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TAKING TEXT AND STRUCTURE SERIOUSLY: REFLECTIONS ON FREE-FORM METHOD IN CONSTITUTIONAL INTERPRETATION

Laurence H. Tribe

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TAKING TEXT AND STRUCTURE SERIOUSLY: REFLECTIONS ON FREE-FORM METHOD IN CONSTITUTIONAL INTERPRETATION

*Laurence H. Tribe**

As recent trade agreements such as NAFTA and the Uruguay Round of GATT illustrate, it has become common for Presidents to submit major international agreements to both Houses of Congress for simple-majority approval, even though Article II, section 2 of the Constitution provides for the President to submit treaties to the Senate for approval by two thirds of the Senators present. In a recent article in the Harvard Law Review, *Professors Bruce Ackerman and David Golove recounted the rise of the "congressional-executive agreement" as an alternative to the treaty form. In addition to arguing that use of the congressional-executive agreement is consistent with constitutional text, Professors Ackerman and Golove asserted that political events in the 1940s so altered the proper understanding of the Constitution that, despite the absence of any amendment in accord with Article V, the Treaty Clause of Article II became purely optional.*

In this Article, Professor Tribe challenges both of those conclusions and the free-form method of constitutional analysis that underlies them. He suggests that modes of argument that regard the Constitution's instructions for treatymaking and for constitutional amendment as merely optional are not genuinely constrained by what the Constitution says or by how its parts fit together. Such modes of argument instead embody major errors in what Professor Tribe describes as the "topology" of constitutional construction — errors that, in his view, disqualify approaches like those of Professors Ackerman and Golove from serious consideration as legitimate forms of interpretation.

Focusing particularly on Professor Ackerman's notions of "constitutional moments" and "higher lawmaking" outside of Article V, Professor Tribe seeks to show that resort to extraordinary theories of constitutional change threatens to undermine genuine inquiry into the meaning of the Constitution's text. Accordingly, Professor Tribe calls for an unabashed return to rigor and precision in the interpretive process — for a commitment to take text and structure seriously.

I. INTRODUCTION: THE SEARCH FOR CONSTRAINTS

I was a college junior thinking of concentrating in comparative literature when I wrote an essay paralleling the lives of Willy Loman in Arthur Miller's *Death of a Salesman*[1] and Gregor Samsa in Franz Kafka's *Metamorphosis*.[2] I playfully argued that Miller's drama and Kafka's story were minor variations on a single theme. I meant the paper as a spoof. When it won a serious prize, I was pleased, but puzzled. I decided then that I should try a field in which the dis-

* Tyler Professor of Constitutional Law, Harvard Law School. I am deeply indebted to David Codell (Harvard Law School Class of 1995) for truly extraordinary research and analytic assistance with this Article. I am also most grateful to many of my colleagues and friends who have inspired and commented helpfully on earlier drafts — particularly Anne-Marie Slaughter, Kathleen Sullivan, Peter Rubin, and Brian Koukoutchos.

[1] ARTHUR MILLER, DEATH OF A SALESMAN (1949).

[2] Franz Kafka, *Metamorphosis*, *in* THE METAMORPHOSIS AND OTHER STORIES (Joachim Neugroschel trans., 1993).

course was considerably more constrained — by truths that one could not manipulate at will just to make one's point.[3] I turned first to abstract mathematics and then to constitutional law,[4] fields in which I took comfort from the thought that some arguments, however elegant or clever, just couldn't be made to work.

Constitutional law, it seemed to me then, was a field in which argument was disciplined — both by constitutional text and by at least a few accepted ground rules for interpreting that text. Although some provisions might be more pliable than others, none could be bent too far without being broken. If the Constitutional Convention's Committee of Style and Revision had used digits rather than words to specify that Senators should be at least thirty years old,[5] a clever interpreter of that provision might argue that a twenty-four year old qualifies, by proposing that the number "30" be read in base eight, rather than in base ten (in other words, $30 = 3 \cdot 8^1 + 0 \cdot 8^0 = 24 + 0 = 24$). But who would listen?

Most of us in the legal academy have long recognized that just how much any "truth" or convention external to our own wishes constrains law in general, and constitutional law in particular, is itself a deep and endlessly debatable subject.[6] Still, decades after my turn to constitutional law, I continue to hold the view — or perhaps adhere to the faith — that there are legal truths out there, or at least legal falsehoods, that simply cannot be wished away, and that legal discourse itself imposes serious constraints, enforced by the interpretive community that engages in that discourse. As my colleague Professor Anne-Marie Slaughter has put it:

> [L]awyers are bound by text as the people are bound by legal rules; the craft of lawyering is in this sense a microcosm of the macrocosm of constitutionalism. It is a habit of mind that gives rise to larger habits of obedience. Similarly, constitutional rules are in some sense arbitrary, as we set them for ourselves; but having set them, we abide by them.[7]

Given this understanding of constitutional law, only on rare occasions do I find myself thinking that I chose the wrong field — that the law

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[3] I now suspect that I was wrong about literary criticism and that, had I stuck it out, I might have seen how that field, too, has externally imposed constraints.

[4] Of course I would never equate these fields; the "Q.E.D." that can properly end a mathematical proof knows no precise analogue in any branch of law. *See* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 96 (1991); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1331–32 (1971).

[5] *See* U.S. CONST. art. I, § 3, cl. 3.

[6] *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 22 (1991); LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 3–8 (1985); *Symposium on Philip Bobbitt's* Constitutional Interpretation, 72 TEX. L. REV. 1703 (1994).

[7] Memorandum from Anne-Marie Slaughter, Professor, Harvard Law School, to Professor Laurence H. Tribe 2 n.1 (Feb. 1, 1995) (on file with the Harvard Law School Library). Professor Slaughter describes her analogy as "a version of Kant's argument for the glory and paradox of humankind, the capacity for genuine self-government." *Id.*

of the Constitution is, in the end, merely a language for pressing one's preferences.

As much as I admire and learn from the writings of Yale Law Professor Bruce Ackerman, I must admit that I experience such moments of doubt when I focus on his contributions to the scholarship of our field. If those contributions were less elegant and distinguished, less sophisticated and fun to read, one could just dismiss them as idiosyncratic and playful, not to be taken very seriously. Alternatively, if Professor Ackerman's writings represented an open and frontal assault on the very idea of constitutional interpretation as a coherent and constrained legal enterprise,[8] one could engage his ideas, like those of other post-modern thinkers, at the level of meta-discourse. One could seek either to defend, or perhaps to refine and reformulate, the notion that, in "doing" constitutional interpretation, one is indeed engaged in an activity significantly disciplined by facts and forces outside oneself. But precisely because Professor Ackerman's work exists within, rather than outside, the project of constitutional law, and because his work is simply too good to dismiss as beside the point, the challenge it poses to the constrained character of constitutional interpretation must be taken with the utmost seriousness. Professor Ackerman talks the talk, and when he speaks, I feel bound to listen. But I am often troubled by what I hear, and find myself revisiting what it is that I believe makes constitutional interpretation truly a *legal* enterprise, genuinely disciplined by widely shared canons of the interpretive arts and by stubborn truths of text, structure, and history.[9]

These thoughts have most recently been inspired by an article appearing in this legal journal.[10] In his latest contribution to the *Harvard Law Review*, Professor Ackerman and his co-author Professor David Golove[11] argue that the powers allotted to Congress under Arti-

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[8] *See, e.g.*, MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 60–69 (1988). *But see* Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1233–37 (1989) (criticizing Tushnet's analysis of various forms of constitutional argument).

[9] To a lesser extent, the work of Professor Ackerman's prolific and brilliant Yale colleague Akhil Reed Amar has a similarly double effect on me. It fascinates. It can't be ignored. Yet it sometimes raises for me the same doubts that Professor Ackerman's work raises. In the discussion that follows, I indicate several ways in which Professor Amar's approach to constitutional interpretation occasionally shares some of the shortcomings of Professor Ackerman's work. *See infra* pp. 1240-41, 1245-48, 1289-92.

[10] *See* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (tracing the rise of the congressional-executive agreement in United States diplomacy).

