contours of which can be defined only by the subjective divination of unelected federal judges.

We should consider the possibility that Professor Ackerman’s theory, even if only descriptive or interpretive, may do more harm to the Constitution than good. Although one may wholeheartedly agree with the outcome of New Deal decisions and therefore desire to prevent future, perhaps more conservative, Courts from undoing the perceived progress made by the New Deal Court, entrenching those decisions by imparting upon them the status of an implicit constitutional amendment may be the undoing of the notion of constitutional fidelity or, indeed, the notion that there is anything readily ascertainable to which we can pledge fidelity at all.

In addition to the constitutional erosion which may result from a legitimation of the notion of implicit constitutional amendments, there is an additional danger posed by Professor Ackerman’s alternative amendment procedure. Specifically, Professor Ackerman’s alternative amendment procedures—both implicit and explicit—delete any role for the states in the constitutional amendment process. If, as Professor Ju-
dith Shklar says, the Constitution is essentially a reflection of our fears about government (and derivatively, ourselves),\(^\text{12}\) it follows that, by incorporating the concepts of supermajoritarianism and federalism into Article V, our Founders erected a framework for minimizing their well-founded fear of regional prejudice and majoritarian passion. Thus, any constitutional amendment procedure that fails to require state input or supermajoritarianism may leave our individual rights and our union more vulnerable to usurpation and disintegration.

Part I of this Article sets forth Professor Ackerman's theory of implicit constitutional amendment. Part II focuses on the New Deal Court's infamous "switch in time" and attempts to discern the contours of the implicit Twenty-Eighth Amendment "ratified" during this era. Part III offers an extensive critique of Professor Ackerman's implicit amendment theory, applying the theory to the implicit Twenty-Eighth Amendment and analyzing its effect on the concept of constitutional fidelity, including the salient values of supermajoritarianism and federalism. Part IV looks at recent decisions that may adumbrate second thoughts about the legitimacy of the implicit Twenty-Eighth Amendment. Specifically, I focus on the recent Supreme Court decisions of United States v. Lopez,\(^\text{13}\) Seminole Tribe of Florida v. Florida,\(^\text{14}\) Idaho v. Coeur d'Alene Tribe of Idaho\(^\text{15}\) and Printz v. United States,\(^\text{16}\) in which the Court, for the first time since the New Deal, has indicated that there are enforceable limits on the congressional commerce power. I shall explore the notion that the Lopez-Seminole Tribe/Coeur D'Alene-Printz triad may signal a judicial retrenchment from the New Deal Court's implicit Twenty-Eighth Amendment and a re-commitment to the constitutional text's vertical division of powers,\(^\text{17}\) possibly marking the beginning of a new era of constitutional fidelity and a repudiation of Professor Ackerman's theory of legitimate implicit constitutional amendment. These recent decisions may suggest that the steady


\(^{13}\) 514 U.S. 549 (1995).


\(^{15}\) 117 S. Ct. 2028 (1997).

\(^{16}\) 117 S. Ct. 2365 (1997).

\(^{17}\) But see Mark Tushnet, *Living in a Constitutional Moment?* Lopez & Constitutional Theory, 46 CASE W. RES. L. REV. 845, 869 (1996) ("[T]he present constitutional moment, if it is one, may involve the evaporation rather than the devolution of public power. That is, power may not be flowing from Congress to state and local governments, but rather going into thin—air or, more precisely, to private institutions.").
march toward nationalism begun by the New Deal Court's infamous "switch in time" has gone too far—has led us too far astray from the constitutional text, past the boundary of reasonable "interpretation" and into the realm of an implicit constitutional amendment which will no longer be tolerated as legitimate. Thus, a judicial "repeal" of the implicit Twenty-Eighth Amendment may be underway.

I. PROFESSOR ACKERMAN'S THESIS

Professor Ackerman contends that "intellectually serious people" should reject the idea that the written, "ceremonial" Constitution is the only legitimate source of constitutional law. More specifically, he asserts that, in certain rare moments in history, "We the People" become sufficiently mobilized to bring about an implicit amendment to the Constitution by forcing all three branches of the national government to agree upon a new constitutional structure. These rare moments of mass mobilization are deemed "higher lawmaking," and are distinguished from everyday "normal lawmaking," by the fact that they are periods of heightened political consciousness, in which average Americans speak up and tell the national branches of government that change is needed. This two-track conception of lawmaking, which Ackerman terms "dualism," permits him to legitimate judicially-instigated constitutional turnabouts and avoid the "countermajoritarian difficulty" seen by monists such as Alexander Bickel and John Hart Ely, who acknowledge only a single-track of lawmaking (i.e., normal lawmaking only). Thus, Ackerman posits that when the Court "speaks during periods of normal politics, [we must reject the idea that] we can hear the genuine voice of the American people. Under such normal political conditions, the political will of the American people cannot be 'represented' by

18. FOUNDATIONS, supra note 4, at 35.
19. Storrs Lectures, supra note 4, at 1056.
20. See FOUNDATIONS, supra note 4, at 6, 285; Storrs Lectures, supra note 4, at 1022; Higher Lawmaking, supra note 4, at 65.
21. FOUNDATIONS, supra note 4, at 7-8. Ackerman states that monists believe that "when the Supreme Court or anybody else, invalidates a statute, it suffers from a 'countermajoritarian difficulty' which must be overcome before a good democrat can profess satisfaction with this extraordinary action." Id. at 8. Professor Bickel is perhaps the Dean of constitutional theorists who believe that judicial review of legislative acts is undemocratic. See generally ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962). On Ely's views, see generally JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105-83 (1980).
means of any such naive synecdoche.”

By contrast, when “We the People” act in the plane of “higher lawmaking,” Ackerman contends that a Court which then issues an opinion to reflect popular desires is not acting undemocratically (i.e., in a countermajoritarian fashion) but, to the contrary, is acting quite democratically.

In order to identify precisely when “We the People” are acting on the higher lawmaking track, Ackerman identifies a four-step process which must take place. First, a constitutional impasse must occur, in which one branch of the national government struggles with one or more of the other branches for the right to exercise a power not given it by the written Constitution. Second, there must be a national “triggering” election in which those who support the constitutional alteration and those who oppose it fight for hearts and minds of “We the People.” Third, provided the election indicates that a mobilized citizenry supports the proposed changes, there will follow a challenge to the institutional legitimacy of the branch opposed to the change. And finally, the implicit amendment will be realized if the dissenting branch has a “switch in time” and changes its stance in order to save its own legitimacy.

Ackerman claims that these four phases have been satisfied—and hence, an implicit constitutional amendment (or “constitutional moment”) has occurred—only twice: (1) the ratification of the Reconstruction or Civil War Amendments; and (2) the New Deal Court’s “switch in time” with regard to the Commerce Clause. In both of

22. Storrs Lectures, supra note 4, at 1027.
23. See id. at 10. Ackerman states that “the dualist believes that the court furthers the cause of democracy when it preserves constitutional rights against erosion by politically ascendant elites who have yet to mobilize the People to support repeal of previous higher lawmaking principles.” Id. at 13. Thus, the Court may, consistent with democratic principles, strike down a law as contrary to a higher lawmaking principle until and unless the law also has the backing of a higher lawmaking movement.
24. See id.
25. FOUNDATIONS, supra note 4, at 49; see also Higher Lawmaking, supra note 4, at 75-76.
27. FOUNDATIONS, supra note 4, at 48-49.
28. Id. Ackerman does not specify whether the will of the people may be divined in a mere majority of the population as a whole. He does intimate, however, that the election must result in a “decisive victory at the polls” for the reformists, in order for the holdout branch to discern that the “people had spoken.” Id.
29. See Higher Lawmaking, supra note 4, at 72-79.
30. Id. at 79-82. Commentators have argued that additional historical periods may
these instances, he contends, both the Reconstruction Republicans and the New Deal Democrats were consciously going outside Article V to effect constitutional change, in much the same way that the Founders consciously went outside the Articles of Confederation in enacting the Constitution.31 This article will focus upon Professor Ackerman’s paradigmatic implicit amendment, the New Deal Court’s “switch in time”—the putative Twenty-Eighth Amendment.32

A. Supreme Court Precedents Addressing the Exclusivity of Article V

Before delving too deeply into the specifics of the implicit Twenty-Eighth Amendment, it is useful to consider whether the Supreme Court itself has ever consciously pondered the exclusivity (or ‘lack thereof) of Article V as a means for legitimate constitutional amendment. In 1855, in *Dodge v. Woolsey*, the Court, in exploring the breadth of the Supremacy Clause, stated that Article V was a mechanism that Americans of the founding era had consciously imposed upon themselves and future generations:

Nor does [the supremacy of the U.S. Constitution] end there. It is supreme over the people of the United States, aggregately and in

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satisfy Professor Ackerman’s four-part scheme, such as the election of 1832 and the public debate over the legitimacy of a national bank or the 1976 election and the issue of Watergate. See Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENTARY 115, 142-43 (1994) (suggesting perhaps as many as 11 such constitutional moments); Tushnet, *supra* note 17, at 859 (citing MARK TUSHNET, RED WHITE & BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 286-87 (1988)).

31. Ackerman states: [B]oth Reconstruction Republicans and New Deal Democrats [were] engaging in self-conscious acts of constitutional creation that rivaled the Founding Federalists’ in their scope and depth.... Rather than merely following the marching orders of the Federalists, both Republicans and Democrats were constitutionally creative procedurally no less than substantively—and they knew it.

FOUNDATIONS, *supra* note 4, at 44. On the alleged “illegality” of the Founding, see generally Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMMENTARY 57 (1987); see also Storrs Lectures, *supra* note 4, at 1058.

32. Professor Ackerman’s forthcoming second volume, *We the People: Transformations*, is primarily aimed at developing further his thesis with regard to the Reconstruction Amendments. Suffice it here to say that, in passing the original Reconstruction Act in March 1867, Congress required that Confederate States, as a prerequisite to readmission to the Union, ratify the Reconstruction Amendments. *See ALAN P. GRIMES, DEMOCRACY & THE AMENDMENTS TO THE CONSTITUTION 50-51 (1978).* Ackerman believes that the clash between President Andrew Johnson (who adamantly opposed the Reconstruction Amendments) and the Republican Congress (which supported them), and the intervening strong electoral victory for congressional Republicans in 1866 forced President Johnson to switch his position in order to avoid impeachment, thereby forcing Southern States to acquiesce in the ratification of the Civil War Amendments. FOUNDATIONS, *supra* note 4, at 44-47.
their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the congress of the United States, when two thirds of both houses shall propose them; or where the legislatures of two thirds of the several States shall call a convention for proposing amendments, which, in either case, become valid, to all intents and purposes, as part of the Constitution when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths of them, as one or the other mode of ratification may be proposed by Congress.33

In acknowledging that “We the People” knowingly selected an amendment process that requires that both proposal and ratification occur via representational (as opposed to direct) democracy, the Court suggests that other routes of constitutional amendment—such as public referendum or judicial fiat—would be illegitimate.34 This suggested view of Article V as an exclusive means for legitimate constitutional change appeared again in two 1920 decisions: Hawke v. Smith35 and Dillon v. Gloss.36 In Hawke, the Court was presented with the question of whether the Eighteenth (prohibition) and Nineteenth (women’s suffrage) Amendments were properly ratified by the State of Ohio, which had a provision in its state constitution requiring that all proposed amendments to the U.S. Constitution be approved by the people of Ohio in a statewide referendum.37 In holding this state constitutional provision to be antithetic to Article V, the Supreme Court stated:

The framers of the Constitution realized that it might in the progress of time and the development of new conditions require changes, and they intended to provide an orderly manner in which these could be accomplished; to that end they adopted the Fifth Article.

33. 59 U.S. 331, 348 (1855) (emphasis added).
34. Id.
35. 253 U.S. 221 (1920).
36. 256 U.S. 368 (1920).
37. Hawke, 253 U.S. at 225. The Ohio state constitutional provision in question read as follows:
The people also reserve to themselves the legislative power of the referendum on the action of the [g]eneral [a]ssembly ratifying any proposed amendment to the Constitution of the United States.

Id. The case challenging the Nineteenth Amendment is reported separately at Hawke v. Smith, 253 U.S. 231 (1920), but the Court refers to the prior Hawke case as the basis for its decision. Id. at 232.
The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

Thus, contrary to Professor Ackerman's thesis, the Hawke Court made it rather clear that Article V is an exclusive means of bringing about legitimate constitutional change.

In Dillon, the Court was asked to determine the validity of the Prohibition (Eighteenth) Amendment. Specifically, it was argued that because Congress had imposed a maximum seven-year time limit upon ratification of the Eighteenth Amendment, the proposal itself was invalid and could not thereby be legitimately ratified by the states. In holding that such a temporal limitation did not affect the validity of the amendment, the Court stated:

[T]he people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending the instrument that the amendment be submitted to representative assemblies in the several states and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the States shall be taken as a decisive expression of the people's will and be binding on all.

In so proclaiming, the Dillon Court was once again affirming the earlier suggestion in Woolsey and Hawke that Article V was the exclusive means of legitimate constitutional amendment. The Court's carefully chosen language states that "all amendments"—not just some—must be

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39. See id.
40. 256 U.S. at 370-71.
41. Id.
42. Id. at 374 (emphasis added). This language in Dillon appears to directly repudiate the extra-Article V theory of Professor Akhil Amar, who asserts that the Constitution may be legitimately amended by simple majoritarian popular referenda. See generally Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 COLUM. L. REV. 457 (1994); Akhil R. Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043 (1988).
ratified by the people "acting through representative assemblies"—not through the Congress or the Court or the President—and that "ratification by these assemblies in three-fourths of the States" would be the only legitimate way to bind the People.43

In the 1931 decision in United States v. Sprague, the Court was again asked to decide the constitutional validity of the Eighteenth Amendment, this time addressing the question as to whether the mode of ratification specified by Congress—ratification by state legislatures—was unconstitutional.44 More specifically, opponents of the Prohibition Amendment argued that the selected mode of ratification—by three-quarters of state legislatures—was unconstitutional because the Founders had intended that amendments "conferring on the United States new direct powers over individuals" must be ratified only by state conventions, not state legislatures.45 They argued that the Founders considered state legislatures to be "incompetent to surrender the personal liberties of the people to the new national government" and that, therefore, only conventions of the people themselves could properly ratify amendments depriving citizens of their personal liberties.46 In rejecting this argument, the Court stated:

The United States asserts that [Art]icle [V] is clear in statement and in meaning, contains no ambiguity, and calls for no resort to rules of construction. A mere reading demonstrates that this is true. It provides two methods for proposing amendments. Congress may propose them by a vote of two-thirds of both houses; or, on the application of the legislatures of two-thirds of the States, must call a convention to propose them. Amendments proposed in either way become a part of the Constitution when ratified by the Legislatures of three-fourths of the several States or by Conventions in three-fourths thereof....

....

The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition.

If the framers of the instrument had any thought that amend-

43. Dillon, 256 U.S. at 374.
44. 282 U.S. 716, 729 (1931).
45. Id. at 729.
46. Id. at 729-30.
ment differing in purpose should be ratified in different ways, nothing would have been simpler than so to phrase Article V as to exclude implication or speculation. The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase affecting the exercise of discretion by the Congress in choosing one or the other alternative mode of ratification is persuasive evidence that no qualification was intended.47

Again, the Court clearly assumes that Article V provides an exclusive means for legitimate constitutional amendment, concluding that the Article’s plain language does not permit alternate modes of legitimate ratification.48

More recently, in U.S. Term Limits, Inc. v. Thornton, the Court held that legislatively imposed term limits for members of Congress constituted a violation of the Qualifications Clauses of the Constitution.49 In reaching this conclusion, the Court proclaimed:

We are . . . firmly convinced that allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework. Any such change must come not by legislation adopted either by Congress or by an individual state, but rather—as have other important changes in the electoral process—through the Amendment procedures set forth in Article V. . . . In the absence of a properly passed constitutional amendment, allowing individual States to craft their own qualifications for Congress would thus erode the structure envisioned by the Framers, a structure that was designed, in the words of the Preamble to our Constitution, to form a “more perfect union.”50

The Court thus emphasizes that, since term limits would “effect a fundamental change in the constitutional framework,” the American people may legitimately impose them in only one way: by a “properly passed” explicit constitutional amendment using the procedures of Article V.51 By implication, any “fundamental” alteration in the Constitution can be legitimately achieved only via the procedures of Article V, suggesting that Professor Ackerman’s alternative, implicit amendment method would be viewed as illegitimate by the current Court.

47. Id. at 730-32 (emphasis added) (citations omitted).
48. Id.
50. Id. at 837-38 (emphasis added).
51. Id.
Finally, the Court’s 1997 decision in *City of Boerne v. Flores* is instructive. In this case, the Court held that the Religious Freedom Restoration Act (RFRA) violated the doctrine of separation of powers, stating that “[i]f Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be ‘superior paramount law, unchangeable by ordinary means’. . . . Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.” The Court, thus, again implies that circumvention of Article V’s procedures—such as by legitimation of implicit amendments—is normatively undesirable.

In short, an examination of prior Supreme Court precedents clearly indicates that the Court itself denies the legitimacy of implicit constitutional amendments. Thus, one of Professor Ackerman’s central ideas—that an implicit amendment is consciously “ratified” by the branch of government making the “switch in time”—is significantly weakened. If, in other words, the New Deal Court would not have characterized its “switch in time” as an implicit constitutional amendment, why should ordinary Americans? Moreover, if the American people were to assign a deeper or more significant meaning to the Court’s “switch in time” than the Court itself, the resulting incongruity would inevitably breed disrespect for the Court and ultimately, the Constitution. Any constitutional theory that encourages a deep divide between the Court’s and the people’s vision of the Constitution cannot be normatively desirable. Perhaps some would argue that these prior precedents are not persuasive because the Court was merely paying lip service to the old-fashioned theory of exclusivity, while secretly recognizing the legitimacy of implicit amendments. One cannot know, of course, what ideas secretly lurk in the minds of the Justices regarding the exclusivity of Article V. But to embrace a constitutional theory that would require that the Justices harbor secret beliefs contrary to their public pronouncements is an exercise in extreme cynicism, not to mention psychic divination. Thus, the more reasonable interpretation of

52. 117 S. Ct. 2157 (1997).
53. *Id.* at 2168 (emphasis added).
54. This language also appears to refute Professor Amar’s simple majoritarian, extra-Article V amendment theory. *See supra* note 42.
55. *See Dodge,* 59 U.S. 331; *Hawke,* 253 U.S. 221; *Dillon,* 256 U.S. 368; *Sprague,* 282 U.S. 716; *U.S. Term Limits,* 514 U.S. 779; *Flores,* 117 S. Ct. 2157.
56. *Foundations,* *supra* note 4, at 51-52; *Higher Lawmaking,* *supra* note 4, at 80.
these prior precedents examining the exclusivity of Article V is that the Justices said what they meant and meant what they said.

B. Democratic Roots: Turning the Tables on the Originalists

Professor Ackerman does not acknowledge these Court decisions, nor does he discuss whether the Supreme Court would agree with his characterization of the New Deal Court's "switch in time" as a legitimate, albeit implicit, constitutional amendment. Nonetheless, Professor Ackerman asks his reader to believe that the New Deal Court self-consciously switched its position on the Commerce Clause in order to save its own institutional legitimacy, yet never considered whether its decisions should be granted the exalted status of a legitimate constitutional amendment, necessitating that future generations and future Courts accord those decisions the same degree of homage as is accorded to written amendments passed via Article V.

Although the New Deal Court itself may not have considered its "switch in time" to be the equivalent of an amendment, Ackerman urges his reader to grant amendment status, insisting that the New Deal Court's decisions were deeply rooted in democracy—indeed, that the genesis of the switch was democratic will. Thus painted, the New Deal Court's Commerce Clause decisions take on a decidedly new flavor—a democratic flavor—that ordinary judicial decisions lack. Be-decked in such democratic armor, the New Deal Court's Commerce Clause decisions become protected against assault by future judicial decisions, which would be countermajoritarian and hence, illegitimate. Professor Ackerman thus cloaks his theory in the mantle of the Originalists, seeking to provide a degree of democratic legitimacy to the New Deal Court's commerce opinions which ordinary Court opinions lack. He then asserts that the Court cannot, consistent with democratic principles, now turn away from the New Deal Court's implicit Twenty-Eighth Amendment by any means other than another era of higher lawmaker or what he terms a "constitutional moment."