[11] In this Article, I shall at times refer to Professor Ackerman where I should properly refer to Professor Golove as well. I do so because their recent article extends arguments that Professor Ackerman has made before, *see, e.g.*, 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6–7, 266–94 (1991), and because Professor Ackerman and I testified together before the Senate Commerce Committee and presented contrary views on whether it was proper for the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), including the Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144, to be submitted to both Houses of Congress for simple-majority approval rather than to the Senate for two-thirds approval. *See*

cle I of the Constitution afford broad authority for Congress to approve international agreements outside the procedure set forth in the Treaty Clause of Article II.[12] The piece claims that, although the Treaty Clause provides that treaties be approved by two thirds of Senators present, a series of political events in the 1940s sealed into constitutional law the principle that the President may submit international agreements to both Houses of Congress for approval by simple majorities. Professors Ackerman and Golove describe the rise of the so-called "congressional-executive agreement" and the virtual eclipse of the once-exclusive Article II treatymaking procedure as though these developments represent a prime exhibit in Professor Ackerman's ongoing explication of what he has elsewhere labeled episodes of "higher lawmaking."[13]

Indeed, Professors Ackerman and Golove describe the thesis that the Article II treatymaking procedure is exclusive as belonging to an "earlier constitutional world, now entirely obscured from view."[14] Much of their article assumes that the constitutionality of the decades-long circumvention of the Treaty Clause through the rise of the ubiquitous congressional-executive agreement is so well-established that "the foundational questions have become unaskable."[15]

It is something of an embarrassment for this point of view that, far from becoming "unaskable," the "foundational questions" were indeed asked recently by the Senate itself when that body turned its attention in 1994 to the World Trade Organization (WTO) Agreement negotiated in the Uruguay Round of GATT.[16] Accordingly, Professor Ackerman's

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GATT Implementing Legislation: Hearings on S. 2467 Before the Senate Comm. on Commerce, Science, and Transportation, 103d Cong., 2d Sess. 285–339 (1994) [hereinafter *GATT Hearings*] (statements and testimony of Prof. Laurence H. Tribe and Prof. Bruce Ackerman).

[12] The Treaty Clause provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2.

[13] This is Professor Ackerman's term for the process or processes by which the American people enact or change their national Constitution — processes that he believes are not necessarily spelled out in Article V or any other foundational text. *See* Bruce Ackerman, *Higher Lawmaking*, *in* RESPONDING TO IMPERFECTION 64–66 (Sanford Levinson ed., 1995). Nowhere in his *Harvard Law Review* article does Professor Ackerman use the phrase "higher lawmaking," but it is apparent from his comparison of the shift in international agreement-making in the 1940s with the New Deal "revolution" (which he has elsewhere described as an episode of higher lawmaking) that he regards the two as similar moments of extraordinary constitutional change outside the procedures provided for in Article V. Indeed, he places this article within the "larger project sketched in *We the People*," Ackerman & Golove, *supra* note 10, at 804, and identifies the acceptance of the congressional-executive agreement form as one of those "specific historical moments at which [the people] have supported fundamental changes." *Id.* at 895. Furthermore, he extols the 1945 "compromise" with regard to treatymaking as "a bipartisan alternative to a formal amendment." *Id.* at 866.

[14] Ackerman & Golove, *supra* note 10, at 802.

[15] *Id.*

[16] *See GATT Hearings*, *supra* note 11, at 285–339.

article turns, in its concluding section, to the debate thereby generated about this supposedly obscured world.[17]

As matters turned out, the WTO Agreement received more than the requisite supermajority support in the Senate so that, from a practical perspective, it seems largely irrelevant whether the agreement was processed through the Treaty Clause of Article II or along the well-greased congressional-executive agreement track of bicameral approval in the House and Senate.[18] Events in the Senate postponed for another day the question that would be presented if *fewer* than two thirds of the Senators present supported such a far-reaching treaty. With respect to the North American Free Trade Agreement (NAFTA), however, Professors Ackerman and Golove are certainly right that, although NAFTA received fewer votes in the Senate than the Treaty Clause would have required,[19] no one discussed (at least publicly) the constitutional problem that this would have posed if the terms of NAFTA were such that it *had* to be regarded as a "treaty" within the meaning of the Constitution.

Professors Ackerman and Golove, however, do not pause to address the crucial question whether the terms of NAFTA render it a treaty requiring Senate supermajority approval, for it is their evident purpose to show that the United States is now firmly committed to a course that has rendered the Treaty Clause purely optional. Indeed, it is telling that Professors Ackerman and Golove are able to write an article entitled *Is NAFTA Constitutional?* and spend 129 pages offering an affirmative answer without anywhere describing what NAFTA purports to do. As will become clear, this feat reflects precisely the free-form character of what Professors Ackerman and Golove put forth as constitutional interpretation. It is evidently unnecessary to know much about what Congress has done in order to offer the confident judgment that Congress's work-product satisfies the requirements of Professor Ackerman and Professor Golove's Constitution.

By exploring the fallacies on which the interpretive approach of Professors Ackerman and Golove is founded, I hope in this Article to reaffirm my sense that constitutional interpretation is, after all, less free-form an exercise than it would be if methods like theirs[20] were to take hold. To this end, I invite readers to join me in the critical process that constitutional interpretation entails as I offer an interpreta-

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[17] *See* Ackerman & Golove, *supra* note 10, at 916–29.

[18] The Senate approved the Uruguay Round of GATT, including the WTO Agreement, by a vote of 76 to 24. *See* 140 CONG. REC. S15,379 (daily ed. Dec. 1, 1994). Arguably, the difference in process is of constitutional significance regardless of the ultimate vote, but that is a matter I do not explore here.

[19] The Senate voted 61 to 38 to approve the North American Free-Trade Agreement Implementation Act, 19 U.S.C. § 3311 (Supp. V 1993). *See* 139 CONG. REC. S16,712–13 (daily ed. Nov. 20, 1993).

[20] And, at times, those of Professor Amar as well. *See supra* note 9; *infra* pp. 1245-48.

tion of the Treaty Clause quite unlike that of Professors Ackerman and Golove. My principal concern, however, is less with treatymaking as such than with how one goes about construing the Constitution and, more generally, with what is required if one is to engage in genuine conversation about what a legal text means.

II. Approaches to Interpretation: From Amending the Constitution Outside Article V to Making Treaties Outside Article II

Nobody familiar with Professor Ackerman's previous scholarship — which advances the notion that the Constitution allows for its own amendment wholly outside the procedures specified in Article V[21] — should be particularly surprised by Professor Ackerman's newest claim that the Constitution allows even the most far-reaching international agreements to be approved outside the mechanisms specified in the Treaty Clause of Article II. After all, if "We the People" may constitutionally circumvent even the terms of our agreement as to how our most fundamental law may be altered, why should we not be able constitutionally to circumvent the terms of this agreement on the less momentous subject of how we may create binding international commitments? And if the care with which Article V respects the states as sovereign actors need not detain us when we circumvent its protections for amending the Constitution,[22] why should we worry about the Senate's unique role — as the only body in which the states are equally represented — when we replace Article II's required Senate supermajority with a simple majority of both Houses in making agreements with foreign countries?

According to Professors Ackerman and Golove, We the People assented to a radical constitutional change in the 1940s, when the populace, the President, and Congress agreed that solemn international agreements could thenceforth be approved by simple majorities of both Houses rather than by two thirds of the Senators present.[23] As Professors Ackerman and Golove describe it, all of this happened just in the nick of time — and perhaps not soon enough. Their thesis is that the special roles given to the Senate both in the Treaty Clause of Article II and in the amendment procedure of Article V were not only

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[21] *See, e.g.*, Ackerman, *supra* note 13, at 72.

[22] Article V requires that constitutional amendments be approved either by the legislatures of three fourths of the states or by conventions in three fourths of the states. *See* U.S. Const. art. V. In addition, Congress must "call a Convention for proposing Amendments" if the legislatures of two thirds of the states so request. *Id.* Finally, Article V's instructions for amending the Constitution expressly provide that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." *Id.*

[23] *See* Ackerman & Golove, *supra* note 10, at 909–13.

undemocratic,[24] but also represented, respectively, a deep "failure in the original constitutional design"[25] and an "acute dysfunctionality,"[26] both resting on "an outdated notion of states' rights."[27]

In the cosmopolitan order favored by Professors Ackerman and Golove, the parochial, sectional, and small-minded perspectives of many of the states would not be permitted to obstruct such efforts as President Wilson's attempt, through the Versailles Treaty, to bring the United States into the League of Nations. Professors Ackerman and Golove note that in the 1940s, many blamed states' rights for the failure of such efforts, a failure viewed as contributing to the outbreak of World War II. Yet the same insufficiently global perspective that would spell doom for the approval of vital international agreements along the treaty track would likewise spell doom for any attempt to sidetrack that procedure explicitly by amending the Constitution through Article V. For Professors Ackerman and Golove, Article V is a non-starter because the very states whose pig-headedness obstructs such farsighted measures as the League of Nations would predictably balk at amending the Constitution in a way that would deprive the Senate of its special role.[28] And Professors Ackerman and Golove are not so populist that they would support Article V's own alternative of a constitutional convention called by the legislatures of two thirds of the states. Who knows what such a convention might do?[29] Far safer, in their view, is the path of informal "constitutional revolution,"[30] whereby the states are overtly shunted aside in a move that has the distinct advantage of not requiring their consent.

As a matter of policy and prediction, Professor Ackerman and Professor Golove's argument leaves a good bit to be desired. The fact that requiring a supermajority in the Senate may at times serve as a check on a bicameral majority is, of course, an undeniable departure from a more purely majoritarian democracy. But so is our version of bicameralism itself. That's the whole point of the system the Constitution put in place. Without bicameralism, the Constitution would never have been ratified. And even if it would be difficult to persuade two thirds of the Senate to back a constitutional amendment to eliminate

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[24] *See id.* at 803.

[25] *Id.* at 802.

[26] *Id.* at 916.