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57. Higher Lawmaking, supra note 4, at 80-81.
58. Id. at 82.
59. FOUNDATIONS, supra note 4, at 47-50; Higher Lawmaking, supra note 4, at 79-82.
60. See FOUNDATIONS, supra note 4; at 47-50.
61. See supra notes 10-11.
62. FOUNDATIONS, supra note 4, at 52; Higher Lawmaking, supra note 4, at 81.
63. FOUNDATIONS, supra note 4, at 53; Higher Lawmaking, supra note 4, at 82.
64. FOUNDATIONS, supra note 4, at 56; Higher Lawmaking, supra note 4, at 86.
Ackerman's theory not only permits the New Deal Court's switch to sidestep the classic countermajoritarian difficulty, but it also avoids what Ackerman perceives as two dangers inherent in Article V: "false positives" and "false negatives." A false positive occurs when a constitutional amendment secures the requisite supermajoritarian consensus of Article V, but does not, in fact, reflect the desires of "We the People." A false negative, by contrast, occurs when a proposed amendment fails to obtain the requisite supermajorities under Article V, but the proposed change is, in fact, widely supported by a decisive, mobilized majority of citizens.

Ackerman fails to cite any examples of false positives. Although perhaps a theoretical possibility, he cannot point to any of the twenty-seven amendments enacted via Article V and proclaim that they falsely reflect the will of the People. In this respect, then, one must presume that Article V's procedures are working rather well. With regard to false negatives, however, Ackerman implies that Article V produced false negatives in both the Reconstruction and New Deal eras. Specifically, supporters of the Reconstruction Amendments and the New Deal were unable to obtain the requisite supermajorities under Article V despite widespread popular support for those reforms. Thus, if votaries of such change had "chose[n] to play punctiliously by the rules of Article V, Reconstruction Republicans and New Deal Democrats confronted the clear and present danger that their long and successful struggle to mobilize the People for fundamental change would be stifled by legalistic nitpicking [sic]."

Rigid adherence to Article V is thus characterized as "legalistic nitpicking [sic]" which would suffocate the life out of a higher lawmaking movement by insisting upon a "process [which] is so cumbersome that it can serve as a safety valve [for the popular will] only under the most extreme conditions." Of course, Ackerman acknowledges that if a political movement garners widespread support, its votaries would likely be able to implement their desires via "normal lawmaking," which requires only majoritarian—as opposed to supermajoritarian-

65. FOUNDATIONS, supra note 4, at 278-80; Higher Lawmaking, supra note 4, at 85.
66. FOUNDATIONS, supra note 4, at 278-80; Higher Lawmaking, supra note 4, at 85.
67. FOUNDATIONS, supra note 4, at 278-80; Higher Lawmaking, supra note 4, at 85.
68. FOUNDATIONS, supra note 4, at 47-52; Higher Lawmaking, supra note 4, at 79-85.
69. FOUNDATIONS, supra note 4, at 47-52; Higher Lawmaking, supra note 4, at 79-85.
70. Higher Lawmaking, supra note 4, at 86.
71. Storrs Lectures, supra note 4, at 1057.
ian—support for enactment. But relying on normal lawmaking in such situations leaves the desired changes vulnerable to being ruled unconstitutional by the Supreme Court, or perhaps worse, to being overruled by future generations through the passage of another "ordinary" law. Either way, reliance upon normal lawmaking offers little chance of long-term stability. Thus, in order to ensure that a higher lawmaking movement for constitutional change is not wasted—i.e., made futile by passage of another law or a declaration of unconstitutionality by the Supreme Court—Ackerman insists that, in "moments of grave crisis," Americans must be able to resort to procedures other than those in Article V in order to bring about the desired constitutional change.

If resort to non-Article V procedures is necessary only in moments of "grave crisis," one must consider whether tossing aside Article V in the name of expediency is wise. As political scientist and future President Woodrow Wilson stated in 1885:

It is at once curious and instructive to note how we have been forced into practically amending the Constitution without constitutionally amending it. The legal processes of constitutional change are so slow and cumbersome that we have been constrained to adopt a serviceable framework of fictions which enables us easily to pre-

72. See FOUNDATIONS, supra note 4, at 9.
73. Id.
74. Id.
75. Higher Lawmaking, supra note 4, at 69. Ackerman's theory seems somewhat reminiscent of Sidney George Fisher, a prominent American lawyer of the mid-nineteenth century who advocated that Congress, like the English Parliament, be given the power to amend the Constitution in order to more efficiently respond to unforeseen emergencies:

But how can our Constitution be altered when the alteration is necessary[?] ... [T]he exigencies of the future may require great and organic change; the best opinion of the country may demand them, ... and the necessity for them may be obvious to all men able to think upon the subject, which nevertheless may not be three-fourths of the people or of the States. Where, then, is the remedy? ... The provision in the Constitution for amending it has been called a safety-valve to prevent the explosion of the people in revolutionary violence. But the efficacy of a safety-valve depends upon the promptness with which it can be opened and the width of its throttle. If defective in either of these, when the pressure of steam is too high the boiler will burst.

SIDNEY GEORGE FISHER, THE TRIAL OF THE CONSTITUTION 25-26 (1862). There is a difference, of course, between advocating a parliamentary-style method of constitutional alteration and advocating a method of constitutional alteration via a mobilized citizenry acting outside Article V. My only point here is to note that both theories seem to hold—either explicitly (as in the case of Fisher) or implicitly (as in the case of Ackerman)—the procedures set forth in Article V for constitutional alteration are perhaps inadequate in times of political crisis.
serve the forms without laboriously obeying the spirit of the Constitution, which will stretch as the nation grows. It would seem that no impulse short of the impulse of self-preservation, no force less than the force of revolution, can nowadays be expected to move the cumbersome machinery of formal amendment erected in Article Five. . . .

*But much the greater consequence is that we have resorted, almost unconscious of the political significance of what we did, to extra-constitutional means of modifying the federal system where it has proved to be too refined by balances of divided authority to suit practical uses...* 76

One such resort to extra-constitutional means in the face of a national emergency, according to Professor Ackerman, was the New Deal’s “switch in time,” which will be discussed extensively in the next section. 77

**II. THE “SWITCH IN TIME” AND THE “RATIFICATION” OF THE IMPLICIT TWENTY-EIGHTH AMENDMENT**

In order to fully understand the importance of the New Deal Court’s “switch in time,” it is useful to place it in historical context. The Great Depression, which began with the crash of the New York Stock Exchange on October 29, 1929, devastated the economy of the United States. 78 In this desperate environment, Presidential candidate Franklin Delano Roosevelt (FDR) campaigned on a promise of government intervention to stop the chaos. 79 The American people responded. 80 In late 1932, FDR was elected President with 57.4% of the popular vote, bringing on his coattails ninety-seven new Democrats in the House and twelve new Democrats in the Senate. 81

By the time FDR took office in 1933, thirteen million people—nearly one in four workers—were unemployed, domestic prices had plummeted by thirty-seven percent, and the gross output of domestic products had fallen by almost half. 82 The centerpiece of FDR’s recov-

76. **WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 242-43 (1885)** (emphasis added).
77. *See Higher Lawmaking, supra note 4, at 80-82; FOUNDATIONS, supra note 4, at 47-50.*
78. **EPSTEIN & WALKER, supra note 7, at 281.**
79. *Id.*
80. *Id.* at 282.
81. *Id.*
82. Stem, *supra* note 8, at 653; *see also* **EPSTEIN & WALKER, supra note 7, at 281** (stating that unemployment climbed from 3.2% in 1929 to 24.9% in 1933).
ery program, the National Industrial Recovery Act (NIRA), was quickly signed into law in June 1933, and established national minimum wages, the right to collective bargaining, and maximum work week hours. Other key acts soon followed, such as the National Labor Relations Act (NLRA), which required employers to bargain in good faith with properly elected unions, the Agricultural Adjustment Act, which limited crop production in an attempt to increase agricultural prices, and the Bituminous Coal Conservation Act, which regulated working conditions in the nation’s coal mines.

Judicial acceptance of the New Deal legislative package was by no means a sure thing. In the 150 years preceding the New Deal, the Supreme Court had let it be known that it was not shy about invalidating acts of legislatures on various constitutional grounds including, most notably, the liberty of contract contained in the Due Process Clauses. This was the basis of the holding in the famous case of Lochner v. New York. Indeed, between 1899 and 1937, the Supreme Court invalidated over 180 state statutes as unconstitutional, primarily on due process or equal protection grounds.

The first signs of trouble with the New Deal came in the January 1935 decision in Panama Refining Co. v. Ryan, which held, by an 8-1 vote, that certain sections of the NIRA regulating the oil industry violated the principal of separation of powers under the nondelegation doctrine. A few months later, on May 27, 1935, now known as

88. 198 U.S. 45 (1905) (invalidating, as violative of the substantive due process right of liberty of contract, a New York statute forbidding employment in a bakery for more than 60 hours per week or 10 hours per day).
89. See BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 154 (1942).
90. 293 U.S. 388, 392 (1935). It is interesting to note that since Panama Refining and Schechter Poultry, another New Deal decision, the Court has not found any act of Congress violative of the nondelegation doctrine. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); see generally, David Schoenbrod, POWER WITHOUT RE-
"Black Monday," a unanimous Court, in *A.L.A. Schechter Poultry Corp. v. United States* (the famous "Sick Chicken" case), invalidated the centerpiece of the NIRA—its requirement that industry trade associations adopt "codes of fair competition"—on both Commerce Clause and nondelegation doctrine grounds. With regard to its Commerce Clause reasoning, the Court stated that:

> Our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States," and the internal concerns of a State. . . . "Without in any way disparaging the[s] motive [of Congress], it is enough to say that the recuperative efforts of the federal government must be made in a manner consistent with the authority granted by the Constitution."  

The fall of the NIRA did not portend well for other New Deal acts. In 1936, in *United States v. Butler*, the Court invalidated the taxing scheme of the Agricultural Adjustment Act because "[i]t[he] act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal [government]." Also in 1936, in *Carter v. Carter Coal Co.*, the Court invalidated, on Commerce Clause grounds, the Bituminous Coal Conservation Act:

> [T]he effect of the labor provisions of the [A]ct . . . primarily falls upon production and not upon commerce; . . . production is a purely local activity. It follows that none of these essential antecedents of production constitutes a transaction in or forms any part of interstate commerce. . . .

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91. 295 U.S. at 551; see also Dean Dinwoody, *The New Deal as the Supreme Court Sees It*, N.Y. TIMES, June 2, 1935, at E3; Franklyn Waltman, Jr., *Roosevelt Sees Social Setback of 50 Years in Court Decision; Calls on People to Face Crisis; His Solution Not Yet Ready*, WASH. POST, June 1, 1935 at A1.
93. 297 U.S. 1, 68 (1936).
That the production of every commodity intended for interstate sale and transportation has some effect upon interstate commerce may be...freely granted; and we are brought to the final and decisive inquiry, whether here that effect is direct...or indirect. The distinction is not formal, but substantial in the highest degree, as we pointed out in [Schechter]. "If the commerce clause were construed," we there said, "to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government."94

The Carter Coal decision was the last time the Supreme Court invalidated an act of Congress as beyond the commerce power until United States v. Lopez in 1995.95

The Court's willingness to strike the New Deal legislation angered FDR and the New Deal Democrats, who considered the Court's decisions to be against the best interests of the country. Shortly after the Schechter Poultry decision, FDR held a press conference, the tone of which was reported by the Chicago Tribune:

Conceding that the New Deal has been wrecked on the rock of the Constitution, President Roosevelt today declared for a radical change in our form of government. To implement the New Deal, the President pronounced himself in favor of curtailing, if not snuffing out entirely, the sovereignty of the 48 states and clothing the central government with unlimited control of agriculture, industry, commerce, and all other enterprises and occupations....Taking advantage of his press conference to deliver a homily consuming more than an hour, from which flashed frequent caustic comments on the Supreme Court decision that destroyed the NRA, Mr. Roosevelt sent up a trial balloon on the proposition of remodeling the government to save the New Deal....The President's sensational utterances electrified the country. The stock and commodity markets broke under the impact of his pronouncement. It detonated in congress with devastating effect.96

FDR viewed the Supreme Court's reasoning to be fundamentally

96. Arthur Sears Henning, Roosevelt Out for Unlimited Central Power, CHI. TRIB., June 1, 1935, at Al.
incompatible with the welfare state the New Dealers had crafted to save the country from economic ruin. Most Americans, judging by the Presidential election of 1936, agreed with their President. FDR won the 1936 election with 60.8% of the popular vote and further strengthened the Democratic Party's control over both houses of Congress. But an ideologically divided Supreme Court permitted the so-called "Four Horsemen"—conservative Justices Butler, McReynolds, Sutherland, and Van Devanter—to form the necessary majority, in many decisions striking New Deal legislation, by winning over one additional moderate vote, often Justice Roberts. Thus, despite a clear dominance of the political branches of the national government, FDR appeared impotent to control the Supreme Court.

On February 5, 1937—notably after the 1936 Presidential election—FDR announced a plan designed to give him control over the wayward Court. In his famous "Court Packing Plan," FDR asked Congress to pass legislation authorizing the President to appoint one new Supreme Court Justice for every sitting Justice who had reached age seventy, up to a maximum of six additional new Justices. At the time of this proposal, there were six Justices over age seventy; thus, under the Court Packing Plan, FDR would have been able to add as many as six new Justices, bringing the total membership on the Court to fifteen. If he were able to appoint six new Justices, FDR would need only two additional votes from the existing nine Justices to obtain the majority necessary to sustain New Deal legislation.

Public and press reaction to the Court Packing Plan was generally negative, and lukewarm at best even among Democrats in Congress.
Undaunted, FDR took his plan to the people via a radio broadcast on March 9, 1937, in which he made a plea as follows:

Last Thursday I described the American form of government as a three horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government—the Congress, the Executive and the Courts. Two of the horses are pulling in unison today; the third is not....

....

...[T]here is no basis for the claim made by some members of the court that something in the Constitution has compelled them regretfully to thwart the will of the people.

....

We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the court and the court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our courts we want a government of laws and not men.

....

... I came by a process of elimination to the conclusion that short of amendments, the only method which was clearly constitutional, and would at the same time carry out other much needed reforms, was to infuse new blood into all our courts. We must have men worthy and equipped to carry out impartial justice. But, at the same time, we must have judges who will bring to the courts a present-day sense of the Constitution. 104

Whether FDR would have succeeded in garnering congressional approval of his Court Packing Plan is unknown. Twenty days after FDR’s radio address, the Court, in a 5-4 decision in *West Coast Hotel Co. v. Parrish*, upheld, against a due process liberty of contract challenge, a Washington State law regulating employment conditions and

Feb. 3 to June 10, 1937, consistently revealed that more Americans opposed than supported the Court Packing Plan).

wages for women. Justice Roberts, long an ally of the conservative Four Horsemen, voted with the *West Coast Hotel* majority, providing the crucial fifth vote. Only a few months earlier, Justice Roberts had voted to invalidate a New York law that was virtually identical to the Washington law, intimating that his views as to the propriety of invalidating New Deal legislation had begun to change. Less than a month later, in *NLRB v. Jones & Laughlin Steel Corp.*, Justice Roberts again provided the crucial fifth vote—this time to uphold, as a valid exercise of the commerce power, one of the remaining cornerstones of the New Deal—the National Labor Relations Act. Justice Roberts’ change of heart in *Jones & Laughlin* saved the New Deal and thus has been dubbed the “switch in time that saved nine.”

The *Jones & Laughlin* “switch in time” may be one of the most significant constitutional decisions ever rendered because it provided the basis for a profound shift from federalism to nationalism and has, together with its progeny, effectively given Congress a police power—the implicit Twenty-Eighth Amendment—to regulate any matter under the guise of the original Commerce Clause. *Jones & Laughlin*, thus, ushered in a new era of national power and laid the foundation for the modern welfare state. Precisely how the Court accomplished this fundamental paradigm shift was, in a doctrinal sense, unexceptional:

Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree.

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105. 300 U.S. 379, 400 (1937).
106. Id.
108. 301 U.S. 1 (1937).
109. EPSTEIN & WALKER, supra note 7, at 301.
110. *Jones & Laughlin*, 301 U.S. at 37.
Thus, the Court appeared to restrict the reach of the Commerce Clause to those matters, including intrastate activities, which are "essential or appropriate to protect . . . commerce from burdens and obstructions" and then, with due respect for our federalist system, only so far as the Tenth Amendment would allow.\textsuperscript{111} In this respect, the doctrine seems consistent with the Founders' concern about eliminating obstructions to the free flow of commerce among the states.\textsuperscript{112} Thus, while \textit{Jones \\& Laughlin} was itself doctrinally palatable in terms of its coherence with the spirit of the Founders' vision, it proved, in hindsight, to be the pinnacle of a slippery slope towards nationalism.

If there were any doubts about the reach of the commerce power after \textit{Jones \\& Laughlin}, subsequent decisions made it clear that it was virtually unlimited. For example, in 1938—only one year later—the Court, in \textit{Consolidated Edison Co. v. NLRB}, extended the NLRA to a utility whose activities were exclusively intrastate on grounds that some of the utility's customers—such as railroads, airports, and telegraph companies—were engaged in interstate commerce.\textsuperscript{113} The Court reasoned that "it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion."\textsuperscript{114} And in the 1939 decision of \textit{Mulford v. Smith}, the Court upheld a new version of the Agricultural Adjustment Act (AAA) which was grounded upon the commerce power rather than the taxing power, reasoning that agriculture could be regulated as "commerce."\textsuperscript{115} An earlier version of the AAA, based upon the taxing power, had been invalidated only three years earlier in \textit{United States v. Butler}, on grounds that the regulation of agriculture violated the Tenth Amendment.\textsuperscript{116} Thus, \textit{Mulford} is significant because it extended, for the first time, "commerce" to include "production" (by allowing restrictions on marketing which in effect would restrict "production") rather than trade in goods or services; more importantly, it enabled Congress to accomplish its legislative goal under the Commerce Clause\textsuperscript{117} despite the fact that, when the same end

\begin{itemize}
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{112} The original purpose behind granting Congress a commerce power was to prevent the economic balkanization of the states. \textit{See THE FEDERALIST} No. 11 (Alexander Hamilton); \textit{see also} \textbf{RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN} 140 (1987); \textbf{FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY \\& WAITE} 13 (1937).
\item \textsuperscript{113} 305 U.S. 197, 220-21 (1938).
\item \textsuperscript{114} \textit{Id.} at 222.
\item \textsuperscript{115} 307 U.S. 38, 51 (1939).
\item \textsuperscript{116} 297 U.S. 1, 68 (1936); \textit{see also supra} text accompanying note 93.
\item \textsuperscript{117} 307 U.S. at 51.
\end{itemize}
was sought under the taxing power, it was held to violate state sovereignty under the Tenth Amendment. It thus intimates, for the first time, that the commerce power is unrestrained by the concept of federalism embodied in the Tenth Amendment.

The intimation of Mulford became reality in the 1941 decision in United States v. Darby, which explicitly overruled Hammer v. Dagenhart, and upheld the Fair Labor Standards Act (FLSA) as a valid exercise of the commerce power. The Court stated that, "[w]hatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause," which was described as being "attended by the same incidents which attend the exercise of the police power of the states." Having thus defined the commerce power as the national equivalent of a police power, it should come as no surprise that the Court then dismissed the Tenth Amendment as "a truism that all is retained which has not been surrendered." Having concluded that the commerce power was plenary as to all its lawful objects, and that all its lawful objects consisted of all the objects of a police power, that which was retained by the Tenth Amendment was, syllogistically, nothing, because all had been surrendered.

The incredible breadth of the commerce power was illustrated in two 1942 cases, Kirschbaum v. Walling, and Wickard v. Filburn. In Kirschbaum, the Court upheld, as a valid exercise of the commerce power, the application of the FLSA to the employees of a landlord—janitors, elevator operators, watchmen and carpenters, inter alia—on the grounds that the landlord employer leased space to a clothing manufacturer who sold clothes in interstate commerce. In Wickard, the Court upheld the imposition of a penalty under the Agricultural Adjustment Act on 239 bushels of wheat grown above a farmer's statutory allotment that were used to feed his livestock and family. Though conceding that farmer Filburn's homegrown wheat was trivial and did

118. Butler, 297 U.S. at 68.
119. 312 U.S. 100, 116-17, 123 (1941) (overruling Hammer v. Dagenhart, 247 U.S. 251 (1918)).
120. Id. at 115.
121. Id. at 114.
122. Id. at 124.
123. 316 U.S. 517 (1942).
125. 316 U.S. at 518-19, 524-25.
126. 317 U.S. at 129.
not itself enter interstate commerce, the Court nonetheless held that, when aggregated with other farmers who grew extra wheat for home consumption, "such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions."\(^{127}\) Interestingly, a book written five years before \textit{Wickard} adumbrated that decision with an eerily similar hypothetical illustration:

If a man plants a patch of potatoes in his back yard, he may feel reasonably assured that he is engaged in a purely local enterprise. Yet the more food that is produced locally, the less will be brought into and the more sent out of the state. The patch of potatoes has an influence—slight, it is true—on the movement of food supplies. If every activity which bears any discernible relation to interstate commerce is subject to federal control, the commerce power has become all-embracing. Congress could require a federal license for the planting of potatoes.\(^{128}\)

After \textit{Wickard} and \textit{Kirschbaum}, there was little doubt that the commerce power had been significantly broadened, allowing Congress to regulate at will. With this broadening of the commerce power came a concomitant narrowing of the Tenth Amendment, which reserves to the states any powers not delegated to the national government.\(^{129}\) In the landmark 1985 decision of \textit{Garcia v. San Antonio Metropolitan Transit Authority}, the Court, in a 5-4 decision, held that states' rights under the Tenth Amendment "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limits on federal power."\(^{130}\) In so stating, the Court adopted a narrow view of states' rights, in which national politicians—i.e., members of Congress—are deemed trustworthy guardians of state interests because they are elected by (and therefore accountable to) local constituencies.\(^{131}\) The concept of federalism was thus reduced to a procedural, nonjusticiable question, leaving to congressional discretion the

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\(^{127}\) \textit{Id.} at 128.


\(^{129}\) The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." U.S. Const. amend. X.


\(^{131}\) 469 U.S. at 528.
boundary line between national and state power. Congressional power under the Commerce Clause thereby became plenary, turning the concept of federalism on its head: rather than a national government of limited, enumerated powers of which the Tenth Amendment prevents encroachment, we now have a national government of unlimited, plenary power of which the Tenth Amendment is reduced to a procedural truism.132

What law student, reading *Wickard* and *Garcia* for the first time, has not furrowed his brow wondering how the commerce power came to be such an omnipotent behemoth and the Tenth Amendment a mere shadow? The answer, according to Professor Ackerman, is the implicit Twenty-Eighth Amendment, which is asserted to be a reflection of the conscious and purposeful desire of the people to realign national-state power.133

III. A CRITIQUE OF ACKERMAN’S THEORY

A. Expressio Unius Est Exclusio Alterius

As an initial matter, perhaps the most obvious flaw in Professor Ackerman’s implicit amendment theory is that it runs counter to the maxim expressio unius est exclusio alterius—"the expression of one thing excludes another."134 While this canon is normally applied by courts in the construction of ordinary statutes, it has often been applied in construing various constitutions,135 and logic would seem to warrant

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132. See New York v. United States, 505 U.S. 144, 157 (1992) (describing the Tenth Amendment as essentially a tautology); Lesser, supra note 7, at 9-11 (asserting that "what we have today is a Congress that shows no reluctance in exercising a national police power to regulate state and local governments as well as private parties, and a Supreme Court that has abdicated its historic role as the ultimate arbiter of controversies over federalism").

133. See FOUNDATIONS, supra note 4, at 44.

[B]oth Reconstruction Republicans and New Deal Democrats [were] engaging in self-conscious acts of constitutional creation that rivaled the Founding Federalists’ in their scope and depth. . . . Rather than meekly following the marching orders of the Federalists, both Republicans & Democrats were constitutionally creative procedurally no less than substantively—and they knew it. *Id.* at 40 (describing the New Deal implicit amendment as a "constitutional triumph of the activist welfare state."); *see also id.* at 53 ("If the American people were ever endorsing a break with their constitutional past, they were doing so in the 1930s.").


135. See, e.g., Head v. Head, 2 Ga. 191 (1847); *In re Constitutional Convention*, 14 R.I. 649 (1883); Carton v. Secretary of State, 115 N.W. 429 (Mich. 1908); People v. Angle, 17 N.E. 413 (N.Y. 1888).
such extension. Applying the expressio unius canon to the language of Article V leads to the conclusion that the expression by the Framers of an explicit procedure for constitutional amendment necessarily implies that all other forms of amendment would be illegitimate.

However, as Karl Llewellyn’s landmark article on statutory interpretation has demonstrated, the maxim expressio unius has a countervailing maxim which states that statutory language may admit of other ways or means “where some only are expressly mentioned by way of example.” Yet, precedents invoking this countervailing maxim are careful to limit its application to those situations in which the statute has expressly indicated that the method provided is merely an example or illustration. Such is not the case with Article V; its language does not expressly indicate that its procedures for constitutional amendment were meant to be merely illustrative. Thus, ordinary canons of statutory construction lead to the conclusion that Article V’s procedures should be viewed as an exclusive pathway to legitimate constitutional alteration.

On a deeper level, the expression of an explicit procedure for constitutional amendment without labeling it as merely illustrative indicates an intended exclusivity because of the negative impact a contrary interpretation would have upon the rest of the Constitution. For example, were we to conclude that Article V’s explicit procedures were merely illustrative (even though the Framers did not label them as such), what impact would this have on other provisions of the Constitution? Would other Articles concerning the organization of the Executive, Legislative or Judicial branches also then be open to the debate as to their exclusivity? Would we, for example, then be able to argue that the Framers did not intend Congress to be the exclusive legislative body? Or perhaps that the failure of the Framers to mention a Prime Minister permits the legitimate recognition of such an office? And what of the Amendments to the Constitution, particularly the Bill of Rights? If Article V’s explicit language can be circumvented, could not the language of the First, Fourth, Fifth, or other equally important

Amendments? Could we not also begin "implying" into those Amendments certain limitations or expansions not even intimated in their language? If Article V is merely precatory language, are not other constitutional provisions equally precatory? If so, the result is an ignorable Constitution, a document rendered merely illustrative, its structure and protections and rights transformed into shining aspirational goals devoid of exclusivity, and hence, meaning. In short, if Article V's language does not create exclusivity, arguably neither does the rest of the Constitution's language, and the written document would no longer require or deserve the fidelity it has traditionally inspired.

B. Amendment versus Interpretation

Another shortcoming of Professor Ackerman's implicit amendment theory is that he does not indicate why the New Deal Court's Commerce Clause decisions are, in fact, tantamount to a constitutional "amendment" and not merely reasonable evolutionary interpretations of prior precedent. While his four-step schema permits him to self-select when he claims these implicit amendments have occurred, Ackerman offers no explanation as to why these implicit amendments are any more "amendment-like" than other judicial decisions or political events which arguably have brought about as much (or more) wholesale change as the New Deal Court's "switch in time." For example, who would not agree that Brown v. Board of Education ushered in a completely new era of Equal Protection Clause meaning and analysis? Or that the Supreme Court's 180 degree turnaround in Baker v. Carr—only twelve years after Colegrove v. Green—was a completely new conception of the justiciability of apportionment? Or, relatedly, that Reynolds v. Sims offered a completely new view of Equal Protection as


139. Professor Ackerman is not alone in this conclusion. Professor Griffin, for example, contends that "[t]he crucial constitutional fact of the twentieth century is that all significant change in the structure of the national government after the New Deal occurred through non-Article V means." Griffin, supra note 4, at 51.


141. 369 U.S. 186 (1962) (holding apportionment challenge justiciable not on Guaranty Clause grounds, but upon Equal Protection Clause grounds).

applied to the apportionment context? Or that the right to privacy found in the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments in *Griswold v. Connecticut* was a fundamental sea-change? And what of the Court’s decision in *Katz v. United States*, which adopted a fundamentally different view of the Fourth Amendment’s prohibition against unreasonable search and seizure than its prior decision in *Olmstead v. United States*? Or the Supreme Court’s 1943 decision in *West Virginia State Board of Education v. Barnette*, which held that a compulsory flag salute law violated the First Amendment, overruling an opposite conclusion reached only three years earlier in *Minersville School District v. Gobitis*? These are only a few examples of fundamental doctrinal shifts by the Supreme Court which undoubtedly changed the “meaning” of the Constitution as much as the New Deal Court’s Commerce Clause decisions.

Indeed, it is enigmatic why Ackerman limits his concept of implicit amendment to the Reconstruction Amendments and the New Deal Court’s “switch in time.” While there may not be an identifiable “signaling event” behind these various paradigm shift decisions, they were all arguably preceded by subtle or not-so-subtle changes in societal thinking—about race relations or the drafters’ intentions with regard to the Bill of Rights or the Fourteenth Amendment—which presumably enjoyed widespread support. But Ackerman suggests that they are qualitatively “different” from the New Deal Court’s “switch in time.” Although these decisions just mentioned do not fit neatly into his four-step framework, it is doubtful that this is because the decisions are, in fact, fundamentally different in kind. More likely, these other decisions fail to obtain implicit amendment status because Professor Ackerman’s

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143. 377 U.S. 533 (1964) (holding that Equal Protection Clause requires apportionment based upon “one person, one vote” principle).

144. 381 U.S. 479 (1965).

145. 389 U.S. 347, 353 (1967) (overruling *Olmstead* and holding that invasion of reasonable expectation of privacy, not physical trespass, triggers the Fourth Amendment’s search and seizure protections).

146. 277 U.S. 438, 466 (1928) (holding physical trespass a prerequisite for search and seizure to occur).

147. 319 U.S. 624, 624 (1943).


149. With regard to *Brown*, for example, Ackerman states that “Earl Warren was perfectly aware that President Eisenhower’s recent election did not mark the rise of an aggressive new movement for constitutional reform... At the time *Brown* was argued and rear- gued, only one thing was clear: such a mass movement did not exist.” FOUNDATIONS, supra note 4, at 134-35.
four-step schema is customized to legitimate and entrench perceived "good" New Deal decisions and their progeny and thereby prevent re-entrenchment by future courts and generations.

Two such "good" New Deal Court progeny which become entrenched by Professor Ackerman's theory are Brown v. Board of Education\textsuperscript{150} and Griswold v. Connecticut.\textsuperscript{151} Professor Ackerman contends that these decisions were not in themselves implicit constitutional amendments but merely legitimate interpretations of the implicit Twenty-Eighth Amendment.\textsuperscript{152} Specifically, he claims that, if one assumes that the New Deal Court decisions implicitly amended the Constitution, Brown and Griswold are merely logical extensions—synthetic interpretations—of this implicit amendment.\textsuperscript{153} Thus, Brown is consistent with the New Deal implicit amendment which Ackerman claims stands for the "new promise of an activist government," of which public schools were paradigmatic.\textsuperscript{154} The New Deal Court's rejection of the old laissez-faire sentiment of Lochner,\textsuperscript{155} therefore, paved the way for the demise of the laissez-faire attitude in Plessy;\textsuperscript{156} hence, Brown is merely a correct reinterpretation of the Equal Protection Clause following "ratification" of the New Deal implicit amendment.\textsuperscript{157} Likewise, Ackerman posits that Griswold merely held that the New Deal implicit amendment rejecting Lochnerian "freedom of contract" principles did not extend beyond economic regulation.\textsuperscript{158} Thus, because the Connecticut statute outlawing the dissemination of birth control services addressed a social or moral, rather than an economic, matter, the state government's exercise of power was still subject to the limits of liberty of contract affirmed by Lochner.\textsuperscript{159} Ackerman asserts, in other

\textsuperscript{150} 349 U.S. 294.
\textsuperscript{151} 381 U.S. 479.
\textsuperscript{152} Ackerman states: "My thesis: we can best understand both Brown and Griswold as a continuation of the project of synthetic interpretation begun in the aftermath of the Civil War in the Slaughterhouse Cases and redirected in New Deal opinions like Carolene Products." FOUNDATIONS, supra note 4, at 132.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 148.
\textsuperscript{155} 198 U.S. 45 (1905).
\textsuperscript{156} 163 U.S. 537 (1896).
\textsuperscript{157} See FOUNDATIONS, supra note 4, at 150 ("Within the new activist order, the schoolchild's sense of racial inferiority had become a public responsibility, not a private choice. The Warren Court's decision to overrule Plessy was not only correct as an interpretive synthesis, but obviously so.").
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 153-54.
words, that the *Griswold* Court, perhaps unconsciously,\(^{160}\) was trying to tell us that *Lochner*’s principle of freedom of contract was not entirely dead; in the realm of non-economic matters, it was, in fact, alive and well:

Douglas makes a crucial turn [in *Griswold*]. He views the courts of the middle republic [i.e., the *Lochner* Court] as engaged in a valid interpretive enterprise, and one from which modern courts can continue to learn as they tried to make sense of the Founding. Instead of repudiating the entire *Lochner* era, he proposes a more discriminating view. He distinguishes between cases, like *Lochner*, that protect private ordering in economic relations, and those, like *Griswold*, that protect privacy in more intimate spheres of life.... Although the New Deal gained the support of the People to regulate these “projects” for the general welfare, Douglas refuses to read the New Deal precedents so broadly as to include “bilateral loyalties” within the sphere of governmental management. He can, therefore, still mark out marriage as an appropriate context for re-presenting the continuing constitutional value of liberty [of contract] inherited from the Founding.\(^{161}\)

Ackerman buttresses his theory by pointing to the dissent in *Griswold* by Justices Black and Stewart, which he says,

offer up a much broader interpretation of the New Deal than does the majority. For them, the 1930s did not merely repudiate the constitutional value of private ordering in “commercial or social projects.” It amounted to a rejection of the very idea that some spheres of life should be insulated from pervasive management by the activist state. On this statist interpretation the People not only decisively authorized their government to regulate sweatshops in the 1930s. They also authorized state management of free choice in any and all areas of life.\(^ {162}\)

Ackerman’s characterization of the battle between the majority and dissenters in *Griswold* highlights a primary weakness of his implicit

\(^{160}\) Indeed, as Ackerman acknowledges, the majority in *Griswold* explicitly rejected the notion that they were basing their decision on the liberty of contract principles espoused in *Lochner*. *Id.* at 154; see also *Griswold*, 381 U.S. at 481-82 (“Overtones of some arguments suggest that *Lochner v. New York* ... should be our guide. But we decline that invitation .... We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.”) (citations omitted).

\(^{161}\) FOUNDATIONS, supra note 4, at 155.

\(^{162}\) *Id.* at 157.
amendment theory: the difficulty, if not impossibility, of defining the contours of the purported implicit amendment. After all, if, by definition, a constitutional amendment is "unwritten," where do we begin when we want to draw the outline of its meaning? If we take Ackerman's characterization of the opinions in *Griswold* as true, it shows us that the Court was unsure as to the basic question of whether the New Deal Court's "implicit" amendment was limited only to economic matters, or whether it was a broader repudiation of natural law, laissez-faire limits on governmental power altogether. And while the majority in *Griswold*, according to Ackerman, concluded that the New Deal implicit amendment was indeed limited to economic legislation, his explanation leaves one with the same distinctly bad taste that *Lochner* left in the mouths of so many legal scholars: that the Court based its conclusion upon personal predilections, not upon textual materials which could help provide the contours of the meaning and purpose of the New Deal Court's "switch in time." This, of course, should come as no surprise, for if the New Deal Court's "switch in time" created an "implicit" constitutional amendment, a fortiori there would be no textual materials to which the *Griswold* Court could refer for guidance.

Ackerman's insistence on characterizing the New Deal "switch in time" as an implicit amendment creates an inherent opportunity for (or perhaps more precisely, requires) the Court to engage in the kind of *Lochnerian*, make-it-up-as-we-go-along natural law adjudication supposedly rejected by the New Deal Court. Without a written textual reference point from which to start, Ackerman's theory of implicit amendment effectively gives the Court carte blanche to define the contours of the New Deal and to deem those contours as supreme over all "lesser" acts of government, including state and federal laws. In a very real sense, this gives the Court unfettered power to strike laws as un-

163. See supra notes 156-157 and accompanying text.

164. Professor Ackerman acknowledges this problem, but, as his theory is merely interpretive rather than normative, supra note 9 and accompanying text, he does not feel compelled to dwell upon it, but merely states:

Since the [higher lawmaking] movement isn't forced to pin its transformative message down in a formal amendment, the modern system relies very heavily on the good judgment of courts. After making their "switch in time," they must reflect upon the deeper meanings of transformative statutes and seek to codify them in transformative opinions that will guide constitutional development in the regime ahead. If the courts fail to discharge this function sensitively, the system will suffer greatly. Is it wise to rely so heavily on judges this way?

*FOUNDATIONS*, supra note 4, at 284. My answer to his last rhetorical question is, of course, "no."
constitutional that it feels do not comport with its fluctuating sense of morality—a la natural law. This is precisely the sort of elitist Burkeanism that Ackerman claims he is striving so strenuously to avoid through his insistence that the New Deal Court “switch in time” emanates from “We the People” and not nine old Justices. Thus, even assuming arguendo that Ackerman is right in characterizing his implicit New Deal amendment as emanating from “We the People,” the application of that implicit amendment is inevitably left to nine Justices who have nothing in writing to guide them. If this is not an invitation to Lochnerian behavior, what is?

Moreover, Ackerman’s proffered explanation of Brown and Griswold is inherently circular because he requires the reader to first accept that New Deal Court’s “switch in time” was, in fact, tantamount to an implicit constitutional amendment, not just a series of ordinary, run-of-the-mill judicial interpretations of the Commerce Clause. Only then can one accept his own particular explanation of Brown and Griswold as mere logical interpretations of the implicitly amended Constitution. But if one does not accept his thesis that the New Deal Court decisions constituted an implicit amendment, one must resort to a more challenging search of the written constitutional text for legitimation—a search that the Warren Court took quite seriously. If one does not like the Warren Court’s proffered textual bases for Brown and Griswold, one may, of course, characterize the decisions as “illegitimate.” One gets the sense, however, that Ackerman intensely wants to avoid this characterization. He intimates that he does not like the Warren Court’s proffered textual bases for these decisions, thereby forcing him to seek a non-textual (i.e., implicit) means of legitimating them: The prophetic vision of the Court [in Brown and Griswold] is flatly inconsistent with the principles of dualist democracy. Even if judges

165. Ackerman tries to distinguish his theory of dualism from “Burkeanism,” which Ackerman describes as the favored theory of practicing lawyers which pragmatically focuses on the notion of incrementally evolving precedents to explain constitutional change. FOUNDATIONS, supra note 4, at 17. Burkeans, according to Ackerman, do not think that “We the People” should run the constitutional show:
The People rule best, the Burkan says with a broad wink, when they leave the business of government to a well-trained elite immersed in the nation’s concrete constitutional tradition. Slowly but surely, this elite will sense the drift of popular sentiment and take the countless small steps needed to keep the tradition responsive to the present’s half-articulate sense of its special needs. Id. at 20. While Ackerman acknowledges that this gradual, incremental change occurs, he contends that Burkeans fail to see that popular uprising of the masses can also result in constitutional change that is not gradual, but quite sudden. Id. at 20-21.
could successfully gain popular acquiescence, this kind of top-down transformation is the opposite of the 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. . . . Of course, it sometimes happens that a preservationist Court may help spark a new forward-looking movement. This is my view of Brown. Nonetheless, on those happy occasions when a Court manages to provide constitutional symbols that new movements find inspiring, it would be a tragic irony if this success should allow lawyers to forget a crucial dualist truth: although judges are in a unique position to preserve the past constitutional achievements of the American people, many other citizens are in better positions to lead the People onward to a better constitutional future. Before one accepts a prophetic reading of Brown or Griswold, it is only prudent to consider the interpretive alternative. 166

Thus, by labeling the New Deal Court’s “switch in time” as an implicit constitutional amendment, Ackerman provides an intellectual means to justify the Warren Court’s noble ends. While Ackerman’s implicit amendment theory may provide some psychological solace to legal academics similarly torn, it does not provide a principled basis for ignoring Article V. If one does think the textual bases of Brown or Griswold are invalid, one may take one’s case to the American people and seek to overturn the decisions or provide an explicit textual basis for them via the procedures provided by Article V.