[27] *Id.* at 870 (describing the views of revisionist historians of the 1940s who defended the use of the congressional-executive agreement). Professors Ackerman and Golove leave little doubt as to their agreement with the revisionists' views of Article V. *See id.* at 915–16.

[28] Professors Ackerman and Golove align themselves with earlier critics who stressed the Senate's institutional interest in maintaining its "monopoly" over treaty approval and who noted the difficulty of persuading two thirds of the Senate, in accordance with Article V, to approve a proposed constitutional amendment to provide for bicameral approval of treaties. *See id.* at 870–71.

[29] *See id.* at 909–10.

[30] *Id.* at 861.

its checking function, it is far from self-evident that the Senate would invariably be more interested in preserving its institutional prerogatives than in advancing the best interests of the United States in a troubled world. It seems problematic for Professor Ackerman and Professor Golove's thesis that support for both NAFTA and the WTO was more solid in the supposedly parochial, obstructionist, and "isolationist"[31] Senate than in the allegedly more democratic and cosmopolitan House of Representatives.[32]

Interesting though it may be, all of this political theorizing is somewhat beside the point of my inquiry. For if one accepts the view of Professors Ackerman and Golove that, given the realities of today's world, the Framers' vision of a Union of equal and sovereign states should be relegated to the dustbin of history, one should have the courage of one's convictions and openly advocate a radically different instrument from the Constitution we now have. As I will show below, the claim of Professor Ackerman in particular — based on the Civil War Amendments and on the changed constitutional interpretations inaugurated around 1937 — that we have *already adopted* that radically different instrument not only is wrong, but also rests on something other than genuine interpretation.

For starters, there is a certain ambiguity in the "constitutional revolution" regarding treatymaking that Professors Ackerman and Golove describe. On the one hand, they insist that the notion that the Treaty Clause is merely one alternative route for the approval of international agreements was indeed revolutionary — foreign to the nation's practice during its first century-and-a-half and foreign to the thinking of the Framers.[33] On the other hand, they offer a handful of textual arguments in support of the new, nonexclusive view of the Treaty Clause that emerged in the 1940s, suggesting that what was

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[31] *See id.* at 803. It is remarkable that, in confronting the 61-38 vote by which NAFTA passed the Senate, *see* 139 CONG. REC. S16,712–13 (daily ed. Nov. 20, 1993), Professors Ackerman and Golove are willing to dismiss as "thirty-four isolationist Senators" those whose negative votes they suppose would have prevented NAFTA's ratification as a treaty. *See* Ackerman & Golove, *supra* note 10, at 803. Professors Ackerman and Golove appear to assume both that, if the Treaty Clause path had been followed, the NAFTA vote would have been the same and, further, that to vote no along the Treaty path, a Senator would have to have been an "isolationist." The world is more complex than that.

Professors Ackerman and Golove, however, place the controversy over the congressional-executive agreement in the context of "a renewed debate between isolationists and internationalists on the need for further engagement in the new world order" and go so far as to suggest that a rejection of a "North American Free Trade *Treaty*" by the Senate "would have changed the face of American politics," perhaps "catapult[ing]" Ross Perot "to the center of the stage of presidential politics." *Id.* at 803–04.

[32] *See* 140 CONG. REC. S15,379 (daily ed. Dec. 1, 1994) (Senate WTO vote of 76 to 24); 140 CONG. REC. H11,535–36 (daily ed. Nov. 29, 1994) (House WTO vote of 288 to 146); 139 CONG. REC. S16,712–13 (daily ed. Nov. 20, 1993) (Senate NAFTA vote of 61 to 38); 139 CONG. REC. H10,048 (daily ed. Nov. 17, 1993) (House NAFTA vote of 234 to 200).

[33] *See* Ackerman & Golove, *supra* note 10, at 808–13.

involved was not a popular *amendment* of the Constitution, but rather popular and political assent to a new but plausible *interpretation* of the Constitution.[34]

Professors Ackerman and Golove present a puzzle by proffering two very different types of support for their nonexclusive view of the Treaty Clause. They argue that the rise of the congressional-executive agreement is legitimate, first, because it is the product of a special type of national consensus for change[35] and second, because, as a matter of ordinary constitutional interpretation, the Necessary and Proper Clause of Article I, section 8[36] provides ample authority for Congress to approve bicamerally and by simple majority any international agreement negotiated by the President that falls within the ambit of one of Congress's enumerated powers.[37] But an important question raised by their article's one-two punch is whether the first move alone would suffice to knock out the Treaty Clause. In Professor Ackerman's regime of constitutional transformation by the People acting outside Article V in bursts of zeitgeist constitutionalism, how important is it that the people adopt a "correct" interpretation of constitutional text?[38]

Within the article by Professors Ackerman and Golove, the question would appear to be academic; after all, they argue that use of the congressional-executive agreement is — and would in theory always have been — consistent with the text and structure of the Constitution. But the constitutional question is not as easily resolved as their article suggests. In their easy embrace of the Necessary and Proper Clause as sanctifying a bicameral, simple-majoritarian alternative to the Senate supermajority requirement of the Treaty Clause, Professors Ackerman and Golove overlook several other textual and structural considerations that make their conclusion at the least problematic and perhaps even untenable.[39]

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[34] *See id.* at 811, 913–14.

[35] *See id.* at 913. Professor Ackerman has sought to identify a "four-stage process" for what he views as informal constitutional amendments: (1) a "Constitutional Impasse"; (2) an "Electoral 'Mandate'" communicated through a national "triggering election"; (3) a resulting "Challenge to Dissenting Institutions" of government; and (4) resolution by a "Switch in Time," an acquiescence by the challenged institution to the popular mandate for constitutional change. Ackerman, *supra* note 13, at 77–82 (applying a version of this schema to the ratification of the Fourteenth Amendment and the New Deal demise of *Lochner*); Ackerman & Golove, *supra* note 10, at 873–75 (applying this schema to the rise of the congressional-executive agreement). *See infra* pp. 1282-84.

[36] U.S. CONST. art I, § 8, cl. 18.

[37] *See* Ackerman & Golove, *supra* note 10, at 908–09, 913–14.

[38] Professor Suzanna Sherry has expressed the same concern with respect to Professor Ackerman's near-originalist devotion to the New Deal "Founders." As she characterizes the underlying philosophy of Professor Ackerman's argument: "We *must* retain the legacy of the New Deal — as interpreted by modern liberals — not because it is right, but because its founders told us to." Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 934 (1992) (reviewing 1 ACKERMAN, *supra* note 11).

[39] *See infra* Part IV.

Professors Ackerman and Golove insist, with recent practice on their side, that I have gotten it all wrong.[40] In their view, although for the nation's first century-and-a-half Presidents felt constrained by the Treaty Clause to present international agreements to the Senate for supermajority approval, the congressional-executive agreement was always there in the wings, just waiting to be discovered and legitimated by a combination of constitutional impasse, popular mandate, and acquiescence by a formerly dissenting Senate.[41]

One gets the distinct impression from Professors Ackerman and Golove that, regardless of the relative merits of the textual and structural arguments that might be gathered on either side of the Treaty Clause debate, certain events in the 1940s congealed into law one particular resolution of the issue which could not be legitimately reversed by a later court or Congress (barring, of course, yet another conflation of constitutional impasse, popular mandate, and concurrence by various branches of the national government). In other words, a court or other institution considering the constitutional question in, say, 1950 would have reached the correct conclusion only by siding with what Professors Ackerman and Golove think "the People" decided in the 1940s, regardless of the relative merits of the textual and structural arguments on both sides, and regardless of whether the result was right or wrong based on criteria that a court or another constitutional interpreter would have relied upon in the absence of the special constitutional consensus supposedly reached by the People and their leaders.

To the criticism that he ignores the importance of "right answers,"[42] Professor Ackerman has responded that "it is more important to sustain the conversation itself than any particular truth."[43] But all genuine conversations presuppose shared principles and canons of discourse. Professor Ackerman's praise for "the conversation itself" begs

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[40] *See* Ackerman & Golove, *supra* note 10, at 917–25. A collection of prominent constitutional and international law scholars joined Professors Ackerman and Golove in a memorandum to congressional leaders in support of Congress's authority to approve the WTO Agreement as a congressional-executive agreement. *See* Memorandum of Law from Professors Bruce Ackerman, Abram Chayes, Kenneth Dam, Thomas Franck, Charles Fried, David Golove, Louis Henkin, Robert Hudec, John H. Jackson, Harold H. Koh & Myres McDougal to Members of Congress and Executive Branch Officials (Nov. 11, 1994) [hereinafter Memorandum from Law Professors] (on file with the Harvard Law School Library). That memorandum simply summarized several arguments made in the article by Professors Ackerman and Golove and replicated the errors of that article by failing to take into account several important textual and structural arguments in favor of a more exclusive view of the Treaty Clause.

[41] *See* Ackerman & Golove, *supra* note 10, at 913–14.