Assuming arguendo that Professor Ackerman is correct in his characterization of the New Deal Court’s switch as a constitutional amendment rather than merely an altered interpretation, what are we to make of his thesis? His primary thesis seems to be that Article V, the textual proxy for the voice of “We the People,” is broken. It is broken because it has not been able to respond to the rational, mobilized political will of “We the People”—creating a false negative—thereby leaving unfulfilled certain popularly desired constitutional changes—namely, the expansion of the commerce power. Because Article V has not been able to respond to the collective political will of the people, Ackerman asserts that Americans have consciously rejected Article V as the exclusive means of constitutional alteration and have, in accordance with the Founders’ vision, resorted to other, implicit procedures for bringing about the desired changes. 167 Whether Article V’s proce-

166. Id. at 139-40.
167. See FOUNDATIONS, supra note 4, at 34-57 (describing and debunking the so-called
dures do in fact present an insuperable barrier to the expression of the political will of the American people will be explored extensively below.

C. Professor Ackerman's Explicit Amendment to Article V

Perhaps revealing that an implicit amendment process may leave something to be desired, Professor Ackerman proposes the following explicit revision to the text of Article V:

During his or her second term in office, a President may propose constitutional amendments to the Congress of the United States; if two-thirds of both Houses approve a proposal, it shall be listed on the ballot at the next two succeeding Presidential elections in each of the several states; if three-fifths of the voters participating in each of these elections should approve a proposed amendment, it shall be ratified in the name of the People of the United States. 168

As an initial matter, it seems ironic that Professor Ackerman—the most strident and articulate voice for the proposition that implicit constitutional amendments exist—would propose an explicit textual amendment to Article V. If implicit constitutional amendments exist, why is an explicit textual amendment necessary? More importantly, if such an explicit textual amendment to Article V is enacted, how should it be enacted? Must it be enacted via the existing procedures in Article V or could it also be enacted via an implicit amendment process? If Professor Ackerman would opt for the former (explicit amendment via the current Article V) rather than the latter (implicit amendment via his four-step schema), does this suggest that, at least in this particular instance, an implicit constitutional amendment is normatively undesirable? 169

If, on the other hand, Professor Ackerman would accept the "ratification" of his proposed amendment via an implicit amendment process, why does he need to provide us with the text of such amendment? After all, if such an amendment were to be "ratified" via his im-

168. FOUNDATIONS, supra note 4, at 54-55.
169. If Professor Ackerman would agree that his explicit textual amendment should be enacted via the current Article V procedures (rather than his 4-step implicit amendment process), this would bolster the impression that his implicit amendment process is intended to be reserved only for moments of "grave crisis" in which expediency necessitates resort to less cumbersome procedures in the present Article V. There is, after all, apparently no "grave crisis" which would necessitate casting aside Article V in order to enact Professor Ackerman's proffered explicit textual amendment.
plicit amendment process, it would, by definition, not have any textual basis, but would instead have to be gleaned from Supreme Court precedents implementing the desires of a higher lawmaking movement, as with the New Deal Court's implicit Twenty-Eighth Amendment. The mere fact that Professor Ackerman proffers a text at all should tell us something. It should tell us that, when it comes to important constitutional alteration, even Professor Ackerman seems to concede that having a text to which one can refer is normatively desirable.

Assuming arguendo that Professor Ackerman's proffered explicit textual amendment were enacted (whether by Article V or implicit means), another unanswered question is whether, post-enactment, implicit constitutional amendments could still be enacted. In other words, is his proffered explicit amendment designed to set forth an exclusive procedure for amending the Constitution? Assuming his proposal was ratified, would future generations of Americans enter the higher lawmaking track only to be relegated to the procedures set forth in his explicit alternative? If so, could the political desires of "We the People" be thwarted? Are, in short, his explicit alternative procedures for constitutional amendment so superior to those of the current Article V that "We the People" would no longer need to resort to implicit amendments?

In order to answer these questions, we must ask ourselves what it is that his "new and improved" version of Article V offers us that the current version does not. Does it offer us greater ability to respond to national political crises? Probably not. Ackerman's "improved" procedure for constitutional amendment would require a minimum of eight years (two succeeding Presidential elections)—and possibly much longer—to obtain a desired constitutional alteration.\(^{170}\) Compared to the time frame required for ratification under Article V, this is astounding. If one disregards the extreme case of the Twenty-Seventh Amendment,\(^{171}\) which took 203 years to ratify,\(^{172}\) the time period for

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170. Suppose, for example, that President Clinton had proposed a constitutional amendment shortly after taking office in January 1996. Assuming that Congress expeditiously approved his proposal by the requisite two-thirds vote, the proposal would have to appear on the Presidential ballots in both 2000 and 2004 and receive three-fifths of the popular vote in order to be ratified. Even in this relatively rosy scenario, the total elapsed time is eight years. If, on the other hand, Congress could not muster the necessary two-thirds in support of President Clinton's proposal until 2001, the amendment could not be ratified until after the Presidential election of 2008—a total elapsed time from proposal to ratification of over twelve years.

171. The Twenty-Seventh Amendment reads: "No law, varying the compensation for
ratification under Article V ranges from a low of three and one-half months (the Twenty-Sixth Amendment) to a high of three years and seven months (the Twenty-Second Amendment),\(^{173}\) yielding a median time of twenty-three months—less than two years—for ratification. Thus, to the extent that Ackerman seeks to speed up constitutional change in order to respond to a perceived crisis, his proposed alternative clearly fails.

Ackerman must, therefore, be concerned about something more than mere expediency. But what else does his proposed revision offer us that the current Article V does not? Two things: (1) it permits the President rather than Congress to propose constitutional amendments and (2) it permits a three-fifths (sixty percent) supermajority of voters in two succeeding Presidential elections to ratify the proposed amendment, as opposed to the current requirement that three-fourths (seventy-

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the services of Senators and Representatives, shall take effect, until an election for Representatives shall have intervened.” U.S. CONST. amend. XXVII. The Twenty-Seventh Amendment was one of the original twelve amendments proposed by Congress (ten of which became the Bill of Rights) in 1789. Finis J. Garrett, *Amending the Federal Constitution*, 7 Tenn. L. Rev. 286, 300 (1929). The 38th state (Michigan) ratified it in May 1992. Levinson, *Introduction*, supra note 138, at 5-6.

172. Indeed, one wonders if the Twenty-Seventh Amendment would be held invalid if challenged on the grounds that the length of time required for ratification rendered the proposal stale. In *Dillon v. Gloss*, for example, the Court suggested that a significant temporal delay in ratification could render a proposed amendment invalid, specifically referring to the proposal which became the Twenty-Seventh Amendment some 72 years later:

> These considerations and the general purport and spirit of the [Fifth] Article lead to the conclusion expressed by Judge Jameson “that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.” That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789 [one of which became the Twenty-Seventh Amendment], one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives generations now largely forgotten may be effectually supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal.

256 U.S. at 375.

173. JOHN R. VILE, CONSTITUTIONAL CHANGE IN THE UNITED STATES 89-90 (1994). The Twenty-Second Amendment, ratified in 1951, limited the number of presidential terms to two. U.S. CONST. amend. XXII. The Twenty-Sixth Amendment, ratified in 1971, extended the franchise to individuals age 18 or older. U.S. CONST. amend. XXVI.
five percent) of state legislatures (or conventions) must ratify. What does this mean? Besides the shift from Congress to the President in the proposal power,\textsuperscript{174} the most striking features of Professor Ackerman's alternative are: (1) it alters the necessary ratification supermajority from seventy-five percent of state legislatures (or conventions) to sixty percent of Presidential election voters and (2) it deletes any direct role for the states qua states in the constitutional amendment process, bypassing federalism altogether.\textsuperscript{175} Professor Ackerman's explicit alternative thus alters the two salient values in the current Article V: supermajoritarianism and federalism.

D. Supermajoritarianism in the Constitutional Amendment Process

Professor Ackerman attempts to retain a form of supermajoritarianism in his alternative version of Article V. But it is clearly a nationalist version, not the federalist version of the original Article V. Precisely why Ackerman believes a supermajority of sixty percent of voters in a Presidential election is preferable to seventy-five percent of state legislatures is unclear. Perhaps Ackerman distrusts state-level politics or simply prefers national politics. Perhaps he simply believes it would be administratively simpler to take a national headcount than a state by state headcount. Whatever the case, Ackerman's explicit alternative to Article V concedes the value of supermajoritarianism, albeit in an altered, purely nationalistic form.

His theory of implicit constitutional amendment, by contrast, does not appear to incorporate supermajoritarianism at all. He never tells us whether, for example, the New Deal "switch in time" would be, in his mind, illegitimate absent a supermajority. Indeed, all he tells us is that, to be legitimate, an implicit constitutional amendment must have the

\textsuperscript{174} Precisely why Professor Ackerman prefers the Chief Executive as the source of proposal is enigmatic. Perhaps he believes the President to be more politically in tune with or responsive to the American people and would therefore be more willing than Congress to propose constitutional amendments when desired by the people. But such rationale has neither empirical nor instinctive support, especially when one considers that members of the House of Representatives must run for re-election every two years, whereas the President is held politically accountable to the people only once every four years. Moreover, certainly a second-term, "lame duck" President is less likely than Congress to be responsive to the people, since he does not have to face re-election, whereas members of Congress must face the electorate again if they wish to keep their jobs.

\textsuperscript{175} While Professor Ackerman's explicit amendment does require two-thirds approval by Congress, this is a far cry from the direct involvement of the states qua states in both proposal and ratification of constitutional amendments that is currently provided in Article V. For a more detailed discussion of this important distinction, see infra Part III. E.
backing of a mobilized citizenry and that the mobilized citizenry must have given a “decisive” electoral victory to advocates of the desired constitutional change. But just because the advocates of a desired constitutional change succeed in obtaining a “decisive” electoral victory for their preferred candidate, it does not follow that a supermajority of Americans voted in favor of this candidate because of the candidate’s views on the single issue of constitutional change. Thus, for example, if candidate X runs for President on a platform of support for issues A, B, C & D—issue C being the issue of constitutional change—it does not logically follow that every voter who casts a vote for candidate X necessarily supports his position on issue C. Indeed, when there are multiple issues at stake in an election (which there invariably are), then one cannot say, without engaging in pure speculation, whether or not any one particular issue was a motivating factor in any given voter’s decision.

Take, for example, the 1936 Presidential election, which Professor Ackerman claims was the decisive electoral victory for FDR in which “We the People” voiced our overwhelming support for an implicit constitutional amendment to expand the Commerce Clause. In the 1936 election, FDR ran on a platform of numerous issues, including, most prominently, opposing the growth of fascism abroad, but also such things as enacting Social Security, revitalizing farms, and reducing slum housing and unemployment through government aid. The

176. FOUNDATIONS, supra note 4, at 48-49; Higher Lawmaking, supra note 4, at 76.

177. I concede that if one obtains extensive polling data, one might well be able to say, with some degree of confidence, that issue C was or was not a motivating factor in an individual voter’s decision. Nonetheless, it is important to note that Professor Ackerman does not offer any empirical evidence to support a conclusion that a supermajority of the voters in the 1936 presidential election supported FDR due to a belief that the Commerce Clause needed to be implicitly amended. Indeed, it is quite an intellectual leap to say that support for FDR—and even for his economic vision—implies tacit voter support for the idea that the commerce power ought to be broadened beyond its textual boundaries in Article I, Section 8, without the necessity of resorting to the explicit procedures provided in Article V for constitutional amendment. For a more detailed discussion of this issue, see discussion infra Part III. D.

178. FOUNDATIONS, supra note 4, at 48; see also id. at 53 (“If the American people were ever endorsing a break with their constitutional past, they were doing so in the 1930s.”).

Democratic Party also, of course, continued its call for national labor standards, which the Supreme Court in *Schechter* had held were unconstitutional as beyond the commerce power.\(^{180}\)

While public support for national labor standards was broad, this does not mean that FDR's "decisive" victory in 1936 was a reflection of supermajoritarian support for an implicit constitutional amendment to implement them. Notably, FDR's June 1936 speech accepting the Democratic Party's nomination did not mention the Supreme Court decisions invalidating portions of the New Deal or the possibility of any action to reverse those decisions.\(^{181}\) And the infamous "Court Packing Plan" was not publicly announced until several months after the 1936 election, making it impossible for voters in that election to send an implicit message about the propriety of alternative means of achieving the desired ends.\(^{182}\) Indeed, the Democratic Party's 1936 platform proclaimed that if the problems of the country "cannot be effectively solved by legislation within the Constitution, we shall seek such clarifying amendment as will assure to the legislatures of the several States and the Congress of the United States, each within its proper jurisdiction, the power to enact those laws..."\(^{183}\) The Democratic Party's platform position in 1936 was thus a position in support of an explicit constitutional amendment, enacted via Article V procedures, to grant Congress and the states the necessary power to enact the reforms that the Court had been invalidating.\(^{184}\)

Thus, even assuming arguendo that one could conclude that a vote for FDR in 1936 reflected support for the single issue of reversing the Court's decisions invalidating New Deal legislation, it is more reasonable to conclude that FDR supporters backed the Democratic Party's position to enact an explicit constitutional amendment via Article V rather than an inchoate, unwritten implicit amendment which was never publicly voiced by their candidate or their party. In short, there is no

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180. 295 U.S. 495 (invalidating portions of the National Industrial Recovery Act on Commerce Clause and nondelegation grounds); see supra Part II.


182. RAUCH, supra note 179, at 233.


184. See They Yielded Democracy, WASH. POST, Feb. 7, 1937, at B8 (editorial noting that Democratic Party platform in 1936 also contained a pledge to "maintain the letter and spirit of the Constitution").
indication that "We the People," by re-electing FDR by a large margin in 1936, were voicing our support for an implicit constitutional amendment, much less an amendment so broad as to effectively grant Congress a police power. Stated another way, one cannot conclude that an individual who voted for FDR in 1936 would have also supported his new position, favoring a more expedient means to achieve the desired ends.

The unease some FDR supporters felt with their President's attempt to subvert Article V was echoed in several editorials contemporaneous with FDR's announcement of the Court Packing Plan, many of them by newspapers which had endorsed FDR in the 1936 election. For example, a Washington Post editorial from February 7, 1937—two days after the Plan was announced—emphatically proclaimed that it was an extreme departure from the theme of FDR's 1936 re-election campaign and a complete surprise to his supporters:

[I]n his campaign for re-election, Mr. Roosevelt repeatedly asserted that he had no revolutionary designs on the fundamental institutions of American Government. There was never the slightest hint to the voters that, if returned to the office of Chief Executive, he would promptly advocate packing the Supreme Court. The magnitude of the shock afforded by his message of Friday is the measure of the complete unpreparedness of the Nation for this proposal.

Even when Mr. Roosevelt's campaign speeches are carefully re-read they will be found to give no intimation of the fundamental change he now advocates. In the address at Madison Square Garden, on the eve of election, the President did announce that the only pass key to the White House would remain in his pocket. But he never suggested that he intended to put the pass key to the Supreme Court on the same ring.

Similarly, in his acceptance speech at Philadelphia, "dedicated to the simple and sincere expression of an attitude toward problems," he vehemently denied designs on the American system of Government, asserting on the contrary that "we are fighting to save a great and precious form of Government for ourselves and for the world."

... There is the further fact that Mr. Roosevelt never once asked and certainly never received a popular mandate for the course he now proposes. On the contrary, he effectively lulled to sleep any

185. For a sampling of editorials from newspapers around the country, see Most Comment is Unfavorable to Court Plan, WASH. POST, Feb. 7, 1937, at A2.
anticipation of this course which might have existed before the election.\textsuperscript{186}

Likewise, the \textit{New York Times} editorialized that FDR’s plan leaves him fairly open to the charge that he is endeavoring to do by indirection what he cannot do directly [i.e., by explicit constitutional amendment]. \ldots Nor will the fact fail to be emphasized that Mr. Roosevelt gave not a single hint of such a scheme in any of his speeches during the campaign. If he was then meditating it, when seeking a mandate from the people, it would have been only proper for him to make public some hint of his intention.\textsuperscript{187}

The \textit{Baltimore Sun} was even more direct, angrily stating:

The President is fresh from a national election in which he was repeatedly challenged to declare whether he had plans either to amend the Constitution or to alter the Supreme Court. He avoided the issue when the voters were going to the polls. To put it conservatively, Mr. Roosevelt has been disingenuous with the people.\textsuperscript{188}

The \textit{Cleveland Plain Dealer} argued that “[s]o momentous a program [as the New Deal] calls for the wider consideration, the more mature deliberation of the amending process” and noted that the “present Congress has no instructions from home to pass [the Court Packing] legislation.”\textsuperscript{189} The \textit{St. Paul Pioneer Press} concluded that “the democratic way of proceeding is to empower the Federal Government with new authority in the way it has always been done in the past, and the way provided in the Constitution itself—by amendment.”\textsuperscript{190} The \textit{Kansas City Star} agreed, concluding that “[i]f this nation is to lodge in the Federal Government absolute powers over industry and commerce, that question should be decided by the people themselves.

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\textsuperscript{186} \textit{They Yielded Democracy}, supra note 184, at B8 (emphasis added); see also \textit{Revolutionary & Subversive}, \textit{WASH. POST}, Mar. 11, 1937, at A8 (“The effect, if not the purpose, of such [Court Packing] procedure would be irrevocably to shatter the balance between Federal & State powers which the Supreme Court was established to maintain, and which it can not possibly maintain under determined political pressure. The procedure would at least tend to make the Constitution a dead letter. And while it would undoubtedly bring this country much closer to a state of pure democracy than is the case today, the procedure evidently implies a tremendous enlargement of that executive power which the founding fathers were determined to keep within limited bounds.”).
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\textsuperscript{187} \textit{Remaking the Judiciary}, \textit{N.Y. TIMES}, Feb. 6, 1937, at C16 (emphasis added).
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\textsuperscript{188} \textit{Opinions of the Nation’s Press on Court Plan}, \textit{N.Y. TIMES}, Feb. 6, 1937, at A10; \textit{Most Comment Unfavorable to Court Plan}, \textit{supra} note 185, at A2.
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\textsuperscript{189} \textit{Opinions of the Nation’s Press on Court Plan, supra} note 188, at A10.
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\textsuperscript{190} \textit{Id}.
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A constitutional amendment should determine it, not the short cut of an increase in the size of the court ....”191 The Richmond Times-Dispatch concluded that “[w]e have supported Mr. Roosevelt heretofore in many of his purposes and objectives, but we certainly cannot go along with him on his latest [Court Packing] proposal.”192 Franklyn Waltman, a popular syndicated columnist, opined that

[m]any persons who applaud President Roosevelt’s general objectives do not believe that such an expansion of Federal control should take place without specifically submitting the question to the people of this country, but under the President's [Court Packing] plan the prospects all point to changing thusly the basic foundations of the Constitution without any reference to the people.193

Several letters to the editors of the Washington Post also hint that such opposition was shared by individual voters who had supported FDR in 1936, but who parted company with their President on the means he had chosen to achieve the desired ends.194 For example, one anonymous writer, a self-labeled “federal employee,” wrote to the Washington Post:

I have been an ardent supporter of Mr. Roosevelt and his policies since 1932, because I have believed that his whole purpose has been to act as the instrument of the people’s wishes .... But with his recent Supreme Court proposal, I believe that Mr. Roosevelt is about to usurp the most fundamental of rights guaranteed to the people by the Constitution—that of the right of constitutional amendment. And I must say that I cannot go along with him on this, no matter how honest his intentions may be.

....

It is not expressed, nor can it be implied, that the makers of the Constitution ever intended that the remedy against void legislation should be placed in the hands of the Chief Executive. Yet that is actually what Mr. Roosevelt is asking for. It is the people’s right and their’s [sic] alone. Else why did the makers specifically provide for amendment by the people directly? For Congress to give the President this power to pack the Supreme Court for his obvious purpose,

191. Id.
192. Most Comment Unfavorable to Court Plan, supra, note 185, at A2.
is to create a dangerous precedent which may easily culminate with
the people never being given the chance again to amend their Con-
stitution. That would be the destruction of a fundamental right of the
people and a severe blow to our democratic form of government.

So it would appear that Mr. Roosevelt has misconstrued the
popular mandate he received in the 1936 election, for I am sure the
American people never intended to surrender their constitutional
right of amendment when they so heartily endorsed his program.195

Another FDR supporter wrote:

I have been a Democrat all my life, an original Roosevelt man, and
one of his most loyal supporters. But when he comes forward with a
proposition to pack the Supreme Court with “yes men,” Mr. Roose-
velt and I are parting company, which I think will be the attitude of
plenty of Democrats like myself.

If Mr. Roosevelt has had this intention all along why didn’t he
tell the voters before the November election? If he thinks the people
of the United States gave him a supreme mandate on matters like
this, let him submit the proposition to the people by amending the
Constitution with existing procedure.196

Numerous New Dealers—Democrats as well as liberal Republic-
cans—also opposed FDR’s plan, generally on the grounds that it would
effectively alter the constitutional balance of power between the na-
tional government and the states without taking the issue directly to the
people.197 Opposition to the plan by women and those living in the
farm belt was particularly strong, leaving numerous Democratic Con-
gressmen and Senators lukewarm to the plan and fueling speculation
that FDR would tour the country in order to drum up support amongst
these groups.198 Given the growing opposition among their constitu-
enents, many Democrats began voicing outright opposition to their Presi-

195. Id. (emphasis added).

196. Id. (letter signed by George W. Rossiter) (emphasis added).


dent's plan.\textsuperscript{199} For example, Senator Frederick Van Nuys, a Democrat from Indiana and an historic FDR defender, opposed the Court Packing Plan, stating that he would "not be a party to breaking [the constitutional checks and balances] down in the absence of a mandate from the people to that effect—which means the submission and ratification of a constitutional amendment."\textsuperscript{200} Likewise, liberal Senator Wheeler of Montana, a Democratic Party Vice Presidential candidate in 1924, vocally opposed the Plan as establishing a "dangerous precedent" and urged the passage of an explicit constitutional amendment instead.\textsuperscript{201} Democratic Senator Harry Flood Byrd of Virginia opposed the Plan on grounds that it subverted the "orderly means" of constitutional amendment provided by Article V.\textsuperscript{202} Democratic Senator Josiah Bailey of North Carolina, in a radio address to his constituents, opposed the Court Packing Plan on grounds that it "predicates a new version of the Constitution" and was as morally corrupt as stacking a jury in the middle of a trial.\textsuperscript{203} Several high profile New Dealers and FDR confidants, including Raymond Moley, Morris Ernst and Frank Walsh, also publicly opposed the Plan.\textsuperscript{204}

Absent mind-reading abilities or extensive contemporaneous polling data, it is difficult to draw any definitive conclusions about how FDR supporters felt concerning their President's decision to use extra-Article V means to effectuate the New Deal. But the historical documents available do suggest that, for at least some New Dealers, FDR's scheme to get around Article V was viewed with hostility and disbelief.\textsuperscript{205} Such a negative reaction is not particularly surprising since FDR did not, prior to the 1936 election, put the American people on notice of his intent to circumvent Article V if the Supreme Court continued along its path of invalidation. Press accounts of the announcement of the

\textsuperscript{199} See infra notes 200-203 and accompanying text; see also Robert C. Albright, Cummings Denies Roosevelt Seeks 'Subservient' Court; Urges Change, WASH. POST, Mar. 11, 1937 (noting that Senator Joseph C. O'Mahoney, a Democrat "hitherto believed to be leaning heavily toward the President's viewpoint," surprised the media by proposing an explicit constitutional amendment to require that acts of Congress could be invalidated by the Supreme Court only by a two-thirds vote).

\textsuperscript{200} Albright, supra note 197, at A2.


\textsuperscript{202} Krock, supra note 197, at A8.


\textsuperscript{204} Franklyn Waltman, Politics & People, supra note 197, at A2.

\textsuperscript{205} See sources cited supra note 197.
Court Packing Plan indicate that FDR intentionally kept the Plan secret in order to maximize its impact,\(^{206}\) and that it hit "like a bombshell,'\(^{207}\) which "produced a sensation almost beyond comparison"\(^{208}\) and "took the country by surprise."\(^{209}\) Thus, it simply cannot be said that "We the People," by re-electing FDR in 1936, had formed any opinion on the acceptability of employing extra-Article V means to implement the New Deal.

Professor Ackerman's contention that the New Deal Court's switch was a democratic decision deeply rooted in democracy\(^{210}\) is thus contrary to the historical facts. The only possible basis for his contention is that "We the People" consciously employed non-Article V means in order to bring about the desired ends (i.e., successful implementation of New Deal legislation) because we agreed with FDR that Article V would produce too little, too late.\(^{211}\) But, again, there is no evidence of broad-based popular support to discard Article V in favor of more "expedient" means of constitutional amendment. Indeed, in the twenty years or so immediately preceding the New Deal Court's switch, there were literally dozens of joint resolutions introduced in Congress which sought to amend Article V, the majority of which sought to expedite the amendment process by increasing popular involvement in either the proposal\(^{212}\) or the ratification\(^{213}\) stages. These resolutions,

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\(^{206}\) See, e.g., President Succeeded in Keeping His Secret, N.Y. TIMES, Feb. 6, 1937, at A9; Roosevelt Kept Plan on High Court Secret, WASH. POST, Feb. 6, 1937, at 7A.

\(^{207}\) Turner Catledge, Roosevelt Asks Power to Reform Courts, Increasing Supreme Court Bench to 15 Justices; Congress Startled, But Expected to Approve—Bill is Introduced, N.Y. TIMES, Feb. 6, 1937, at A1.

\(^{208}\) Power Requested to Add Justices to Supreme Court, ATLANTA CONST., Feb. 6, 1937, at A1.


\(^{210}\) FOUNDATIONS, supra note 4, at 113-14.

\(^{211}\) FOUNDATIONS, supra note 4, at 44 ("Rather than meekly following the marching orders of the Federalists, both [Reconstruction] Republicans and [New Deal] Democrats were constitutionally creative procedurally no less than substantively—and they knew it.").

\(^{212}\) See, e.g., H.R.J. Res. 110, 67th Cong., 1st Sess (1921) (petition by 500,000 voters during congressional elections or 1 million voters during a special election may propose constitutional amendments); H.R.J. Res. 123, 66th Cong., 1st Sess (1919) (same); H.R.J. Res. 60, 66th Cong., 1st Sess. (1919) (same); S.J. Res. 22, 66th Cong, 1st Sess. (1919) (same); H.R.J. Res. 294, 64th Cong., 1st Sess. (1916) (majority of voters in 2/3 of states may propose amendments); H.R.J. Res. 319, 63d Cong., 2d Sess. (1914) (10% of voters in a majority of states may propose amendments); S.J. Res. 26, 63d Cong., 1st Sess. (1913) (permitting 15% of voters in 24 states to propose constitutional amendments); S.J. Res. 24, 63d Cong., 1st Sess (1913) (permitting a majority of both houses of Congress or voters in 10 states to propose constitutional amendments); see also Ernest C. Carman, Why & How
however, were universally rejected.\textsuperscript{214} It therefore seems reasonable to conclude that the New Deal generation carefully considered the procedures contained in Article V, openly debated them,\textsuperscript{215} and ultimately found them adequate to meet the exigencies of modern America. Even more persuasive, however, is the extensive historical evidence which indicates that immediately after the Court's June 1935 Schechter Poultry decision invalidating the National Industrial Recovery Act—the cornerstone legislation of the New Deal\textsuperscript{216}—Congress began serious and widely publicized deliberations on various proposed explicit constitutional amendments which would have expanded national power in order to implement New Deal legislation.\textsuperscript{217} Senator Edward Costigan, for

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the Present Method of Amending the Federal Constitution Should be Changed, 17 ORE. L. REV. 102, 108 (1938) (proposing specific text of amendment to Article V which would permit a majority of state legislatures to propose amendments and a majority of voters during the next national election to ratify such proposed amendments).

213. See, e.g., H.R.J. Res. 429, 67th Cong., 4th Sess. (1923) (stating that "any state may require that ratification by its legislature be subject to confirmation by popular vote"); S.J. Res. 4, 68th Cong., 1st Sess. (1923) (same); S.J. Res. 40, 67th Cong., 1st Sess. (1921) (same); H.R.J. Res. 69, 67th Cong., 1st Sess. (1921) (same); H.R.J. Res. 60, 66th Cong., 1st Sess. (1919) (same); S.J. Res 22, 66th Cong., 1st Sess. (1919) (permitting ratification by a majority of voters in a popular referendum); S.J. Res. 24, 63d Cong., 1st Sess. (1913) (allowing ratification by a majority of voters in a majority of states). In 1924, the Senate Judiciary Committee favorably reported out a resolution which would have permitted constitutional amendments to be ratified directly by popular vote. See generally S. REP. No. 202, 68th Cong., 1st Sess. (1924). However, this resolution never reached the Senate floor.

214. See supra notes 212-213. Post New Deal efforts by various states which have petitioned Congress for an explicit amendment to Article V to increase state power over the proposal of constitutional amendments have also failed. See 103 CONG. REC. 4831 (1957) (petition by Idaho to permit a 2/3 vote of 12 state legislatures to propose constitutional amendments); 102 CONG. REC. 7241 (1956) (same petition by Michigan); 101 CONG. REC. 2861 (1955) (same petition by South Dakota).


216. See supra Part II.

217. See Robert C. Albright, Special Session Still Rumored on Capitol Hill, WASH. POST, June 2, 1935, at A17 (stating that "at least one new proposal for a constitutional amendment was advanced in the Senate, and a group of House independents called a nonpartisan conference for Tuesday morning to consider ways and means of amending the Constitution to meet the President's social and economic legislative demands"); Senators See Upheaval Over Roosevelt Plan, CHI. TRIB., June 2, 1935, at A5 ("[A] public reaction on expanding the powers of the central government to invade the states and deal with all social and economic problems would be sought with a view of calling a special session of congress in the fall. The congress would be asked to pass a resolution to amend the constitution, the senate leaders say, and the states would be asked to call their legislatures in special session to ratify it."); Franklyn Waltman, Jr., Suits on NRA are Dropped by Roosevelt.
example, introduced a joint resolution to amend the Constitution which would have granted Congress the "power to regulate hours and conditions of labor and to establish minimum wages in any employment and to regulate production, industry, business, trade and commerce to prevent unfair methods and practices therein." Senator William E. Borah also supported an explicit constitutional amendment, forcefully advocating that the issue of constitutional change be brought directly to the people. In a radio address defending the Supreme Court's decision in *Schechter Poultry*, Senator Borah stated:

The only thing I shall urge is that in the matter of the change the people be consulted. The Constitution should not be changed by the Supreme Court. It should not be changed in Washington. It should be changed by the people alone.

......

Nothing should blind us to the fact, no emergency should confuse us to the great truth that the rights of the States are peculiarly the rights of the people and touch their habits and customs and daily way of living as nothing else may.... If any change is contemplated in this respect the first to be consulted should be the people themselves and that can only be brought about through an open proposal for an amendment to the Constitution. The people know what, if any, portion of their local rights they are safe in surrendering far better... than the courts or the Congress or the executive departments can possibly know.

......

... Those who feel, therefore, that the States should be shorn of their power in whole or in part owe it to the people to submit their proposals to the people in the way of a definite amendment. That is the American way to meet this issue.
The *Washington Post* editorialized that Senator Borah's appeals for explicit constitutional amendment were based upon "unquestionable wisdom," concluding that "[a] nation may choose between a government operated at the discretion of its rulers, or operated under laws approved by and changeable only through the will of its people. The former is a dictatorship; the latter a democracy."\(^{221}\)

If "We the People" so overwhelmingly supported an expanded commerce power, as Professor Ackerman asserts, one must wonder why FDR did not request congressional proposal of an explicit constitutional amendment and, likewise, why the American people did not demand such a proposal of their elected representatives.\(^{222}\) According to leading newspaper accounts shortly after the announcement of the *Schechter Poultry* decision, FDR clearly pondered going the route of Article V:

The party leaders took it for granted, from the President's remarks at yesterday's press conference, that he is planning a constitutional amendment to get around the Supreme Court's decisions shattering the foundations of the New Deal.\(^{223}\)

Everything the President said indicated the only solution was adoption of a constitutional amendment giving the Federal Government jurisdiction over wages, working conditions and production in mining, manufacturing and farming.\(^{224}\)

There would seem to be no doubt that [Roosevelt] wants a constitutional amendment of the interstate commerce clause on perhaps a popular referendum on the subject, as some authorities contend is permissible under the basic law... [T]he President is acting in the American tradition when he heads a direct movement for legal change instead of looking to the high court for a succession of what

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\(^{221}\) Senator Borah on Democracy, supra note 219, at A8.

\(^{222}\) Indeed, there have been four constitutional amendments enacted via the procedures of Article V which have overturned Supreme Court decisions deemed undesirable by "We the People." The four amendments are: (1) the 11th Amendment, which overturned *Chisolm v. Georgia*, 2 U.S. 419 (1793); (2) the 14th Amendment, which overturned *Scott v. Sandford*, 60 U.S. 393 (1856); (3) the 16th Amendment, which overturned *Pollack v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); and (4) the 26th Amendment, which overturned *Oregon v. Mitchell*, 400 U.S. 802 (1970). These four amendments suggest that, when "We the People" so desire, we are fully capable of firing up the machinery of Article V to effectuate the desired constitutional change.

\(^{223}\) Senators See Upheaval Over Roosevelt Plan, CHI. TRIB., June 2, 1935, at A5.

\(^{224}\) Waltman, supra note 91, at A1.
Alice Longworth, speaking of the gold-clause case, called "pragmatic sanctions."225

Indeed, the New York Times reported that FDR and his key advisors were considering asking Congress to propose an explicit amendment specifying that the mode of ratification must be by state conventions acting via popular referenda.226 In this manner, it was believed that an explicit constitutional amendment implementing New Deal legislation could be proposed by Congress and ratified by the requisite three-fourths of states within only sixty days.227 But FDR ultimately rejected the idea of an explicit constitutional amendment, believing it would be vulnerable to judicial sabotage by hostile judges and that there was insufficient time to resort to the cumbersome machinery of Article V.228 Thus, despite extensive talk of an explicit constitutional amendment, none was ever proposed by FDR or Congress, nor petitioned by the states.

225. Dinwoodey, supra note 91, at E3.
227. Id.
228. See Rexford G. Tugwell, The Democratic Roosevelt: A Biography of Franklin D. Roosevelt 414-15 (1957). In his radio broadcast of March 9, 1937—approximately 4 months after his re-election—FDR explained his abandonment of his party's platform position in support of an explicit constitutional amendment as follows:

It would take months or years to get substantial agreement upon the type and language of an amendment. It would take months and years thereafter to get a two-thirds majority in favor of that amendment in both houses of the Congress.

Then would come the long course of ratification by three-fourths of the States. No amendment which any powerful economic interests or the leaders of any powerful political party have had reason to oppose has ever been ratified within anything like a reasonable time. And thirteen States which contain only 5 percent of the voting population can block ratification, even though the thirty-five States with 95 percent of the population are in favor of it.

And remember one thing more. Even if an amendment were passed, and even if in the years to come it were to be ratified, its meaning would depend upon the kind of justices who would be sitting on the Supreme Court bench. And amendment, like the rest of the Constitution, is what the justices say it is, rather than what its framers or you might hope it is.

FDR must have come to the ineluctable conclusion that an explicit amendment was not politically possible, that he could not obtain the requisite two-thirds approval of Congress nor three-quarters approval of the states for such a fundamental alteration of the governmental structure. Indeed, congressional reaction to the idea of an explicit amendment to broaden national power was quite negative. Why would it be difficult to obtain the support of two-thirds of Congress and three-quarters of the (then) forty-eight states for an explicit amendment to implement the New Deal? Two possible answers emerge: (1) there was insufficient supermajoritarian consensus as to the propriety or appropriate scope of such an amendment; and (2) such an explicit amendment would upset the delicate national-state balance of power, triggering ratification resistance by the states.

The second point will be discussed extensively in the next section on federalism. With regard to the first point—lack of supermajoritarian consensus—it is enough to say that it would be difficult, if not impossible, to obtain even simple majoritarian consensus on the breadth of an explicit New Deal amendment. Should it grant to Congress a broad power to enact any form of "social justice," as many union leaders advocated? Or should it be a narrower grant of authority, allowing Congress only to regulate industrial working conditions? Or perhaps even narrower, permitting regulation of only certain industries, such as manufacturing, mining and agriculture? Whether and to what extent to grant Congress a new regulatory power was obviously a question subject to numerous opinions, making expeditious approval by two-thirds of Congress and three-fourths of the states difficult.

229. See Albright, supra note 217, at A17 (stating that Senator Norris of Nebraska "was decidedly pessimistic about the prospects of revising the Constitution . . ." and stating that "[o]ther Senate Democrats declared the President would be unable to get a two-thirds vote of the Senate to submit a constitutional amendment"); Capitol Split on Roosevelt's NRA Comment, WASH. POST, June 1, 1935, at A1 (stating that "[a] broad cross-section of Democrats joined with Republicans in condemning the constitutional amendment route as a way out of NRA difficulties"); Senators See Upheaval Over Roosevelt Plan, CHI. TRIB., June 2, 1935, at A5 (quoting Senator Alfred Smith as saying, "[t]hey'll never amend the constitution. They can't get two-thirds in each house of [C]ongress for such a scheme, much less the ratification of three-fourths of the states."); Franklyn Waltman, Jr., President Drops NRA; Retains Skeleton Staff for Research in Trade, WASH. POST, June 5, 1935, at A1 (reporting that Senator Borah of Idaho "indicated belief . . . that, if the President's ultimate purpose is to seek expansion of Federal control in intrastate matters [via an explicit constitutional amendment], he will not succeed").


231. See FDR Maps Strategy On Bar With Cabinet, supra note 228, at 2.
The American people wanted the national government to improve their lives, to help pull them out of the depression. And they also supported their President, whose vision instilled in them a sense of hope they so desperately needed. But despite their support for FDR, the American people clearly did not heed his early calls for an explicit constitutional amendment. They did not rally in the streets or petition Congress to propose such an amendment. They may have realized that the expansion of national power desired by FDR was potentially dangerous, a greater danger to the long-term well-being of the country than the waning economic depression. They may have been unable to agree on the scope of the transfer of power to the national government. Or they may have simply been too lazy to muster the political energy necessary to sustain a movement for an explicit constitutional amendment. If any of these suggestions is even partially true, one must seriously ponder what long-term impact Professor Ackerman’s implicit amendment theory may have on democracy. Because the New Deal generation either did not approve of expanding national power or could not agree on the scope of such expansion, amendment via Article V was unlikely. Is this result normatively undesirable? If the New Deal generation was ambivalent about how to resolve this important constitutional question, does this not suggest that, by failing to enact an explicit amendment via Article V, our representational form of democracy was working rather well?

Moreover, if, as Professor Ackerman suggests, implicit constitutional amendments allow the Constitution to be more malleable in response to popular political will, they may also encourage political lethargy in the long-run. Indeed, by making its “switch in time,” the New

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232. As syndicated columnist Franklyn Waltman put it in March, 1937:

The President’s contention that there is no “substantial agreement” on the type of an [explicit] amendment is a little mystifying, especially since he claims in the same breath to have a mandate from the people to undertake certain unspecified courses of action. If that mandate exists, if it is sufficient to give the President power to name a Supreme Court in harmony with his political philosophy, then it is sufficient, as soon as he assumes the leadership in that direction, to bring about “substantial agreement” on a Constitutional amendment plainly authorizing what he seeks.

His contention that “substantial agreement” on the type of an [explicit] amendment necessary to meet his objectives is lacking, in reality is an argument that there is a lack of approval for the broad course which Mr. Roosevelt would like to follow. And the lack of “substantial agreement” on his Supreme Court scheme is evidence of the truth of that contention.

Franklyn Waltman, Politics & People: President’s Frankness in Latest Fireside Chat Effective Indictment of Court Minority, WASH. POST, Mar. 11, 1937, at A2.
Deal Court made continued mass political mobilization unnecessary, hence weakening, rather than strengthening, democracy. Stated another way, the New Deal Court’s switch effectively took the wind out of the sails of those crying for explicit amendment, allowing the New Deal generation to go on with their daily lives without having to mobilize further to resolve arguably the most important constitutional question raised since the Founding.

If Americans therefore accept Professor Ackerman’s challenge to come “out of the closet” and acknowledge legitimate implicit constitutional amendments, they would effectively be relieved of the “burden” of mobilizing to the extent required by Article V. And although Professor Ackerman’s four-step schema requires a “decisive” electoral victory for the party advocating constitutional change,233 this is a far cry from the sort of political mobilization required to ratify an explicit amendment via Article V. Under Professor Ackerman’s implicit amendment theory, “We the People” would have to provide a decisive victory for the party advocating constitutional change, but after Election Day, we would not have to get out of our recliners. After Election Day, we would no longer have an incentive to write letters to our elected officials or march in the streets or attend political rallies because our desires could be implemented through the single act of voting for a particular candidate on a particular day. Even assuming arguendo that an implicit amendment provides a more expedient means of effectuating constitutional change desired by the people, is it normatively desirable if it encourages greater political lethargy? Is it more “democratic” in the long run? If democracy is about more than merely a head count of those who bother to show up at the polls, if it is about encouraging citizens to make their voices heard on issues of great importance to them, the answer to these questions is “no.” Because Professor Ackerman’s implicit amendment theory may discourage sustained political activity and expression, it is arguably less, not more, democratic than the process of constitutional change required by Article V.