[42] Miriam Galston & William A. Galston, *Reason, Consent, and the U.S. Constitution: Bruce Ackerman's* We the People, 104 ETHICS 446, 449, 465–66 (1994). The Galstons keenly question the logic of Professor Ackerman's celebration of popular deliberation, given that "Ackerman imposes no express substantive constraints on the people's deliberative product." *Id.* at 465 ("[I]f truth is no object, why are thoughtfulness, evidence, production of arguments, public debate, and commitment to the public good important, indeed, essential to higher lawmaking?").

[43] Bruce Ackerman, *Rooted Cosmopolitanism*, 104 ETHICS 516, 531 (1994).

the question of how the Constitution requires this "conversation," understood as an exercise in discerning the meaning of legal materials, to be conducted. Professor Ackerman's willingness to embrace a public discourse that would treat the Constitution as amendable by procedures nowhere specified therein has led him to treat *all* constitutional text and structure as casually as he treats Article V. What remains is barely recognizable as an interpretive undertaking at all.[44] Ironically, the sort of argument Professor Ackerman offers as his contribution to the constitutional conversation he so values empties that conversation of the richness that legal dialogue demands. Such a style of argument dismisses most of the standard conversational gambits as trivial or immaterial; it substitutes grand vision for meticulous textual analysis and avoids candid confrontation of logical objections based on the consequences of maintaining one's position in other contexts.

Those who share my conviction that Professor Ackerman's approach to *amending* the Constitution is constitutionally suspect might nevertheless be tempted to regard his treatment of the Treaty Clause as less of a threat to the project of constitutional law because Professor Ackerman's argument purportedly deals only with the more quotidian matter of *reading* what the Constitution currently provides. The approach in Professor Ackerman's NAFTA article itself, however, presents a significant threat to the whole enterprise of constitutional dialogue and decisionmaking — a threat implicit in his earlier works but made manifest here. The danger arises from a facile treatment of constitutional text and structure and a free-form approach to saying what they mean — an approach seemingly shaped by conclusions arrived at quite apart from an analytically careful dissection of the legal materials. Professor Ackerman seems willing to substitute political process for the reasoned and rigorous textual and structural analysis that is elemental to constitutional interpretation.

It seems axiomatic that, to be worthy of the label, any "interpretation" of a constitutional term or provision must at least seriously address the *entire* text out of which a particular fragment has been selected for interpretation, and must at least take seriously the *architecture* of the institutions that the text defines. It is with these axioms that I would contrast Professor Ackerman's approach to constitutional exegesis — an approach that lifts textual fragments outside the Constitution as a whole and analyzes them without paying genuine attention to the logic and design of the governing institutions created by the Constitution.

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[44] *See* 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, *supra* note 13, at 13, 17–22 (discussing the boundary between constitutional interpretation and constitutional invention).

These concerns are not solely theoretical. Professor Ackerman applies his form of constitutional reasoning to important debates in the arena of public policy. He recently presented his reading of Articles I and II to the Senate Commerce Committee and advised that committee that the establishment of the WTO did not need to conform with the Treaty Clause, not because that agreement in particular so carefully preserved the sovereign prerogatives of the states and of the nation that it did not need to be viewed as a "treaty,"[45] but rather because an ordinary exercise of Article I power would, he assured the Senate, suffice to bind the United States internationally to literally *any* agreement related to foreign commerce or related to some other enumerated congressional power.[46]

What the Constitution has to say about current controversies such as the WTO debate is, of course, important even apart from the larger methodological questions it raises. I, too, have participated publicly in the WTO debate.[47] Reflection upon some of the claims made by Pro-

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[45] That would be a hard point to make as to the agreement approving the WTO. *See infra* note 156.

[46] *See GATT Hearings*, *supra* note 11, at 312–14, 324–25, 329 (statement of Prof. Bruce Ackerman).

[47] *See id.* at 285–86, 290–312 (statement of Prof. Laurence H. Tribe). Professors Ackerman and Golove include in their article a lengthy, critical account of my participation in the WTO debate. *See* Ackerman & Golove, *supra* note 10, at 917–25. Contrary to the suggestions of Professors Ackerman and Golove, I was not "enlisted" by Senator Jesse Helms and consumer advocate Ralph Nader as part of a concerted "last-minute challenge" to the WTO. *Id.*, at 917. Rather, it was Senator Byrd's thoughtful comments from the floor of the Senate about the possible need to process the WTO Agreement as a treaty that prompted my entry into this debate. *See* 140 CONG. REC. S8872 (daily ed. July 13, 1994) (statement of Sen. Byrd). And, as I explained at each step of the debate, I was not opposed to the WTO, but only to the manner of its consideration by Congress.

Although Professors Ackerman and Golove criticize me for modifying my position during the course of the debate over the WTO, *see* Ackerman & Golove, *supra* note 10, at 918, one of the important goals of constitutional debate is to come to more fully reasoned understandings of the Constitution's requirements.

At the time of my Senate testimony, although I favored the WTO as a policy matter and had no desire either to see it defeated or to swell the Senate's influence, I could see no way to avoid the conclusion that the agreement creating the WTO and bringing the United States within that body needed to be treated as a treaty. My view then was that the Constitution draws a line between non-treaty international agreements that the President may conclude with bicameral, majority congressional approval and treaties, which require supermajority Senate ratification. Shortly before Congress was to vote, the Office of Legal Counsel of the Department of Justice released a lengthy analysis of my views and advanced new arguments for treating that line as permeable enough to warrant deference to the determination of the President and Congress that a particular agreement (there, the WTO Agreement) falls on the non-treaty side of this line. *See* Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Michael Kantor, United States Trade Representative *passim* (Nov. 22, 1994) [hereinafter Dellinger Memorandum] (on file with the Harvard Law School Library). Still believing that the line in question existed, and thinking that the new Department of Justice analysis deserved careful consideration, I stated publicly my intention to reassess the matter. *See* Memorandum from Laurence H. Tribe to Sen. George J. Mitchell et al. 1–2 (Nov. 28, 1994) (on file with the Harvard Law School Library). Although some Senators quoted that public statement as an abandonment

fessor Ackerman in this debate has led me to fear that the loose forms of constitutional argument he has championed might well leave political actors with the uneasy feeling that the text of the Constitution can be read to justify just about any decision — and so can safely be ignored.

Hoping to show that this need not be the state of affairs in constitutional discourse, I explore below in Parts IV and V some of the specific weaknesses of Professor Ackerman's textual, structural, and historical arguments by examining what he failed to consider in his treatment of the congressional-executive agreement. But first, I turn in Part III to several observations about what I call the "topology" of constitutional construction — basic precepts that underlie sound interpretation of those constitutional provisions that establish the shape or architecture of our government.

III. Avoiding Basic Errors of Constitutional Topology

To understand the Constitution as a legal text, it is essential to recognize the sort of text it is: a *constitutive* text that purports, in the name of the People of the United States of America, to bring into being a number of distinct but interrelated institutions and practices, at once legal and political, and to define the rules governing those institutions and practices.

Read in isolation, most of the Constitution's provisions make only a highly limited kind of sense. Only as an interconnected whole do these provisions meaningfully constitute a frame of government for a nation of states. Although the first three Articles of the Constitution broadly correspond to the three great governmental institutions created

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of my view that the WTO Agreement was indeed a treaty that required a Senate supermajority to become law, *see, e.g.*, 140 Cong. Rec. S15,078–79 (daily ed. Nov. 30, 1994) (statements of Sen. Moynihan), that was an incorrect understanding of what I had said. As Part IV of this Article makes clear, my reassessment has led me to conclude that the *only* line the Constitution draws between non-treaty international agreements and "treaties" is a quite different line from the one on which I had initially focused: it is the line between those agreements the President may conclude with *no* ex post approval by any legislative body, and those for which supermajority Senate ratification is essential. With regard to *that* line, not even the Department of Justice urged that the WTO Agreement could be defended as requiring *no* ex post approval, and I have no doubt that the agreement is a "treaty" under any defensible interpretation of that term. *See infra* note 156. The category whose boundaries the Department of Justice urged that the President and Congress be given latitude to draw — the category consisting of agreements for which the President needs *some* form of ex post legislative approval but which he may nonetheless avoid submitting to the Senate for supermajority ratification — is, I have now reluctantly concluded, *nonexistent*: there are no such agreements.

This is not to deny, of course, that some agreements between the United States and foreign powers might, under their own terms, be less than self-executing, and might, even after Senate ratification, require congressional legislation to achieve domestic legal effect. Thus, the view advanced here does nothing to limit the powerful and sometimes indispensable role that Congress in general, and the House of Representatives in particular, might play in deciding how or whether to make a treaty fully effective domestically. *See infra* note 133.

by the Constitution, each of these three Articles contains numerous cross-references to the other two, so that the interdependent nature of the governmental structure thereby created is obvious. Like any blueprint of a complex architectural edifice, moreover, the whole constituted by these three Articles is plainly more than the sum of its parts. There is no way to avoid at least some reading between the lines if one is to make coherent sense of the edifice in its entirety.