Whatever the reason for the New Deal generation’s failure to pass an explicit constitutional amendment, however, one thing is clear: the failure to even begin a serious effort for ratification of an explicit constitutional amendment indicates that “We the People” were ambivalent about the issue. It indicates, contrary to Professor Ackerman’s suggestion, that Americans of the mid-1930s were not a mobilized citizenry

233. FOUNDATIONS, supra note 4, at 48-49.
desirous of implementing the New Deal at any cost. The strong opposition to FDR’s Court Packing Plan—including vocal opposition by former FDR loyalists—reaffirms this conclusion.\textsuperscript{234} There is simply no indication, in short, that the American people gave FDR a blank check to implement the New Deal in any way possible. The Supreme Court’s “switch in time,” therefore, is not a reflection of the desires of a mobilized supermajority, not deeply rooted in democracy, and therefore not deserving of constitutional amendment status to be revered by future generations.

\textit{E. Federalism in the Constitutional Amendment Process}

Another possible explanation for the failure to propose or ratify an explicit constitutional amendment implementing the New Deal is the federalist structure of Article V. Under Article V, states play an integral role in the constitutional amendment process.\textsuperscript{235} While proposal of a constitutional amendment may be made either by a two-thirds vote of Congress or upon application of two-thirds of the states for a constitutional convention, ratification can only occur one way: by three-quarters vote of the states, either acting through their state legislatures or through state constitutional conventions.\textsuperscript{236}

Explicit constitutional amendments to expand national power are particularly difficult to obtain,\textsuperscript{237} precisely because Article V requires the states to consent to all constitutional amendments by three-quarters ratification. Thus, even if FDR had succeeded in convincing two-thirds of Congress to propose an explicit constitutional amendment expanding congressional power to implement the New Deal, such an amendment would have faced an uphill battle at the ratification stage, because it was not clear that the states (and the citizens living in them) wanted to give their national government such an extreme authorization of power.

Within a week of the announcement of the Court Packing Plan, for example, both houses of the state legislatures of Kansas, Maine and New Hampshire, as well as the Connecticut House and the Texas Senate, adopted formal resolutions opposing the plan.\textsuperscript{238} The opposition

\textsuperscript{234} See sources cited \textit{supra} notes 185-197 and accompanying text.
\textsuperscript{235} U.S. Const. art. V.
\textsuperscript{236} \textit{Id.}
\textsuperscript{237} Although not impossible, as evidenced most obviously by the Reconstruction Amendments. U.S. Const. amend. XIII-XV.
\textsuperscript{238} Georgian Selected to Direct House Opposition to Roosevelt Plan For Enlarged Supreme Court, \textit{Atlanta Const.}, Feb. 10, 1937, at A3; Two Legislatures Vote Protest to
emanated from Democratic as well as Republican legislators, providing further confirmation that many New Dealers who supported FDR in 1936 were not supportive of his attempt to circumvent Article V.\textsuperscript{239}

Why states should have been so hostile to the Court Packing Plan is rather obvious. If Congress enacted the Plan, FDR would be given authority to pack the Supreme Court with Justices who could be expected to uphold the constitutionality of New Deal legislation. If the New Deal legislation were upheld, furthermore, national power—particularly the commerce power—would be considerably expanded and state power commensurately contracted.\textsuperscript{240} Thus, states had as much to fear from the Court Packing Plan as they did from an explicit New Deal amendment, and their opposition could be expected equally as to both.\textsuperscript{241} One Radical Party Congressman from North Dakota, Gerald P. Nye, echoed the predictable opposition of states by declaring, "I know that my state would not countenance any such centralization of power over intrastate business as now evidently contemplated, and I do not believe another state in the Union would."\textsuperscript{242}

Professor Ackerman would prefer to eliminate direct state involvement in the constitutional amendment process. Under either his explicit alternative to Article V or his implicit amendment theory, states would have neither proposal nor ratification power.\textsuperscript{243} Under his proffered explicit revision to Article V, the President alone would have the

\textit{Court Change, WASH. POST, Feb. 11, 1937, at A3.}

\textsuperscript{239} See \textit{Opposition from the States}, WASH. POST, Feb. 11, 1937, at A8. Indeed, the editors of the Post noted that "[t]he Texas Legislature has condemned the [Court Packing] scheme just about as emphatically as that State approved the re-election of President Roosevelt three months ago." \textit{Id.}

\textsuperscript{240} A \textit{Washington Post} editorial put it this way:

The States have good reason to be perturbed by the President's plan... [T]he issue on which Administration acts have been most frequently held unconstitutional is the division of powers between the Federal and State governments. Various addresses and official acts of the President give rise to the assumption that his purpose in seeking a change in the membership of the Supreme Court is to make possible the extension of national power without an amendment to the Constitution. That is a matter of direct concern of the State legislatures that may well engage their attention. . . .

\textit{Id.}

\textsuperscript{241} Indeed, states may have had more to fear from the Court Packing Plan because their Representatives and Senators in Congress had shown "unusual susceptibility to executive influence." \textit{Id.} Thus, states had greater and more direct control over the ratification of an explicit amendment than they would have had over congressional deliberations of the Court Packing Plan.

\textsuperscript{242} \textit{Congress Split Over President's Views}, CHI. TRIBUNE, June 1, 1935, at A2.

\textsuperscript{243} See supra Part III.C.
power to propose constitutional amendments and such proposed amendments could be ratified only upon three-fifths support of voters in two succeeding Presidential elections.\textsuperscript{244} And under Ackerman's implicit amendment theory, constitutional amendments are the byproduct of an institutional struggle amongst the three branches of the national government, with the states having no voice at all.\textsuperscript{245} Thus, in order to assess the normative desirability of Professor Ackerman's theory, it is essential to determine whether preserving a role for the states in the constitutional amendment process is itself normatively desirable.

Why would it be desirable to ensure that states have a role in proposing or ratifying constitutional amendments? The historical documents relating to the Constitutional Convention do not shed much light on this question. With regard to the proposal power, the most extensive discussion came during the last week of the convention when Alexander Hamilton (a Federalist) stated that Congress—not just state legislatures—ought to be given the power to propose amendments.\textsuperscript{246} Thus, it appears that the delegates to the Convention simply assumed, without any debate, that the states would have the power to propose constitutional amendments. This lack of debate is not particularly surprising. After all, one of the chief reasons the Constitutional Convention was called was that the Articles of Confederation's procedures for amendment proved woefully ineffective as a means of bringing about desired changes.\textsuperscript{247} Specifically, Article Thirteen of the Articles of Confederation had two primary defects: (1) it required unanimity before amendments could be effective; and (2) it granted the power to propose

\textsuperscript{244} For the full text of Ackerman's proffered alternative to the current Article V, see \textit{supra} Part III.C. Interestingly, Professor Ackerman does not say whether he intends his explicit alternative to be a substitute for, or an addition to, the existing Article V. \textit{See Foundations, supra} note 4, at 54-56.

\textsuperscript{245} \textit{See Foundations, supra} note 4, at 48-49.

\textsuperscript{246} \textit{James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America} 539 (Gaillard Hunt & James Brown Scott eds., Greenwood Press 1970) (Madison reported that Hamilton stated, "The State Legislatures will not apply for alterations [i.e., amendments] but with a view to increase their own powers. The National Legislature will be the first to perceive and will be the most sensible to the necessity of amendments, and ought also to be empowered, whenever two thirds of each branch should concur to call a Convention. There could be no danger in giving this power, as the people would finally decide in the case.").

amendments exclusively to Congress.\textsuperscript{248} Article V rectified both of these defects.

None of the twenty-seven amendments enacted via Article V has been proposed by a constitutional convention convened at the request of two-thirds of the states (they have all gone the "easier route" of being proposed by a two-thirds vote of Congress).\textsuperscript{249} This does not mean that the states have not played an important role in the proposal stage or that their power to propose amendments is unnecessary. As one commentator has noted, "[w]hen Congress is divided and unable to act, or if it is slow to act, the state legislatures can [and have] act[ed] as a prod."\textsuperscript{250} Two good examples of this coercive power of states in proposing constitutional amendments are the repeal of the Prohibition (Eighteenth) Amendment, which was initiated by the petition of five states,\textsuperscript{251} and the Twenty-Second Amendment (limiting Presidential tenure to two terms), which was initiated by the petition of five states prior to congressional consideration.\textsuperscript{252} Even more significant is the example of the Seventeenth Amendment, ratified in 1913, which provided for the direct election of Senators by the people of the states.\textsuperscript{253} Because such a

\begin{itemize}
  \item \textsuperscript{248} ARTICLES OF CONFEDERATION art. XIII ("[N]or shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states [sic], and be afterwards confirmed by the legislatures of every state.").
  \item \textsuperscript{249} See 143 CONG. REC. E1303 (daily ed. June 24, 1997) (statement of Rep. Bliley of Virginia). Interestingly, Congressman Bliley recently introduced legislation which would amend Article V in order to make it easier for states to begin the amendment process without depending on Congress. Specifically, the legislation would allow two-thirds of the legislatures of the states to propose specific, identically worded constitutional amendments, which, if not expressly disapproved by two-thirds vote of Congress, would then be submitted to the states, three-quarters of which would have to ratify. H.R.J. Res. 84, 105th Cong., 1st Sess. (1997). The chief advantage of this revised approach is that it would permit states to begin the amendment process without having to call a constitutional convention, an untested mechanism widely viewed as presenting significant unanswered questions as to both substantive scope and procedural form. See 143 CONG. REC. E1303 (June 24, 1997) (remarks of Congressman Bliley); see also LESTER BERNHARDT ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 40-48 (Callaghan & Co. 1942); Buckwalter, supra note 247, at 549-561.
  \item \textsuperscript{250} Fred P. Graham, The Role of the States in Proposing Constitutional Amendments, 49 A.B.A. J. 1175, 1176 (1963).
  \item \textsuperscript{251} AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V, 73 (A.B.A. Special Constitutional Convention Study Comm. 1974) [hereinafter AMENDMENT OF THE CONSTITUTION.]; Buckwalter, supra note 247, at 548; cf. Graham, supra note 250, at 1176 (stating that four states had so petitioned).
  \item \textsuperscript{252} AMENDMENT OF THE CONSTITUTION., supra note 249, at 73-74; Buckwalter, supra note 247, at 548; Graham, supra note 250, at 1178 n.20.
  \item \textsuperscript{253} U.S. CONST. amend. XVII, § 1. Prior to the adoption of the 17th Amendment, Senators were chosen by the legislatures of the states. U.S. CONST. art. I, § 3.
\end{itemize}
constitutional amendment did not serve the self-interest of the sitting Senators, congressional proposal was not immediately forthcoming. It was not until twenty-three state legislatures had petitioned for such a constitutional amendment that Congress reluctantly acquiesced and proposed a direct-election amendment.254

It should also be remembered that the Anti-Federalists harbored deep suspicion towards the new national government and they insisted, throughout the Convention, that the states' voices be heard in important governmental decisions.255 Article V attempted to palliate this suspicion by providing two explicit assurances.256 First, it provided a guarantee that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."257 Secondly, and more importantly, Article V stated that states—and only the states—held the power to ratify proposed constitutional amendments.258

Giving the states the exclusive power of ratification is important in several respects. Perhaps the most important benefit obtained by permitting states to ratify proposed constitutional amendments is that it provides a necessary check on national power. Specifically, if the states did not hold the ratification power, certain states or regions of the country could more easily be disadvantaged, perhaps even abolished altogether. Indeed, as Governor of New York, FDR himself acknowledged this normatively desirable characteristic of federalism in a national radio address in which he stated:

The whole success of our democracy has not been that it is a democracy wherein the will of a bare majority of the total inhabitants is imposed upon the minority, but because it has been a democracy where, through a dividing of government into units called States, the rights and interests of the minority have been respected and have always been given a voice in the control of our affairs. This is the

254. Graham, supra note 250, at 1178; see also AMENDMENT OF THE CONSTITUTION, supra note 251, at 72 (stating that from 1901 to 1911, a total of 30 states adopted 69 petitions for a constitutional convention on this issue).


256. U.S. CONST. art. V.

257. Id. Article V also contains another entrenchment provision which preserves state power, albeit in a temporally limited fashion, to retain slavery: "[p]rovided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article . . . ."

258. Id.
principle on which the little State of Rhode Island is given just as large a voice in our national Senate as the great State of New York.

The moment a mere numerical superiority by either States or voters in this country proceeds to ignore the needs and desires of the minority, and, for their own selfish purposes or advancement, hamper or oppress the minority, or debar them in any way from equal privileges and equal rights—that moment will mark the failure of our constitutional system.\(^{25}\)

Thus, for example, suppose a constitutional amendment is proposed which would abolish ten states in the American heartland—Kansas, Nebraska, Colorado, North Dakota, South Dakota, Missouri, Montana, Iowa, Oklahoma and Wyoming,—and turn them into a giant, population-barren landfill for the use of the remaining forty states. Under Article V as it exists today, such a proposal would have to be ratified by three-quarters of the states, acting either via their state legislatures or state conventions. This means that the proposed amendment could be defeated by a mere thirteen states. Undoubtedly, the ten states targeted for abolition would refuse to ratify the amendment. Thus, if they could convince a mere three additional sister states—say, perhaps the bordering states of Idaho, Utah and New Mexico, to name only a few of the potential candidates—to reject the proposed amendment, it would fail.

Contrast this likely outcome of defeat with the likely outcome under Professor Ackerman’s implicit amendment theory. Imagine that the scarcity of land for waste dumping became an issue seized by Party X in the 2008 elections. Moreover, Party X’s presidential candidate runs on a platform which advocates abolishing the heartland to make much needed room for the country’s growing waste. Party X’s presidential candidate then becomes the New President and at the President’s request, Congress immediately passes a law abolishing the ten states, and turns them into a landfill. The Supreme Court, however, then rules that this law is unconstitutional.

Assume further that as the 2012 Presidential election nears, the country’s waste problem is growing increasingly severe. The President runs for re-election, again asking the citizens to support him in his effort to implement his plan for a national landfill in the heartland and be-

\(^{25}\) FDR’s speech occurred on March 2, 1930, and was reprinted in Franklyn Waltman, Politics & People: Centralization of Power in U.S. Held Road to Oligarchy in Address of Greatly Admired Political Authority, WASH. POST, Mar. 13, 1937, at A2.
rating the Supreme Court's decision as wrong, both as a matter of constitutional law and modern necessity. The President wins re-election by a landslide, sweeping into Congress on his coattails a decisive majority for Party X. The Party X-dominated Congress quickly passes another law abolishing the ten states and declaring the area a national landfill. Shortly thereafter, the Supreme Court has a "switch in time" and rules that the law is now constitutional.

According to Professor Ackerman, this course of events—essentially just a futuristic twist on his account of the New Deal—has created a legitimate, implicit constitutional amendment which permits the abolition of the ten states. Thus, while the procedures in Article V would likely have resulted in a defeat for this kind of constitutional change, Professor Ackerman's implicit amendment theory results in success. The net effect of such a nationalistic amendment process is that the interests of the citizens living in these ten states have been trampled upon with tyrannical disregard by actors within the three branches of the national government. If you live in one of these ten states, too bad.

The key difference between the Article V procedure for amending the Constitution and Professor Ackerman's implicit amendment procedure or his explicit alternative to Article V is that in the former, the states qua states have a significant say-so, whereas in the latter, they do not. Thus, under Article V, states are essentially entrusted to protecting their own interests (and the interests of their citizens) via the requirement that three-fourths of the states must ratify proposed amendments. Under Professor Ackerman's implicit amendment procedure, by contrast, the interests of the states (and their citizens) is entrusted to the three branches of the national government, which has unchecked power to oppress the states (and their citizens).

The practical differences in these two procedures for constitutional amendment are potentially quite significant. Article V, by providing a meaningful role for the states in the proposal and ratification stages of the constitutional amendment process, provides an incentive to expeditious proposals and a strong disincentive to the disadvantaging of states and regions, thereby fostering the unity of the states and the perpetuation of the union. Because neither Professor Ackerman's implicit amendment theory nor his explicit alternative to Article V provides any role for the states in the amendment process, they are normatively undesirable.
IV. THE END OF THE TWENTIETH CENTURY: BEGINNING OF A JUDICIAL "REPEAL" OF THE IMPLICIT TWENTY-EIGHTH AMENDMENT?

Considering how far we have strayed from the Founders' vision in our Commerce Clause jurisprudence, the question naturally arises as to whether we can ever go back. Richard Epstein, for example, asserts that "[i]t is far easier to keep power from the hands of government officials than it is to wrest it back from them once it has been conferred. We have had our chance with the [C]ommerce [C]lause, and we have lost it."260

To be sure, the legal realist will argue that an outcome-oriented Court can do whatever it wants, whenever it wants. But returning to our constitutional roots in the Commerce Clause arena is much more complicated than a matter of technical power and a will to exercise it. Literally hundreds, perhaps thousands, of national laws are grounded in the Commerce Clause.261 It is, by far, the single largest source of power of the modern national government. To tinker with the scope of the commerce power, therefore, potentially places the legitimacy of these laws—and therefore much of the national government itself—in jeopardy.

A. United States v. Lopez

Despite this risk, in its 1995 United States v. Lopez decision, the Supreme Court invalidated—for the first time since the New Deal—a national law as exceeding the commerce power.262 The law that was invalidated, the Gun-Free School Zones Act, made it a federal crime for "any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reason to believe, is a school zone."263 The defendant, twelfth grader Alfonso Lopez, Jr., had clearly violated the federal law by carrying a loaded .38 caliber handgun to school with him that day.264 His only argument for freedom was, to say the least, a long shot: to argue that the Gun-Free School Zones Act exceeded the com-

260. See Epstein, supra note 7, at 1455.
261. Most significantly, perhaps, are the federal civil rights laws, which are grounded in the Commerce Clause. See Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).
264. Lopez, 514 U.S. at 551.
When the Fifth Circuit bought Alfonso Lopez’s argument and reversed his conviction, legal scholars were surprised, perhaps even amused. Yet, they were generally confident that the Supreme Court would reverse, continuing its post-New Deal trend of upholding congressional exercise of the commerce power under a rational basis standard.

When the Supreme Court upheld the Fifth Circuit and invalidated the Gun-Free School Zones Act, the decision shocked many for whom the Commerce Clause had become, as Deborah Merritt put it, “an intellectual joke.” Chief Justice Rehnquist, perhaps sensing the shock waves that the decision would send throughout the legal community, took great pains to cite every major New Deal opinion. Perhaps in an effort to suggest that these opinions and other laws grounded in the commerce power were not in jeopardy the court stated that:

*Jones & Laughlin Steel, Darby,* and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce. But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.

Having thus reassured the legal community that the sky was not falling, the *Lopez* Court then assuaged the federalists:

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress’ authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits,
congressional legislation under the Commerce Clause will engender "legal uncertainty."... The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation.... Any possible benefit from elimination of this "legal uncertainty" would be at the expense of the Constitution's system of enumerated powers.\[270\]

*Lopez* thus raises more questions than it answers, conveying a message of simultaneous doctrinal evolution and theoretical devolution—an odd combination of progress and regress. On a cynical level, one is reminded of Machiavelli's assertion that, in altering the law, one must "retain the semblance of the old forms; so that it may seem to the people that there has been no change in the institutions, even though in fact they are entirely different from the old ones."\[271\]

Doctrinally, the majority in *Lopez* sets out a tripartite framework for analyzing Commerce Clause issues.\[272\] Specifically, the Court says that there are three categories of commercial laws: (1) those that regulate the "use of the channels of interstate commerce";\[273\] (2) those that "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce";\[274\] and (3) those that "regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."\[275\] Although the Court mentions the rational basis standard,\[276\] it appears that, with regard to category three—those laws which must have a "substantial relation" to interstate commerce—the Court is, in practical terms, engaging in a somewhat more rigorous review. After all, requiring the government to prove a "substantial relationship" to a legitimate governmental objective (e.g., commerce) is the classic judicial parlance for intermediate scrutiny, not rationality review.\[277\] If one

270. *Id.* at 566.


272. See infra notes 273-276 and accompanying text.


274. *Id* at 558.

275. *Id.* at 558-59 (citation omitted).

276. *Id.* at 557.

thinks about it, this makes sense: category three Commerce Clause cases do not *facially* have any connection to commerce in the way that categories one (channels of commerce) and two (instrumentalities of or persons/things in commerce) do. Thus, under category three, the government must proffer something more than a mere rational basis. Indeed, the Court explicitly acknowledged that the Gun-Free School Zones Act "is a criminal statute that by its terms has nothing to do with 'commerce' or any other sort of economic enterprise, however broadly one might define those terms."278

Thus, as a doctrinal matter, *Lopez* is more properly labeled "evolutionary" rather than revolutionary. *Lopez* merely says that if an act of Congress, such as the Gun-Free School Zones Act, does not facially have a connection to the channels, instrumentalities, or persons/things in interstate commerce, Congress will bear the burden of proving a substantial connection to interstate commerce in order to sustain it as a valid exercise of the commerce power.279 It establishes, in effect, a "quasi-suspect class" of laws passed pursuant to the commerce power which do not have any facial connection with interstate commerce. This quasi-suspect class—category three—must then pass intermediate scrutiny to be upheld, meaning that the government must prove to the Court that the facially non-commercial activity at issue does, in fact, bear a substantial relation to interstate commerce.

The *Lopez* standard of heightened scrutiny for category three laws appears to have its roots in the famous "footnote four" of the 1938 decision in *United States v. Carolene Products Co.*280 In that footnote, Justice Stone suggested that certain legislative acts may or should be subject to review more stringent than mere rationality review.281

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279. *Id.* at 562-63.
280. 304 U.S. 144, 152 (1938).
281. *Id.* at 152 n. 4.
Specifically, Justice Stone stated that "[t]here may be narrower scope for operation of the presumption of constitutionality[, i.e., rationality review,] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . ."282 Thus, if a law passed pursuant to the commerce power appears on its face to have nothing to do with any of the enumerated powers in Article I, Section 8, a fortiori it would, in the words of Justice Stone, "appear[] on its face to be within a specific prohibition of the Constitution,\"283—namely, the Tenth Amendment, which reserves all powers not delegated to the national government to the states.284 Under this reasoning, therefore, a law grounded in the Commerce Clause which has no facial link to commerce whatsoever—e.g., the Gun-Free School Zones Act—would appear to violate the Tenth Amendment and would require more exacting judicial scrutiny. The burden thus would rightfully fall upon the government to articulate a substantial nexus to interstate commerce to validate it under the Commerce Clause.

This sort of heightened scrutiny for facially suspect legislative acts is, of course, nothing new. It is precisely the sort of review afforded in the equal protection context to laws which single out suspect or quasi-suspect categories of individuals.285 It is also analogous to the Court's long-standing tradition of reviewing with greater vigor those dormant commerce cases in which a state law is facially discriminatory in its effect on other states.286 In such cases, the law is inherently suspect be-

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282. Id. (emphasis added).
283. Id.
284. U.S. CONST. amend. X.
285. See supra note 277 (citing equal protection cases imposing intermediate scrutiny).
286. The modern test in the dormant Commerce Clause area was pronounced in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), in which the Court stated:

[The] general rule can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142. The test, although complicated, appears to be that a state law, even with a legitimate purpose, will violate the dormant Commerce Clause if it discriminates against other states, unless there is no other, less discriminatory alternative available for achieving the legitimate purpose. This translation of the Bruce Church test appears to have been embraced in the 1977 decision in Hunt v. Washington State Apple Advertising Comm'n, 432
cause it seeks to obtain an unfair advantage for its own citizens at the expense of the citizens of other states—precisely the sort of economic balkanization and favoritism that the national government, through the Commerce Clause, was intended to have the power to remedy. Likewise, in the active commerce category three cases, the law is inherently suspect because it has no facial link to interstate commerce—precisely the sort of activity that the state government, through the Tenth Amendment, was intended to have the power to regulate. Thus viewed, the Dormant Commerce Clause and the Commerce Clause are but mirror images of each other: the former defines the boundaries of the Tenth Amendment in light of the Commerce Clause, while the latter defines the boundaries of the Commerce Clause in light of the Tenth Amendment. It should come as no surprise, then, that the Court in Lopez, perhaps unconsciously, took a step towards harmonizing the standard of judicial review in the dormant and active commerce contexts.

Imposing a heightened standard of scrutiny for quasi-suspect, category three cases effectively shifts the burden of proof onto Congress to articulate a substantial interstate commerce nexus. Thus, rather than simple rationality review, which presumes a legislative act is constitutional, heightened scrutiny essentially presumes a legislative act is unconstitutional, and asks the legislative body to prove otherwise if the law is to be sustained. In order to meet this burden of proof, it then

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U.S. 333 (1977), in which the Court stated:

> [T]hat state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry.... [T]he challenged statute has the practical effect of not only burdening interstate sales of Washington apples, but also of discriminating against them.... [T]he state therefore bears the burden to justify the discrimination in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives.

Id. at 350, 353. Perhaps the clearest explanation of the level of review afforded in dormant Commerce Clause cases came from Justice Brennan's majority decision in Hughes v. Oklahoma, 441 U.S. 322 (1979), in which the Court invalidated an Oklahoma law banning the export of domestic minnows. The Court declared:

> [The law] on its face discriminates against interstate commerce.... Such facial discrimination by itself may be a fatal defect, regardless of the State's purpose, because "the evil of protectionism can reside in legislative means as well as legislative ends." At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.

Id. at 336-37 (emphasis added).

287. This interpretation of Lopez would be highly analogous to Justice Rehnquist's concurrence in Hodel v. Virginia Surface Mining and Reclamation Ass'n, in which he expressed his belief that Congress should bear the burden of proving a substantial nexus of the
becomes quite important for Congress to provide either an explicit interstate nexus requirement in the statute, or findings that document how the regulated activity substantially affects interstate commerce, or both. Indeed, the *Lopez* Court makes just this point, distinguishing the federal statute outlawing firearm possession by a felon\(^{288}\) by noting that "[u]nlike the statute [outlawing firearm possession by a felon], [the Gun-Free School Zones Act] has no express jurisdictional element, which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce."\(^{289}\) With regard to the importance of findings, the Court noted that

> [a]lthough as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, the government concedes that "neither the statute nor its legislative history contains express . . . findings regarding the effects upon interstate commerce of gun possession in a school zone." We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.\(^{290}\)

While reliance on findings and explicit statutory nexus may seem

\(^{288}\) See 18 U.S.C. § 1202(a).

\(^{289}\) 514 U.S. at 562. An interesting post-*Lopez* question is whether the mere existence of an explicit statutory nexus, if factually satisfied, would be enough to sustain a federal law in the event of a facial challenge. In *Scarborough v. United States*, the Court upheld a conviction under a federal statute which prohibits convicted felons from "possess[ing] in or affecting commerce, any firearm or ammunition," 18 U.S.C. § 922(g), upon mere proof that the firearm had once crossed state lines. 431 U.S. 563, 567 (1977). The Government's burden, the Court stated, did not include having to prove that the defendant himself moved the firearm across state lines. 431 U.S. at 575 n.11. It is unclear precisely whether *Scarborough* is a statutory interpretation or a constitutional decision, but it certainly seems to imply that mere movement across state lines would be sufficient under the Constitution since the Court stated that the statute was to be construed to reach the limits of the Constitution. *Id.* at 575. Interestingly, the *Lopez* Court—of which only two Justices were also on the *Scarborough* Court—never even mentions *Scarborough*.

\(^{290}\) *Lopez*, 514 U.S. at 562 (citations and footnote omitted).
formalistic, it is important to remember that the Court did not say that either was required. Rather, the Court merely appears to be attempting to provide Congress with some sort of blueprint for exercising its commerce power in a constitutionally valid way. It is, in short, telling Congress that, if it wants to use the commerce power to regulate activities that do not, on their face, have a link to interstate commerce, it is walking on thin constitutional ice. Such laws inherently raise constitutional eyebrows because, without a facially apparent grounding in the commerce power, they implicate federalism. All the talk about findings and nexus is, therefore, a prophylactic warning to Congress that such laws may violate the Constitution and that, in order to avoid future instances of institutional conflict, Congress had better dot its i’s and cross its t’s.

Assuming Congress gets the message and provides an explicit nexus and findings, does this mean that the Court will defer and uphold the law? The answer is unclear. On the one hand, providing such high value to an explicit nexus and findings would seem to elevate form over substance, providing no real substantive limits on the commerce power so long as Congress jumped through these procedural hoops. On the other hand, giving conclusive value to an explicit nexus and findings would seem to devalue the Tenth Amendment.

If the current Court is nervous that congressional exercise of the commerce power is approaching a point where “We the People” would not approve, requiring Congress to jump through the hoops of providing an explicit nexus and findings may reassure it that this is not, in fact, the case. Thus, by requiring these extra procedures, the Court is effectively telling Congress that it must inform the American people as to what it is doing and why it is doing it. If Congress provides an explicit nexus and findings, it essentially engages in a dialogue with “We the People,” explaining to us why these extra federal laws redound to our benefit, enhancing accountability and limiting obfuscation. It establishes, in essence, a procedural proxy for ensuring that, at least in the

291. Senator Kohl later introduced a Gun-Free School Zones Act of 1995 which contained both an explicit nexus requirement that the gun “has moved in or... otherwise affect[ed] interstate or foreign commerce,” and nine explicit findings of interstate nexus. See S. 890, 104th Cong., § 2 (1995). Although the Senate Judiciary Subcommittee on Youth and Violence held hearings on the bill in July 1995, shortly after the Lopez decision, no further hearings were held. A companion House bill was introduced by Rep. Schumer of New York. See H.R. 1608, 104th Cong. (1995).

292. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); see also supra Part II.
commerce power arena, the underlying assumptions of Garcia—that federalism concerns can be adequately safeguarded by Congress—are worthy of continued judicial confidence.293

B. Seminole Tribe of Florida v. Florida and Idaho v. Coeur d’Alene Tribe of Idaho

In March 1996, a closely divided Supreme Court decided Seminole Tribe of Florida v. Florida, a case presenting the question whether Congress, acting via its Indian Commerce Clause power, may abrogate a state’s Eleventh Amendment immunity.294 In holding that Congress may not so abrogate, the Court explicitly reversed its decision in Pennsylvania v. Union Gas Company, rendered only seven years earlier.295 Thus, in a breathtakingly short period of time, the Court did an about-face with regard to congressional power vis-à-vis the states, holding that a statute passed pursuant to the congressional commerce power could not trump an explicit constitutional amendment.296

The Court in Seminole Tribe noted that its departure from the principle of stare decisis was warranted because Union Gas was only a plurality opinion which had “created confusion among the lower courts”297 and, more importantly, because “[t]he plurality’s rationale [in Union Gas] deviated sharply from [our] established federalism jurispru-
Seminole Tribe is therefore striking not only for the speed with which it followed on the heels of Union Gas, but for the palpable respect the Court accorded the sovereignty of the states, a respect which had been eroding steadily since the New Deal. Thus, at its core, Seminole Tribe scales back the commerce power from what it was thought to be only seven years earlier in Union Gas.

A recent decision from the District Court for the Northern District of Alabama is illustrative of the potential implications of Seminole Tribe. In MacPherson v. University of Montevallo, two professors at a state university sued their employer, alleging violation of the Age Discrimination in Employment Act (ADEA). The university defended the action, claiming that the federal court lacked subject matter jurisdiction to entertain the suit against the university (an arm of the state) because of the Eleventh Amendment. The district court agreed, reasoning that the ADEA was enacted pursuant to the Commerce Clause and that the commerce power after Seminole Tribe was not so extensive as to permit abrogation of the Eleventh Amendment. The MacPherson decision provides a clear illustration of the contraction of the commerce power which accompanied the reinvigoration of the Eleventh Amendment in Seminole Tribe. Thus, while some may dismiss Seminole Tribe as a minor decision restricted to the narrow issue of sovereign immunity, it has very real and significant implications for the commerce power because it takes power back from Congress that was thought to be within the commerce power only a few years ago.

Seminole Tribe, moreover, has been recently expanded upon by the Court's 1997 decision in Idaho v. Coeur d'Alene Tribe of Idaho. In Coeur d'Alene, a Native American Tribe sued the state of Idaho, various state agencies and various state officials in their individual capacities, alleging that it had the exclusive right to use and occupy Lake Coeur D'Alene, and seeking various forms of declaratory and injunctive relief. The state asserted that the suit could not be maintained in

298. Id.
300. 938 F. Supp. at 786-87.
301. Id. at 787; see also Equal E.E.O.C. v. Wyoming, 460 U.S. 226, 243 (1983) (holding that the ADEA was enacted pursuant to the Commerce Clause power).
304. Id. at 2031-32.
federal court due to the Eleventh Amendment. The Tribe responded that federal subject matter jurisdiction was valid pursuant to the doctrine of *Ex Parte Young*, which previously had permitted the maintenance of suits against state officials in their individual capacities, so long as the complaint alleged that the state officials were violating federal law and the relief sought was prospective in nature.

A five Justice majority in *Coeur d'Alene* held that the federal court did not have subject matter jurisdiction to hear the suit, holding that the "authority stripping" doctrine of *Ex Parte Young* could not be invoked to grant such jurisdiction under the facts of the case. Specifically, the majority held that resort to *Ex Parte Young* was unavailable, stating:

To interpret *Young* to permit a federal court-action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court’s federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

Although five Justices agreed that the substantive concept of state sovereignty precluded the maintenance of the Coeur d’Alene’s suit against Idaho, no single rationale for this conclusion emerged. Specifically, two Justices—Rehnquist and Kennedy—reached this conclusion by explicitly adopting a case by case, multi-factor balancing approach, requiring courts to consider whether there is an alternative state forum available, the form of relief is sought, the nature of the case, the importance of the federal right at stake, whether federal court jurisdiction is necessary to vindicate federal rights, and the effect an exercise of federal court jurisdiction would have upon state sovereignty. Indeed,

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305. *Id.* at 2032.
306. *Id.* at 2034, 2043 (O’Connor, J., concurring); *id.* at 2047-48 (Souter, J., dissenting) (citing *Ex Parte Young*, 209 U.S. 123 (1908)).
307. *Id.* at 2043.
308. *Id.* at 2034.
309. *Id.* at 2043; *see also infra* notes 310-314 and accompanying text.
310. *Id.* at 2039.
this last factor—the effect on state sovereignty—was derived from an obscure implicit reference in Seminole Tribe to Bivens v. Six Unknown Federal Narcotics Agents, a case which requires the federal court to consider if there are "special factors counseling hesitation" before implying a private right of action against federal officials who violate an individual's federal rights.311

The three concurring Justices—O'Connor, Scalia, and Thomas—took issue with the principal opinion's transformation of Ex Parte Young, asserting that the principal opinion unnecessarily muddied the constitutional waters by substituting a multi-factor balancing approach for the previously clear inquiry set forth in Ex Parte Young.312 Specifically, the concurring Justices concluded that "[o]ur case law simply does not support the proposition that federal courts must evaluate the importance of the federal right at stake before permitting an officer's suit to proceed."313 These three Justices, therefore, concluded that a balancing approach was not required under Ex Parte Young; rather, the Court's traditional two-tiered inquiry remains: (1) has an ongoing violation of federal law been alleged; and (2) is the relief sought properly characterized as prospective.314

Given the divergence of opinion as to the rationale of the holding in Coeur d'Alene, the question remains: what, if anything, did a majority agree upon? There is some common ground that can be identified. Five Justices agreed that although the case involved a request for purely prospective relief, the suit was the "functional equivalent of a quiet title action," which "implicate[d] special sovereignty interests," particularly the interest of states in controlling navigable waters within their borders.315 The majority then characterized the declaratory and injunctive relief sought by the Tribe to be "far reaching and invasive" because

311. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 396 (1971). The Seminole Tribe majority cited the case of Schweiker v. Chilicky, 487 U.S. 412 (1988), a case considering the propriety of recognizing a Bivens action. However, as Justice O'Connor correctly points out in her concurrence in Coeur d'Alene, 117 S.Ct. at 2047, the Seminole Tribe majority's reference to Chilicky merely stated that "where... Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an Ex Parte Young action" against a state officer." Seminole Tribe, 116 S.Ct. at 1118. Thus, the divination by Justices Kennedy and Rehnquist of an intent to embrace a "Bivens-esque" balancing approach through such an obscure reference in Seminole Tribe is quite a stretch.

312. Coeur d'Alene, 117 S. Ct. at 2047.

313. Id.

314. Id.

315. Id. at 2040-41.
[The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands.\textsuperscript{316}

Thus, the majority concluded, the "dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case."\textsuperscript{317}

The concept of state sovereignty thus gained a substantive flavor previously unheard of in the Court's prior \textit{Ex Parte Young} jurisprudence. Although a majority of the \textit{Coeur d'Alene} Court refused to transform \textit{Ex Parte Young} into a balancing inquiry, nonetheless it seems clear that, taken in combination with \textit{Seminole Tribe}, the concept of state sovereignty has taken on a new vigor in the Eleventh Amendment context, spilling into the void created by a slowly receding commerce power.

\textbf{C. \textit{Printz v. United States}}

The trend toward judicial diminution of the congressional commerce power continued with the June 1997 decision in \textit{Printz v. United States}.\textsuperscript{318} In \textit{Printz}, the Court invalidated a key portion of the so-called Brady handgun control law which required chief law enforcement officers (CLEOs) to make a "reasonable effort" to determine—within five business days—whether prospective purchasers of handguns were legally allowed to possess a handgun.\textsuperscript{319} In ruling that this portion of the

\begin{itemize}
  \item \textsuperscript{316} \textit{Id.} at 2031-32.
  \item \textsuperscript{317} \textit{Id.}
  \item \textsuperscript{318} 117 S. Ct. 2365 (1997).
  \item \textsuperscript{319} \textit{Id.} at 2383-84; Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536 (1994) (codified at 18 U.S.C. §§ 921-922). Pre-existing federal law made it unlawful for numerous categories of individuals to possess a handgun, including: convicted felons; fugitives from justice; individuals adjudicated to be mentally defective; illegal aliens; unlawful users of controlled substances; individuals dishonorably discharged from the military; individuals who have renounced their U.S. citizenship; or individuals subjected to specified restraining orders or convicted of misdemeanor domestic violence offenses. \textit{Id.} at
Act was unconstitutional, Justice Scalia, writing for the slim five-to-four majority, held that it violated the constitutional principle of state sovereignty (i.e., federalism).\textsuperscript{320}

The \textit{Printz} decision is significant in several respects. First, in a pragmatic sense, it indicates that a conservative bloc of five Justices—Rehnquist, Scalia, O’Connor, Kennedy and Thomas—is willing to define and enforce meaningful limits on the congressional commerce power. Interestingly, this five Justice majority is the same majority which struck down the Gun-Free School Zone Act in \textit{Lopez} and denied Congress the power to abrogate the states’ Eleventh Amendment sovereign immunity in \textit{Seminole Tribe} and \textit{Coeur d’Alene}. Their emerging view of congressional power is clearly more restrictive than any other Court of the Twentieth Century, providing fuel to the speculation that a broader constitutional movement is underway.

In a legal sense, the \textit{Printz} decision is even more spectacular. Justice Scalia is careful not to rely on \textit{Lopez}, mentioning the case only twice—once in the body of the opinion and once in a footnote, and both times citing to Justice Kennedy’s concurrence rather than the majority opinion.\textsuperscript{321} Instead, Justice Scalia prefers to invoke the Court’s 1992 decision in \textit{New York v. United States} as his primary authority, which held that a federal law giving states the option to either “take title” to in-state radioactive waste or pass state legislation for its disposal was unconstitutional.\textsuperscript{322} The \textit{New York} Court did not make clear the precise basis for the unconstitutionality of the federal law in question: “Whether one views the take title provision as lying outside Congress’ enumerated powers [i.e., the Commerce Clause], or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.”\textsuperscript{323} Thus, \textit{New York} could be read as establishing either a limit on the federal commerce power or as establishing a line of state sovereignty beyond which Congress may not go. Either way, however, the end result was the same: a federal law was

\textsuperscript{320} § 922(d) & (g).