With a brevity other nations have tried to emulate in the two centuries since this document was written and ratified, it put in place a remarkably supple and enduring frame of government. Few suppose that such a result was assured simply by the genius of the design itself; enormous good luck in the leaders whose stewardship gave the structure life, including the judges and other officials whose interpretations of the text embedded it within a thick tradition of precedent and practice, have of course been partly responsible for the success our Constitution has enjoyed. Nor has the success been unqualified. From the original Constitution's tragic compromise with the institution of slavery, to a number of interpretive turns in the reading of the document over time, it has been a source of sorrow as well as joy. What remains true, however, is that the text has succeeded, in its interaction with the community of its interpreters, in providing the basic architecture of a scheme of government remarkable in the history of the world.

I use the phrase "basic architecture" quite deliberately. Had the text been construed without constant attention to the fact that it does indeed define an architecture — a connected structure rather than simply a sequence of directives, powers, and prohibitions — there is little reason to suppose that it could have become the basis for such success as it has enjoyed. It is for this reason that I put such great emphasis upon text *and* structure, both the structure *within* the text — the pattern and interplay in the language of the Constitution itself and its provisions — and the structure (or architecture) *outside* the text — the pattern and interplay in the governmental edifice that the Constitution describes and creates, and in the institutions and practices it propels.[48]

To take structure as well as text seriously, one must attend to the "topology" of the edifice — those fundamental features that define how its components interlock and that identify the basic geometry of their interconnected composition. As I describe below, careless constitutional interpretation often suffers from basic errors with respect to "constitutional topology."

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[48] In this piece I often use the terms "structure" and "architecture" for distinct purposes. I ordinarily use "structure" to refer to the ways that various parts of the Constitution fit together. I ordinarily use "architecture" to describe the framework or shape of the government established by the Constitution.

A. Altering the Fundamental Properties of a Configuration of Government Power

Topology is a field of mathematics devoted to the study of those properties of geometric configurations in space that remain unchanged by certain continuous transformations, such as twisting or stretching. Some deformations, or discontinuous changes, fundamentally alter the properties and structure of a geometric configuration. Topologists study such matters in detail. They search for ways of identifying those features of multidimensional solids or surfaces that cannot be altered through mere bending or stretching. For instance, a möbius strip — roughly speaking, a strip of ribbon that has been given a twist before being made into a closed loop — has but one surface and one edge. Without cutting the strip, we cannot make it into a two-surfaced entity like a normal sheet of paper. If such a strip is suitably cut, however, it will become either a conventional, two-surfaced rectangle or a doubly-twisted möbius strip, depending on how the cut is made. Similarly, if we started with a sphere, but have ended up with a donut-shaped surface surrounding a single hole, then we have necessarily engaged in some radical manipulations — such as cutting, or tearing and restitching. And the basic properties of the donut are certain to be radically different from the basic properties of the sphere.

Topological considerations are relevant to the structural integrity of any complex system whose parts fit together into a multidimensional whole. The Constitution and the architecture of the government it established are no exception. Their integrity depends on the use of topologically sound modes of constitutional interpretation. The government established by the Constitution has a particular architectural configuration, with a definite shape that prescribes the resulting framework of official authority. The concrete properties of this constitutional configuration are defined by specific instructions for, among other things, the enactment of statutes, the making of treaties, the approval of compacts, and the passage of constitutional amendments — and for the interpretation of certain gaps in the Constitution's instructions about such matters. Because the constitutional allocation of responsibility for these various actions is part of a larger framework of separated and divided powers, it is possible that changing any of these processes will upset the overall balance and thereby fundamentally alter the constitutional configuration. And in construing these architectural provisions, certain interpretive moves are more analogous to tearing than to mere stretching or bending; the consequences of any such tearing may be that we end up with a system different in very basic ways from that envisioned by the Constitution.

The legislative veto, which the Supreme Court found unconstitutional in *Immigration and Naturalization Service v. Chadha*,[49] posed just such a topological problem. Imagine Congress's legislative authority as a roughly spherical solid. Although the sphere will not be entirely smooth — there will be numerous bumps and outward extensions corresponding to congressional delegations of power — it may be imagined as close enough to a sphere for government work. But if we were to take one of these small extensions, stretch it outward, and then loop it back into the original solid at another point, we would thereby alter the shape in a fundamental way. We would have created a hole in the figure, giving it at least some of the properties we would expect to see in a donut, rather than in a sphere. This was the type of transformation effected by the legislative veto, which represented not simply a bump or extension of a normal delegation, but a *loop* back into congressional power. The type of congressional power thereby created, in which the legislative branch directly supervised the execution of the law, was akin to the parliamentary form of government that the Framers repudiated.

Thus, as I have explained elsewhere, it is helpful to characterize *Chadha* as a rejection of a quasi-parliamentary form of government in which Congress delegates legislative power to itself or its parts.[50] A primary separation-of-powers concern embodied in provisions such as the Appointments Clause[51] and the Incompatibility Clause[52] is that Congress not control the execution of the laws it enacts. Because the creation of a legislative veto option would allow Congress to delegate to itself, or to those answerable to it, a role in the execution or implementation of the laws it passes, the legislative veto conflicts with the basic architecture of the federal government under the Constitution.[53] *Chadha* thus counsels that we beware of interpretive moves that fundamentally alter the topology of the government framework the Constitution describes. Modes of constitutional interpretation that would allow Congress to give itself a role in the approval of international agreements embody precisely such improper topology-altering moves.[54]

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[49] 462 U.S. 919 (1983). In *Chadha*, the Court invalidated as violative of Article I's bicameralism and presentment requirements a statutory provision whereby a single house of Congress could veto a decision of the Attorney General to suspend deportation of an alien. *See id.* at 923, 956–59.

[50] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-9, at 245–46 (2d ed. 1988); TRIBE, *supra* note 6, at 71–74.

[51] U.S. CONST. art. II, § 2, cl. 2.

[52] *Id.* art. I, § 6, cl. 2.

[53] *Cf.* Bowsher v. Synar, 478 U.S. 714, 721–27 (1986) (holding unconstitutional a provision of the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. § 901 (Supp. III 1985), that reserved to Congress the power to remove the official charged with execution of the Act); *id.* at 726 ("The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.").

[54] *See infra* Part IV.B.

B. *Mistaking Gaps in Maps for Holes in Space*

The topological perspective suggests another potential error in the enterprise of constitutional interpretation: the error of viewing maps of solids as though they fully described the features depicted. Every painter or photographer knows that a two-dimensional representation of a three-dimensional object cannot capture all that is there. Similarly, anyone who has tried to depict a three-dimensional solid in a two-dimensional graph or diagram knows that there are practical limitations to such an effort. Certain conventions must be adopted to communicate the depth and angles that one cannot otherwise accurately depict. Thus, as many a schoolchild learns, one cannot draw a three-dimensional object such as a cube as easily as one can draw a square. Instead, one must use graphing conventions such as dotted lines to depict the edges that lie "behind" the "front" of a cube.

Most of us looking at such a depiction understand the three-dimensional shape that it is meant to describe. But one who is unfamiliar with the convention of using dotted lines to represent background edges might misconstrue the gaps in those dotted lines as *actual holes* in the solid.

An error of just this sort is also possible in construing the Constitution. The Constitution describes in words a framework of government that clearly is of more dimensions than can be depicted in a series of sentences. It is only natural then that the map of our government presented in the Constitution's text cannot fully represent the many contours of the governmental architecture it describes. But just as mathematicians who want to communicate with each other meaningfully must agree on what the dotted lines in their graphs will represent, so interpreters of the Constitution must follow certain conventions in reading the gaps that are present in the Constitution's "map" of our government.

These gaps are numerous and at times quite basic. A word frequently omitted from the federal Constitution but often understood to be silently there is the word "federal" itself. Although the Sixth Amendment provides for a speedy jury trial, right to counsel, and other protections "in *all* criminal prosecutions,"[55] we know as a matter of structure and history that these Sixth Amendment protections applied only to *federal* criminal prosecutions (until the Fourteenth Amendment and incorporation doctrine came along).[56] Similarly, the

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[55] U.S. CONST. amend. VI (emphasis added).

[56] *Cf.* Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833) (holding that the Fifth Amendment right to just compensation for takings of property applies only against the federal government, not against the states). Indeed, the Fifth Amendment's guarantee that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law," U.S. CONST. amend. V, unlike its Fourteenth Amendment counterpart, nowhere specifies that it applies only to *governmental*, as opposed to entirely *private* action. It is the structure and history

guarantee of the writ of habeas corpus[57] and the bans on bills of attainder and ex post facto laws[58] in section 9 of Article I apply only to the federal government, as is clear — despite the absence of any express indication in section 9 — from section 10's analogous prohibition on *state* bills of attainder and ex post facto laws (but not on suspensions of the writ of habeas corpus).[59] Although a constitutional provision might not in words be limited to the federal government, one should not quickly assume that this opening in the text corresponds to open slots in the architecture of our government that may be filled in with entities besides the federal government, such as the states.[60]

Another word commonly omitted from the Constitution's text but frequently understood to be there implicitly is the word "only." As I describe further below, there has been a recent trend among constitutional scholars, including Professor Ackerman and Professor Amar, to view this kind of gap in particular — the absence of the word "only" in a constitutional provision — as though it described an actual "hole" in the architectural framework of our government. Thus, Article V does not say that it provides the *only* ways to amend the Constitution, and the Treaty Clause of Article II similarly fails to state that Senate ratification is the *only* method of approving major international agreements. Professors Ackerman and Amar imagine that these gaps in the map describe actual holes in our governmental framework — holes that they propose to fill in with alternative methods of constitutional amendment or of national treatymaking. Their initial interpretive move of seeing deep significance in the absence of the word "only" is akin to viewing a dotted line in a diagram as though it represented actual holes in the structure being diagrammed. When a description of a structure is of lower dimensionality than the structure depicted, however, we must take special care in the interpretive moves we make.