The law was named for Jim Brady, a former a Press Secretary to President Ronald Reagan, who was shot and seriously injured in 1981, when an assassin attempted to gun down the President. \textit{See Lizette Alvarez, The Supreme Court: The Reaction; Lawmakers See Minor Defeat Over Checks of Gun Buyers, N.Y. TIMES, June 28, 1997, at A1.}


321. \textit{Id.} at 2377.

322. 505 U.S. 144, 174-77 (1992); \textit{see also Printz}, 117 S. Ct. at 2380-82.

rendered unconstitutional. The precise intellectual route taken to reach such ends appeared unimportant, a theme which is echoed in Printz.

The dissent by Justice Stevens is not so subtle, explicitly stating that the Commerce Clause provides "a sufficient basis" for upholding the validity of the Brady Act.\textsuperscript{324} Moreover, the dissenters assert that the Necessary and Proper Clause of Article I, Section 8, provides an "additional grant of authority" which "is surely adequate to support the temporary enlistment of local police officers in the process of identifying persons who should not be entrusted with the possession of handguns."\textsuperscript{325} Thus, the dissenters' argument goes something like this: Congress has a plenary power to regulate interstate commerce; handguns are part of interstate commerce; therefore, Congress may direct state executive officials to carry out a federal law regulating such interstate commerce.\textsuperscript{326}

The majority, although not explicitly relying upon Lopez, nonetheless invokes its spirit in addressing the dissent's Necessary and Proper Clause argument. The majority refers to the dissent's invocation of that Clause to be a "resort[] to the last, best hope of those who defend ultra vires congressional action ... ."\textsuperscript{327} The Brady Act, furthermore, was considered ultra vires by the Printz majority because it was "fundamentally incompatible with our constitutional system of dual sovereignty"\textsuperscript{328} as set forth in various constitutional provisions, including, inter alia, the Tenth Amendment, the limited enumeration of congressional powers in Article I, Section 8, and—interestingly—Article V.\textsuperscript{329}

In relying upon this broad concept of "state sovereignty," the Printz majority therefore relies, in part, upon the rationale of Lopez. If, as the dissenters asserted, the Brady Act was a constitutional exercise of the commerce power, there would be no disagreement and the Act would have been upheld. In holding the Brady Act unconstitutional, the majority necessarily implied three things: (1) the Act, which was grounded in the commerce power, was nonetheless beyond the scope of the commerce power (ultra vires); (2) the Act was beyond the scope of the commerce power (ultra vires) because it infringed upon the princi-

\textsuperscript{324} Printz, 117 S. Ct. at 2387 (Stevens, J., dissenting).
\textsuperscript{325} Id.
\textsuperscript{326} Id. at 2386.
\textsuperscript{327} Id. at 2378.
\textsuperscript{328} Id. at 2384.
\textsuperscript{329} Id. at 2376.
ple of state sovereignty embodied in numerous constitutional provisions, including, inter alia, the Tenth Amendment, Article I, Section 8 and Article V; and (3) the Act infringed upon the principle of state sovereignty because it commanded state officials to enact or administer a federal regulatory program, in violation of the holding in *New York v. United States.* Number one is necessarily true because if it were not, the majority would have simply agreed with the dissenters that the Brady Act was a proper exercise of congressional power and proceeded no further. But the majority did obviously go much further, articulating once again a broad, substantive concept of state sovereignty which, by implication, limits congressional power under Article I, Section 8, including the power to regulate commerce.

*Printz,* thus, reveals a deep and fundamental schism between the majority and minority on the issue of federalism. For example, Justice Scalia, writing for the majority, asserts that federalism, as embodied in the Tenth Amendment and the limited enumeration of congressional power under Article I, section 8, cannot be reduced to a procedural truism whereby Members of Congress are trusted to adequately represent the separate states’ sovereign interests:

The great innovation of this [constitutional] design was that “our citizens would have two political capacities, one state and one federal, each protected from incursion by the other”.... This separation of the two spheres is one of the Constitution’s structural protections of liberty. “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”

Justice Scalia then quotes Madison’s *Federalist No. 51,* which proclaims that a nation encompassing dual sovereignty provides “a double security... to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”

Justice Stevens, writing for the minority, adopts the procedural view of federalism pronounced in *Garcia v. San Antonio Metropolitan Transit Authority* that “[a]part from the limitation on federal authority

330. 505 U.S. at 177.
331. *Printz,* 117 S. Ct. at 2377-78.
332. Id. at 2378 (quoting THE FEDERALIST NO. 51, at 323 (James Madison)).
inherent in the delegated nature of Congress’ Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. The dissenters thus assert that because members of Congress are elected by the people of the States,

it is quite unrealistic to assume that [members of Congress] will ignore the sovereignty concerns of their constituents. It is far more reasonable to presume that their decisions to impose modest burdens on state officials from time to time reflect a considered judgment that the people in each of the States will benefit therefrom.

Under this view, therefore, state “sovereignty” is only as extensive as Congress says it is, since members of Congress can be trusted to act with states’ interests in mind.

In short, the majority believes federalism is a substantive concept, whereas the minority believes it is merely procedural. Furthermore, the majority’s view holds far-reaching implications for the Commerce Clause and the implicit Twenty-Eighth Amendment. After all, the majority concedes that the Tenth Amendment and congressional power under Article I, Section 8 (including the Commerce Clause) are complimentary concepts, one beginning where the other ends. Thus, if Congress has power to legislate under Article I, Section 8, then the legislation will not infringe upon states’ rights protected by the Tenth Amendment. On the other hand, if Congress does not have the power to legislate under Article I, Section 8, then the legislation infringes upon the residual powers reserved to the States under the Tenth Amendment.

Thus, if federalism is viewed as substantive, the Court must first decide the difficult question of whether Congress has the power, under

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333. 469 U.S. 528, 550 (1985); see also Printz, 117 S. Ct. at 2394 (Stevens, J., dissenting).
334. Printz, 117 S. Ct. at 2394.
335. See id. at 2365.
336. See id.
337. The Court states:
Residual state sovereignty was also implicit, of course, in the Constitution’s conferral upon Congress of not all governmental powers, but only discrete, enumerated ones . . . which implication was rendered express by the Tenth Amendment’s assertion that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Printz, 117 S. Ct. at 2376.
Article I, Section 8 (or some other constitutional provision) to enact the legislation. Only then can it answer the question of whether a given legislative enactment violates the Tenth Amendment. By contrast, if federalism is viewed as merely procedural, then the Court does not have to decide undergo these intellectual contortions, but can simply dismiss a Tenth Amendment challenge on grounds that states' rights are per se adequately protected by Congress. This latter approach (federalism as a procedural concept) enables the Court to punt the more difficult issue of the limits of congressional power, including the limits of congressional power under the Commerce Clause.

The Printz majority, by adopting a substantive view of federalism, inherently draws an outer boundary on congressional power, requiring courts, for the first time since the New Deal, to engage in a serious inquiry as to the proper scope of such power when faced with a Tenth Amendment challenge.338 It is, therefore, potentially a sea-change from New Deal and post New Deal precedents which have effectively granted Congress a police power and reduced federalism to a procedural truism. If the Court continues along this path, the implicit Twenty-Eighth Amendment may be soon be a thing of the past, a vestige of a bygone, big-government-is-better-government era.

D. Synthesis: Judicial "Repeal" of the Implicit Twenty-Eighth Amendment?

Are Lopez, Seminole Tribe and Printz the opening salvo in a broader movement towards restricting congressional power—i.e., could they mark the beginning of a judicial "repeal" of the New Deal Court's implicit Twenty-Eighth Amendment? Shortly after Lopez was decided in 1995, most legal commentators dismissed it as no big deal, an isolated spasm of federalism that would soon subside.339 Professor Ackerman, however, suggested that Lopez could "be one of the opening cannonades in the coming constitutional revolution."340

338. See id. at 2365.
339. See, e.g., DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 141 (1995) (opining that the impact of Lopez "will be limited"); Stephen G. Calabresi, A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez, 94 Mich. L. Rev. 752, 831 (1995) (noting that "conventional wisdom is that Lopez is nothing more than a flash in the pan."); Fried, supra note 8, at 37 (calling Lopez "a modest and conscientious exercise of the Court's power... Far from striking out on a new course, the Court both adhered to and refreshed tradition."); see also Merritt, supra note 267 (explaining the doctrinal impact of Lopez).
Viewed in isolation, *Lopez* is interesting, but not revolutionary.\(^{341}\) The initial post-*Lopez* years indicated that federal District Courts were willing to read *Lopez* quite broadly, invoking the decision to invalidate—either facially or as applied—numerous federal laws, including the federal arson statute,\(^{342}\) the Child Support Recovery Act,\(^{343}\) the Freedom of Abortion Clinic Entrances Act,\(^{344}\) superfund liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),\(^{345}\) and the federal robbery statute.\(^{346}\) However,
since this initial frenzy of invalidation, the courts of appeals have re-
verser the vast majority of these decisions, indicating great reluctance to open the potential floodgates without further guidance from the Su-
preme Court.347

Although Lopez itself has had limited impact, when it is viewed in con-
junction with Seminole Tribe, Coeur d’Alene and Printz, a potential new meaning emerges, suggesting that Lopez may be more than an iso-
lated spasm of federalism. Taken together, these cases intimate that the current Court may feel little or no entrenched loyalty to the omnipotent congressional commerce power created by the New Deal Court. Thus, if one assumes the existence of the implicit Twenty-Eighth Amendment (as does Professor Ackerman), one faces a quandary when assessing the Lopez-Seminole Tribe/Coeur d’Alene-Printz triad. After all, if the Twenty-Eighth Amendment gave the Congress a police power which is checked only by the discretion of the national political process, the Court’s attempt to draw an outer boundary on this congressional power is illegitimate, a form of constitutional infidelity. Thus, according to Professor Ackerman, Lopez, Seminole Tribe, Coeur d’Alene and Printz can be legitimate (and hence, deserving of fidelity) only if they can be accounted for in democratic terms. In short, they would have to be the result of a higher lawmaking movement, an implicit amendment of the implicit Twenty-Eighth Amendment.348

If, indeed, this triad of cases does signal the initial stages of a new implicit amendment, it only serves to illustrate the inherent weakness of Professor Ackerman’s implicit constitutional amendment theory. If we accept that the New Deal Court’s decisions culminated in an im-
licit constitutional amendment, we are faced with an obvious problem. How do we define the substance of the supposed implicit amendment? I have suggested in this article that the implicit amendment essentially granted Congress a general police power—indeed, I have even given the reader a textual version of this implicit amendment.349 But who is to say that my textual version of the implicit Twenty-Eighth Amend-
ment is accurate? After all, the sine qua non of an implicit amendment is that there is no text to which one can refer for guidance. Thus, in or-
der to assess whether the Lopez-Seminole Tribe/Coeur d’Alene-Printz triad constitutes an implicit amendment (or the initial stages thereof),

347. See cases cited supra notes 342-343.

348. See FOUNDATIONS, supra note 4, at 53, 284; Higher Lawmaking, supra note 4, at 82.

349. See supra p. 140.
one must first determine whether these decisions are consistent or inconsistent with the implicit Twenty-Eighth Amendment. However, because the Twenty-Eighth Amendment is implicit, how can one determine whether these decisions conform to it?

If one defines the implicit Twenty-Eighth Amendment as broadly granting to Congress a general police power (as I have assumed), then Lopez, Seminole Tribe, Coeur d'Alene and Printz appear to be inconsistent and hence, may mark the genesis of a new implicit amendment of an existing implicit amendment. If, on the other hand, one defines the implicit Twenty-Eighth Amendment in some narrower way, Lopez, Seminole Tribe, Coeur d'Alene and Printz may not be an implicit amendment of this implicit amendment at all; rather, they may be merely a "clarification" of the implicit Twenty-Eighth Amendment.

The inherent problem, therefore, in accepting the notion of an implicit constitutional amendment is that it provides us with no reference point from which to assess whether future Supreme Court decisions are legitimate or illegitimate. There is, in short, nothing to which we can readily refer in making legitimacy assessments of implicit constitutional law. An implicit constitutional amendment thus eerily takes on the character of natural law: it is supposedly "out there," providing a meta-principle upon which we are to base our substantive constitutional law, yet it cannot be seen, and no two individuals will likely divine it in the same way.

Professor Ackerman thus finds himself in a rather precarious situation. As a constitutional democrat—specifically, a dualist—he wishes to avoid the countermajoritarian difficulty and legitimate certain judicial opinions on the grounds that they emanate from the popular political will of "We the People." But in proposing his theory of implicit constitutional amendment, he paints himself into an elitist, antidemocratic corner. The New Deal Court's implicit Twenty-Eighth Amendment is a paradigmatic example. Did it culminate in an implicit amendment that granted Congress a general, unbounded police power in order to provide maximum national leverage to deal with the needs of society? Or did it merely culminate in an implicit amendment to grant Congress the power to regulate economic issues only? Or even more narrowly, did it merely grant Congress the power to regulate certain categories of economic activities such as employment terms and relations (i.e., wages, hours, and collective bargaining) and production limitations (e.g., agriculture)? Or something else, perhaps?

Precisely because we cannot answer these questions with any pre-
cision, Ackerman's theory provides the judiciary with a carte blanche to tell us precisely what the New Deal implicit amendment was all about. This, of course, gives the Justices the same kind of creative power exercised by the *Lochner*\(^3\) Court and so roundly condemned by the New Deal Court. It is, in essence, horribly anti-democratic—as much, or more so, than simply accepting the fact that the Court was not designed to be a democratic institution.

Because an implicit amendment is so amorphous a concept, we cannot say, until perhaps Professor Ackerman tells us, whether the *Lopez*-Seminole Tribe/Coeur d'Alene-Printz triad is part of a higher lawmaking movement which may culminate in a "repeal" or modification of the implicit Twenty-Eighth Amendment. We can say, however, that these cases are arguably reflections of a broad political movement toward federalism and away from the concept of an omnipotent national government. The 1980 presidential election of Ronald Reagan was a landslide which triggered the so-called "Reagan Revolution" of the 1980s, the primary theme of which was a resurgence of interest in states' rights and smaller national government.\(^3\) While Professor Ackerman concedes that the Reagan election was not in itself a constitutional moment, the neo-federalism movement begun by Reagan has continued unabated into the 1990s.\(^3\) The Republican takeover of Congress in 1994 accomplished largely on the "Contract with America,"\(^3\) which included many anti-nationalist, pro-federalist initiatives, such as a ban on unfunded state mandates\(^3\) and term limits for members of Congress.\(^3\) Indeed, *Lopez* was even argued before the Supreme Court on election day 1994—the very day that the Republicans

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\(^3\)50. 198 U.S. 45.


352. *FOUNDATIONS*, supra note 4, at 51, 56.


swept Congress clutching their "Contract with America." 356

But even if one accepts that the Lopez-Seminole Tribe/Coeur d'Alene-Printz triad represents a fundamental change in the Court’s view of federalism—from procedural to substantive—it appears that, at most, America is in only the earliest phase of Professor Ackerman’s four-step “higher lawmaking” process. Specifically, Professor Ackerman’s first step is an “impasse” among the branches of the national government, an intense disagreement between, say, the Court and Congress as to a fundamental issue of law or authority. 357 Are the Court and the Congress currently at such an impasse? Perhaps not yet. While the Court does appear to be increasingly willing to invalidate congressional legislation, it is not yet clear whether this amounts to a sufficiently serious challenge to congressional authority to satisfy Professor Ackerman. Even assuming, arguendo, that one could characterize the current Court-Congress relationship as at an “impasse” with regard to congressional power, it seems reasonable to conclude that the second phase of Professor Ackerman’s four-step schema has not yet occurred: namely, a decisive electoral victory for the proponents of reform. 358 While the election of President Reagan in 1980 was certainly a “decisive” election, it occurred seventeen years ago, and therefore cannot serve as the decisive electoral victory envisioned by Professor Ackerman. In other words, because step two (decisive electoral victory) presumably must occur after step one (interbranch impasse), one must assume that the 1980 election would not count. And it seems improbable that the Presidential elections of 1984, 1988, 1992 or 1996 could be classified as “decisive” electoral victories, much less decisive electoral victories for a party advocating revolutionary reform.

The only national election that has the potential for serving as the requisite decisive electoral victory is the election of 1994, in which the Republicans regained control of both houses of Congress. 359 However, was the 1994 election “decisive” enough? It seems unlikely. While the Republicans did gain forty-nine House and nine Senate seats in 1994, their margin of control was quite thin. 360 Moreover, the 1996 elections

356. See Tushnet, supra note 17, at 845.
357. FOUNDATIONS, supra note 4, at 49.
358. FOUNDATIONS, supra note 4, at 49.
360. Id. (stating that the resulting Senate division was 53 Republicans, 47 Democrats, and the House division was 227 Republicans, 199 Democrats).
showed marginal increases for the Democrats, further suggesting a lack of the requisite "decisiveness" to satisfy Professor Ackerman's second step.

Thus, if a higher lawmaking movement is to occur, a decisive electoral victory should come soon, perhaps in the year 2000. The important point is that, according to Professor Ackerman's four-step schema, we are not now living in a constitutional moment. The net result is that, absent such a period of higher lawmaking activity, Professor Ackerman's implicit amendment theory, by definition, brands the *Lopez-Seminole Tribe/Coeur d'Alene-Printz* decisions to be illegitimate, countermajoritarian usurpations of popular political will. This is so because they are retrenchments from the New Deal Court's implicit Twenty-Eighth Amendment, an implicit amendment which Professor Ackerman believes reflects the will of "We the People" and deserves fidelity until such time as repealed by another implicit amendment. Thus, Ackerman's theory suggests that the current Court's attempt to back away from or "repeal" this implicit amendment is unfaithful to the Constitution and undeserving of the respect of legal scholars and ordinary Americans alike.

Is this a normatively desirable result? Should we embrace a constitutional theory that mandates greater allegiance to an unwritten, inchoate implicit amendment than to the Supreme Court's interpretation of the written Constitution? Are judicial opinions abiding by such unwritten, implicit amendments (assuming they exist) really more "democratic" than opinions abiding by the written Constitution? If I have done my job, your answer should be "no" or at least, "not necessarily."

**CONCLUSION**

Article V provides us with a relatively specific and elaborate process for bringing about constitutional alteration. Nowhere in the history preceding the adoption of the Constitution was it said that Article V was not intended to be exclusive and indeed, Supreme Court statements regarding Article V indicate that the Court itself considers Article V to be exclusive. Yet constitutional theorists such as Professor Ackerman contend that, because the Founders did not say that Article V was in-
tended to be exclusive, we can infer that there are legitimate, extra-
Article V means of amending the constitution.

Before we embrace such theories, we should stop and think very
carefully about the specific procedure embodied in Article V and ask
ourselves whether that procedure reveals a purpose. Specifically, we
should ponder whether Article V, which ensures that constitutional
amendment will be brought about only with the involvement of the
states qua states, was consciously adopted by the Founders as necessary
to protect against majoritarian tyranny and control regional divisions.
Thus, any constitutional amendment process—implicit or explicit—
which is not federalist in structure is undeserving of legitimacy.

We should also ponder whether supermajoritarianism support ex-
stisted for the implicit Twenty-Eighth Amendment and, if not, what long-
term effect an implicit amendment theory may have on democracy it-
self. Specifically, although Professor Ackerman endeavors to convince
us that the New Deal’s implicit Twenty-Eighth Amendment is deeply
rooted in democracy, the historical evidence is to the contrary. The
New Deal generation was not mobilized in support of employing extra-
Article V means to implement the New Deal; rather, the historical evi-
dence indicates that this generation openly debated and approved of
Article V as the exclusive legitimate means to effect constitutional
change. Moreover, the enforcement and practical application of im-

cit amendments is inherently elitist, not democratic. Implicit
amendments require, at their core, that nine unelected Supreme Court
Justices divine popularly desired constitutional change without so much
as the benefit of the written word. Any constitutional theory which in-
vites such *Lochnerian* behavior is normatively undesirable.

The desire to elevate “good” Supreme Court decisions to the level
of a constitutional amendment is understandable. Such elevation pro-
tects those “good” decisions from revision or repeal by subsequent
majorities in Congress or the Court that do not share the same values.
But the truth of the matter is that, unless law is grounded in the written
Constitution, it is not the product of higher lawmaker, but merely or-
dinary lawmaking and hence, is vulnerable to revision by later majori-
ties. The Supreme Court’s recent decisions in *Lopez, Seminole Tribe,*
*Coeur d’Alene* and *Printz* are, therefore, legitimate interpretations of
the Constitution deserving of our respect; implicit amendments, by
contrast, are not.