Professor Ackerman has failed to exercise such care in constitutional interpretation. In articulating his theory of constitutional mo-

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of the Bill of Rights as a whole that supplies the "state action" (or, more properly here, the federal action) requirement that the text itself often fails to express.

57 *See* U.S. CONST. art. I, § 9, cl. 2.

58 *See id.* art. I, § 9, cl. 3.

59 *See id.* art. I, § 10, cl. 1.

60 This is not to say that, when a provision of the Constitution forbids a particular branch of some level of government from violating a given right, one should automatically assume that only that branch is so limited. The answer to the question which governmental branches are implicitly constrained often requires further analysis of structure and history. Consider two contrasting examples. The First Amendment explicitly limits only Congress, not other branches of the federal government, yet it has been understood to restrict the executive and judicial branches as well. However, the Contract Impairment Clause, which says that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts," *id.* art. I, § 10, cl. 1, has been interpreted to apply to the enactments of state legislatures, but not to judicial reformulations of contract law. *See* Tidal Oil Co. v. Flanagan, 263 U.S. 444, 451 (1924).

ments, Professor Ackerman has latched onto this gap — the absence of the word "only" where Article V specifies the means by which the Constitution may be amended — as partial justification for his search for alternative means of "higher lawmaking."[61] Unsurprisingly, and perhaps even predictably in the constitutional universe configured by the moves he has made with respect to Article V, Professor Ackerman has also seen the absence of the word "only" where Article II specifies the means by which treaties may be made as evidence that an alternative means of approving international agreements exists in Article I.[62]

It is old news in constitutional and statutory interpretation that decoding the sounds of silence — attributing substantive meaning to what a text does *not* say — can be a hazardous enterprise.[63] What the absence of the word "only" means in the context of a particular statutory or constitutional provision will depend in significant part on *what sort of provision* is being construed, as well as on *what the text itself says* about the significance of such lacunae. Professor Ackerman's rush to find in the absence of the word "only" a license first to propose unusual and extra-textual modes of constitutional lawmaking outside Article V, and then to justify alternative modes of ratifying international agreements outside Article II, ignores the basic character both of these constitutional provisions and of the text as a whole.

Article V and the Treaty Clause of Article II both address how the most fundamental agreements — among the people and their government, in Article V; between the nation and foreign states, in Article II — may be altered or made. Both are among the provisions that establish the basic framework of our system of governance. Both give to the states a decisive role in ratifying fundamental national commitments, either directly (under Article V) or as equally and uniquely represented in the Senate (under Article II). Given the careful efforts of the Framers to establish an elaborate scheme of checks and balances and a delicate division of lawmaking power, these architectural provisions do not lend themselves to Professor Ackerman's mode of interpretation.[64]

Questions regarding the proper inferences to be drawn from the explicit constitutional descriptions of powers and rights are as old as the text of the Constitution itself. In discussing the propriety of apply-

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[61] *See* Ackerman, *supra* note 13, at 72.

[62] *See* Ackerman & Golove, *supra* note 10, at 811.

[63] *See* TRIBE, *supra* note 6, at 29–44.

[64] *See* David R. Dow, *The Plain Meaning of Article V*, *in* RESPONDING TO IMPERFECTION, *supra* note 13, at 127 (arguing that "Article V must be understood as exclusive not precisely because the Framers expected it to be, but because the structure of the government they established *depends* upon its exclusivity").

ing the canon of interpretation *expressio unius est exclusio alterius*[65] to provisions of the Constitution, Alexander Hamilton argued that:

> the rules of legal interpretation are rules of *common sense*, adopted by the courts in the construction of the laws. The true test, therefore, of a just application of them is its conformity to the source from which they are derived. . . . Is it natural to suppose that a command to do one thing is a prohibition to the doing of another, which there was a previous power to do, and which is not incompatible with the thing commanded to be done?[66]

Hamilton noted that, although canons of exclusivity are contrary to common sense if used to deny a power that existed prior to or apart from the provision at issue, maxims such as *expressio unius est exclusio alterius* are properly applied to provisions enumerating the limited powers of Congress and the limited jurisdiction of the federal courts.[67] Thus, Hamilton was surely right to note that, because Congress was given the power to constitute courts,[68] the Constitution's guarantee in Article III of a right to *criminal* trial by jury[69] could not

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[65] Hamilton used English rather than Latin: "The expression of one thing is the exclusion of another." THE FEDERALIST No. 83, at 496 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (internal quotation marks omitted).

[66] *Id.* Concerning consultation of the Framers, it should be axiomatic that it is enacted law — whether in the form of a statute or a constitution — that governs, never the unenacted intentions of any lawgiver. To the extent that information about the assumptions, hopes, or fears of those who wrote or ratified a given provision might shed light on the provision's original meaning, such information seems to me worth consulting. But the ultimate question in every case must be what the provision in question means, not what those who favored or opposed it thought. Although proponents of interpretation according to "original intent" are sometimes accused of seeking to give binding legal effect to the mere mental states of particular lawmakers, most "originalists" are probably guilty of no such thing. *See* CHARLES FRIED, ORDER AND LAW 61–67 (1991); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209–17 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–65 (1989).

Where Professors Ackerman and Golove stand on this fundamental question is not entirely clear. Insofar as the "Constitution" they purport to be interpreting consists of a complex mix of enacted texts and national experiences outside the constitutional text, they appear to give the effect of law to supposed ideas and beliefs nowhere promulgated in any recognizable form. Thus, in a typical passage, they have the following to say about the alleged transformation of the Treaty Clause from an exclusive mode of international agreement-making into the mere option that Professors Ackerman and Golove claim it later became: "The intentions of the Framers have been redeemed — so long as we recognize that the relevant Framers were the Americans who fought the Second World War and not those who fought the Revolution." Ackerman & Golove, *supra* note 10, at 803. For my part, even if this were demonstrably true, it would be irrelevant.

[67] *See* THE FEDERALIST No. 83, *supra* note 65, at 496–97. Supporters of a non-exclusive reading of the Treaty Clause are thus mistaken in suggesting that Hamilton considered the canon *expressio unius est exclusio alterius* to have "no validity as a canon of constitutional construction." Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pt. 1), 54 YALE L.J. 181, 237 n.99 (1945) (citing THE FEDERALIST No. 83 (Alexander Hamilton)).

[68] *See* U.S. CONST. art. I, § 8, cl. 9.

[69] *See id.* art. III, § 2, cl. 3.

properly be read to preclude Congress from providing for *civil* juries as well.[70] But the principle behind the maxim *expressio unius est exclusio alterius* more sensibly applies to provisions of the Constitution that both create entities and describe the powers those entities may wield.

The Constitution is, of course, capable of negating maxims of exclusivity. The Ninth Amendment, for example, says explicitly that the Constitution's "enumeration . . . of certain rights, shall not be construed to deny or disparage others retained by the people."[71] But the Constitution contains nothing remotely like what I might call a "Nine-Tenths Amendment" directing that:

> The enumeration in this Constitution of certain procedural requirements for making the Supreme Law of the Land shall not be construed to deny or disparage the invention and exercise of alternative means of making such Supreme Law, without complying with those requirements, by any branch or combination of branches of the United States Government, notwithstanding any protections elsewhere provided for the States.[72]

That the Constitution would never have been ratified two centuries ago had such a provision been included, and probably could not be ratified today with any such provision, is beyond dispute.[73] Yet it seems as though Professors Ackerman and Golove have adopted a novel canon of construction to apply to the Constitution's grants of power, the canon *expressio unius est* inclusio *alterius*, as though my

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[70] *See* THE FEDERALIST No. 83, *supra* note 65, at 496–97. In the end, of course, the Seventh Amendment was added to provide a *guarantee* of the right to civil jury trials "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." U.S. CONST. amend. VII.

[71] U.S. CONST. amend. IX.

[72] The Tenth Amendment provides: "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." *Id.* amend. X. The Ninth and Tenth Amendments should caution us against "penumbral thinking" with respect to grants of national government power. *See* Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1657 (1993) (criticizing Professor Amar's virtually free-form derivation, from the enforcement clause of the Thirteenth Amendment, of government power to override the First Amendment in matters of racist speech, and noting that "penumbral thinking" can just as easily be used "to expand the powers of government" as "to expand individual rights"); *see also* TRIBE, *supra* note 6, at 42–44 (discussing the Ninth and Tenth Amendments and the act of construing constitutional silences).

Note that Professor Amar's method of reading Article V's procedures as non-exclusive is not as vulnerable to the Tenth Amendment objection as Professor Ackerman's, inasmuch as Professor Amar's method treats the power of extra-Article V amendment as reserved not to the national government, but to "the people." *See* Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 459 (1994); Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1897 (1994). However, insofar as the people are capable of acting rationally only through the medium of national institutions, the difference may be limited.

[73] Indeed, it is hard to imagine that such a provision could have been ratified at any point in our history even by any of the methods, formal or informal, envisioned by either Professor Ackerman or Professor Amar. *See* Ackerman, *supra* note 13, at 77-82; Ackerman & Golove, *supra* note 10, at 875; Amar, *supra* note 72, at 458–61.

proposed Nine-Tenths Amendment could be read into the document. This mode of interpretation is in tension with more than just the language of the Ninth and Tenth Amendments. Even in the absence of those provisions, the most plausible way of reading the Constitution as a legal text, in light of the historical background against which it was adopted — and particularly in light of the overarching concern with state sovereignty that both Article II and Article V reflect[74] — would be to read as exclusive those provisions that specify how elements of the supreme law of the land are to be adopted. Instead, Professor Ackerman has seized upon the Framers' failure to use the word "only" as an opening for his own theories about how the supreme law of the land is to be made. Whatever one thinks of the utility of clear statement rules in the context of statutory interpretation, it runs time in reverse to impose such requirements on the Framers two centuries after the fact.

In fact, it would have been impossible for the Framers to have provided enough "only"s to satisfy interpreters such as Professor Ackerman. One striking problem with reading too much into the absence of the word "only" in a provision is that the word "only" can be absent *all over*.[75] Given a particular provision, how does Professor Ackerman know where the missing "only" would have been inserted? The Treaty Clause provides that "He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[76] Professor Ackerman seems to see the word "only" to be absent before the word "by"; as Professor Ackerman reads it, the Treaty Clause does not say, "He shall have Power, *only* by and with the Advice and Consent of the Senate, to make Treaties." But the word "only" is also missing before the pronoun "He." Is it possible that, because the Treaty Clause, in describing the President's powers, does not say, "*Only* he shall have Power . . . to make Treaties," that *Congress* could negotiate treaties wholly apart from the President but still subject to Senate supermajority approval, provided, of course, that Congress found such negotiation to be a "necessary and proper" means of regulating foreign commerce? This result would be unthinkable, would it not? The potential hazards of searching for absent "only"s are even greater with

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[74] *See* Thomas K. Landry, Ackermania*l: Who* Are *We the People?*, 47 U. MIAMI L. REV. 267, 289 n.85 (1992) (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 242 n.* (Max Farrand ed., rev. ed. 1966) (quoting one of the Framers as saying, "we would sooner submit to a foreign power, than to [sic] submit to be deprived of an equality of suffrage, in both branches of the legislature, and thereby be thrown under the domination of the large States")).

[75] I seem to have missed this point previously. *See* TRIBE, *supra* note 6, at 44 & n.105 (noting the "potential *determinacy*" of a text's silence).

[76] U.S. CONST. art. II, § 2, cl. 2.

longer provisions such as Article V.[77] Professor Ackerman should thus abandon his hunt.

Professor Ackerman is not alone in this error. His colleague Professor Amar, too, has seemingly made use of *expressio unius est inclusio alterius* and the search for absent "only"s. Professor Amar's distinctive argument for the nonexclusivity of Article V[78] illustrates the point above that, once one attaches significance to the absence of "only" in a constitutional provision, the meaning of that provision will vary with the placement of the missing "only." Professor Amar notes that Article V "emphatically does *not* say that it is the *only* way to revise the Constitution."[79] Although he acknowledges that for provisions such as Article V, it is common to "read the enumeration of one mode . . . as impliedly precluding any other modes," Professor Amar abandons the spirit of this more common approach by latching onto "an alternative way of understanding the implied exclusivity of Article V: it enumerates the only mode(s) by which ordinary *Government* . . . can change the Constitution . . . . Under this alternative view, Article V nowhere prevents the *People* themselves" from changing their Constitution.[80] Although he presents his construction of Article V as true to the interpretive principle of "implied exclusivity," Professor Amar has simply focused on the "only"-absence that supports his argument best. Like Professor Ackerman, he has mistaken a gap in the constitutional map for a hole in constitutional space.

C. *Treating Elements of Architecture as Mere Illustration or Suggestion*

Another related interpretive move that conflicts with sound principles of constitutional topology involves erroneously treating actual elements of architecture as though they were mere diagrams or illustrations. This faulty mode of interpretation views elements of government architecture not as the full-bodied entities they are, but as merely suggestions, illustrations, or symbols of something else. The en-

[77] To see the multiplicity of meanings a provision might have if we only isolate the proper "only" that isn't there, consider the many things that the first part of Article V might mean, depending upon which "only" we happen to find missing:

> [Only] [t]he Congress, [only] whenever two thirds of both Houses shall deem it necessary, shall [only] propose [only] Amendments [only] to this Constitution, or, [only] on the Application of [only] the Legislatures of two thirds of the several States, shall [only] call [only] a Convention [only] for proposing [only] Amendments, which, [only] in either Case, shall be valid to all Intents and Purposes, [only] as part of this Constitution, [only] when ratified by [only] the Legislatures of three fourths of the several States, or [only] by Conventions in three fourths thereof, [only] as the one or the other Mode of Ratification may be proposed by [only] the Congress . . . .

Id. art. V. (providing the Constitution's [only] procedures for amendment). I'm sure that these aren't the only "only"s missing. But I'd better say so explicitly so that I'm not misunderstood.

[78] *See* Amar, *supra* note 72, at 459.

[79] *Id.* (emphasis in original).

[80] *Id.* (emphasis in original).

deavors by Professors Ackerman and Amar to conjure new modes of constitutional amendment involve such an error. Another less significant instance of treating architectural provisions as though they were only shadowy suggestions of unenumerated possibilities is present in Professor Amar's recent argument that Article I's provision of immunity from civil arrest for members of Congress[81] might properly be read to "invite . . . analogous immunities for members of coordinate branches," such as the President.[82] Whatever the merits — as a matter of federal common law — of the case for temporary presidential immunity from civil suit,[83] I disagree with Professor Amar's suggestion that the existence of congressional immunity might somehow invite us to analogize comparable immunity for the President, and that this invitation is based on "crisp[ ] arguments from constitutional text and structure."[84] The Constitution is silent as to presidential immunity. Professor Amar is right that the provision of limited immunity for members of Congress in no way *bars* presidential immunity, but such provisions should not too readily be treated as invitations to construct analogous rules.

Given Professor Ackerman and Professor Amar's enthusiasm for this troublesome interpretive move, I am tempted to note the emergence of a distinctive new "Yale school" of constitutional interpretation (even though it is the *Harvard Law Review* that has been giving it its greatest press of late).[85] The central characteristic of this new school is a willingness to treat even the architecture-defining, power-conferring provisions of the Constitution as merely suggestive — as though they offer teasing hints about the design of any number of possible government frameworks. Perhaps the Constitution may be amended by popularly called conventions. Or perhaps a combination of events producing national electoral mandates will suffice. Or perhaps — well, by what means would *you* like to change the Constitution?

I emphatically reject any such treatment of our Constitution's architectural provisions. Constitutions that merely proclaim political aspirations, like those of the former Soviet Union and its satellites, might be so regarded. Not so for constitutions that create an edifice of law. Ours is a constitution that calls certain institutions into being. Thus, we must look to that Constitution to determine how these institutions are to operate and when their products are to be regarded as law. The United States Constitution tries to define with some precision the processes that determine which laws, treaties, or agreements will in

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[81] *See* U.S. CONST. art. I, § 6, cl. 1.

[82] Akhil R. Amar & Neal K. Katyal, *Executive Privileges and Immunities: The* Nixon *and* Clinton *Cases*, 108 HARV. L. REV. 701, 706 (1995).

[83] I think the case is quite strong.

[84] Amar & Katyal, *supra* note 82, at 702.

[85] *See* Ackerman & Golove, *supra* note 10; Amar & Katyal, *supra* note 82.

fact be binding upon us. We must look to the procedural requirements of these enabling provisions to evaluate the validity of something purporting to be law. If Article V is not exclusive, how are we to know what other methods suffice? Professor Amar looks back to the eighteenth century and seizes upon the idea of popularly demanded constitutional conventions.[86] Professor Ackerman, by contrast, turns to what he regards as the most extraordinary moments in our constitutional history and seeks to extract from them lessons about how "We the People" may change the Constitution outside Article V.[87] But how do We the People — or judges or other political actors — know when to accept the products of a particular procedure as lawful? We can know that something has the binding force of law only if it complies with the requirements that, as a matter of social fact, we have agreed must be met when law is to be made.[88] Pending some upheaval of the magnitude of the 1780s or of the 1860s, in which we would have no choice but to argue about whatever deeper matrix of lawfulness should ground our constitutional order, the only such requirements for our polity are those that are, for the time being at least, embodied in our Constitution's text.

The errors that Professors Ackerman and Amar have made may result from applying too quickly to the Constitution's concrete architectural provisions a mode of reasoning that is more appropriate to construing the Constitution's abstract declarations of basic rights, particularly in light of the Ninth Amendment. Those provisions of the Constitution that are manifestly *instrumental* and *means*-oriented and that frame the architecture of the government ought to be given as fixed and determinate a reading as possible — one whose meaning is essentially frozen in time insofar as the shape, or topology, of the institutions created is concerned.[89] This is so even though those provisions that appear designed more directly to embody *ends* as such in their proclamations about how governments are to treat persons, and that represent not the system's *architecture* but its *aspirations*, ought perhaps to be read through lenses refined by each succeeding generation's vision of how those ends are best understood and realized.[90] Thus one might (although, of course, some interpreters would argue that one should not) read requirements like that of "equal protection of the

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[86] *See* Amar, *supra* note 72, at 462–87.

[87] *See infra* Part V.C.

[88] *See infra* note 227.

[89] Some of the variables in architecture-defining sentences, such as "commerce" in Article I, section 8, or even "treaty" in Article II, might have some evolutionary potential even if the basic architecture is deemed to have a fixed meaning.

[90] This distinction between architectural and aspirational provisions resembles a distinction drawn nearly seven decades ago by Edward Corwin. *See* Edward Corwin, *Judicial Review in Action*, 74 U. PA. L. REV. 639, 659–60 (1926) (positing two constitutional canons of construction, the "historical" and the "adaptative").

laws" as referring to general principles that call for elaboration over time in a way that the quite specific instructions of Articles V and II (and perhaps even of some highly specific rights-protecting provisions such as, for example, the Seventh Amendment) cannot be read — especially in light of the Tenth Amendment, whose clear message is that federal *powers* in particular are not to be invented, or to be generated extemporaneously, but must find a solid source in constitutional text.[91] For the Constitution to serve as a *constitutive* document, some provisions require rigid definition; not all may be given a wide berth for evolution. Although it may be debatable which of these categories best describes a particular provision of the Constitution, architectural provisions that specify the *processes* by which government is to effect legal change, such as Article V and the Treaty Clause of Article II, clearly demand a fairly rigid definition. Wherever the Framers explicitly addressed how law and binding obligations are to be adopted, the novel principle *expressio unius est inclusio alterius* can be applied only at great peril to the basic architecture established by the Constitution.

As a matter of constitutional topology, the Yale school propounds interpretive transformations that leave us with a configuration fundamentally different from the one that the Constitution's text and structure create. Nonexclusive views of Article V and of Article II's Treaty Clause enfeeble two of the Constitution's state-sensitive supermajority requirements for what should be especially solemn modes of lawmaking, and thereby damage the Constitution's basic architecture.

D. Ignoring the Connections and Intersections Among Surfaces and Structures

Finally, constitutional topology counsels against the additional error of ignoring how the surfaces or edges of a complex structure connect and intersect. Spheres in space may connect at a single point of tangency or at numerous points so that a portion of each sphere is contained in the other, or they may intersect not at all.

The same is true of governmental powers. In understanding the division of authority among the branches of the federal government or among the states and the federal government, one must take into account how each of those entities interlocks with the others. Clearly there is potential for the powers granted to each entity to clash with

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[91] There is no ultimate contradiction between an insistence on reading enabling provisions in a relatively rigid manner and a willingness to treat certain other provisions more loosely. A full explanation of why this is so would be beyond the scope of this Article, and others may be excused for having found some amusement in my "taking up the cudgels for a textualism that the later Black could well be proud of." Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMMENT. 101, 105 (1994) (discussing my views of Article V and the 27th Amendment).

the powers granted to the others. Thus, each of the Constitution's numerous grants of power must be interpreted in light of the others. For example, although Congress has broad power under Article I to regulate foreign commerce,[92] the President's Article II power to appoint principal officers[93] suggests that it is not Congress but the President who must be responsible for choosing the Secretary of Commerce (with consent of the Senate, as provided in Article II).[94] Professors Ackerman and Golove, as I explain more fully below, have erroneously viewed Articles I and II as "great and *independent* grants of power"[95] and have construed Congress's powers under Article I without any serious attention to how they relate to the powers described in Article II.

It is not surprising, then, that Professor Ackerman and Professor Golove's case for the congressional-executive agreement paints a misshapen picture of the Constitution we are bound to construe. I now turn to a critique of that picture.

IV. A Case Study: In Defense of the Exclusivity of the Treaty Clause

My call in the following pages to take constitutional text and structure seriously even in the field of foreign relations might strike some as oddly formalistic. The Supreme Court and constitutional commentators (including me) have long noted "that the Constitution's separation of powers and its arrangement of checks and balances are less precise in [the area of foreign affairs] than a survey of the text might suggest."[96] With regard to the foreign affairs powers of the United States Government, there is indeed much that is left unsaid in the Constitution. When instances of textual silence are combined with the generally accepted principle that the United States Government has plenary power over foreign affairs, it is possible to imagine numerous ways in which international relations might be conducted by our national officeholders.

But the realm of such possibilities is still a bounded one. The particularly fluid character of international legal norms cannot be wholly transposed onto questions of American constitutional law, for our Constitution and the legal traditions of construing it provide sources and limits of authority considerably more stable and constraining than

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92 *See* U.S. Const. art. I, § 8, cl. 3.

93 *See id.* art. II, § 2, cl. 2.

94 *See infra* p. 1275.

95 Ackerman & Golove, *supra* note 10, at 920 (emphasis added).

96 Tribe, *supra* note 50, § 4-2, at 211; *see also* Louis Henkin, Foreign Affairs and the Constitution 32 (1972) ("As they have evolved, the foreign relations powers appear not so much 'separated' as fissured, along jagged lines indifferent to classical categories of governmental power.").

those of international law. Specific constitutional provisions constrain what will pass as legitimate means for the conduct of the United States' foreign affairs. When government leaders exercise power on behalf of the United States, the means they use should be rigorously examined in light of what the Constitution *does* provide with regard to foreign relations. Weak constitutional analysis cannot be justified by impatience with formal limits on the conduct of international affairs or by an assumption, usually quite correct, that the courts will be hesitant to interfere in the field of international relations. Careful constitutional interpretation with regard to the separation of powers — not petty formalism, but strict attention to considerations of text and context without which words lose their meaning and arguments their sense — is both legitimate and appropriate even in the setting of foreign relations, especially as modern economic and political trends blur the distinction between domestic and international life.

At first glance, the case for the validity of the congressional-executive agreement may seem linguistically and historically plausible. The congressional-executive agreement has recent practice on its side. Indeed, since 1934, the treaty form has been largely abandoned for trade agreements.[97] The Restatement (Third) of the Foreign Relations Law of the United States notes that the "prevailing view" is that the congressional-executive agreement "can be used as an alternative to the treaty method *in every instance*."[98] But, as an analysis of text and structure will show below, those who have set forth the constitutional case for the congressional-executive agreement have too quickly relied upon the broad reach of Congress's Article I, section 8 power over foreign commerce without adequately considering how their position

[97] *See* Harold H. Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 146 n.7 (1992).

[98] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1986) (emphasis added); *see also* HENKIN, *supra* note 96, at 175 ("[I]t is now widely accepted that the Congressional-Executive agreement is a complete alternative to a treaty: the President can seek approval of *any agreement* by joint resolution of both houses of Congress instead of two-thirds of the Senate only" (emphasis added).).

Although the Justice Department's Office of Legal Counsel in recent months had seemed to endorse Professor Henkin's view, *see* Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Michael Kantor, United States Trade Representative 4 & n.8 (July 29, 1994) (quoting HENKIN, *supra* note 96, at 175–76), Assistant Attorney General Dellinger has since indicated that his office "do[es] not dispute Professor Tribe's view that some such agreements [with foreign nations] may have to be ratified as treaties." Dellinger Memorandum, *supra* note 47, at 4 n.13.

Of course, the reading of the Treaty Clause advanced by Professors Ackerman and Golove (and by Professor Henkin before them) does not render that provision a complete nullity. The Treaty Clause still provides the President a powerful *option* by creating a path whereby international agreements — including those that Article I absolutely prohibits the states from entering — may be made and become part of United States law without any involvement by the House of Representatives. Indeed, the Treaty Clause procedure gives the President and the Senate the power to supersede a prior statute without the involvement of the House — to the extent that a treaty may supersede a prior act of congressional legislation.

would mesh with the terms of other constitutional provisions and with the architecture of decisionmaking that those provisions interact to define.[99]

A. *Article I as a Self-Contained Alternative to the Treaty Clause?*

Professors Ackerman and Golove base their textual case for the congressional-executive agreement as an all-purpose alternative to the treaty form on what they term a "Marshallian" constitutionalism.[100] Under this view, Articles I and II are seen as "great and independent" sources of federal power.[101] Anything that falls substantively within the subject-matter reach of Article I may be embodied by Congress in any governmental or institutional form that might rationally be deemed "necessary and proper" — regardless of whether Article II (or perhaps another constitutional provision) specifically empowers a different combination of actors to achieve the result in question.[102] But a closer look at Articles I and II (and for good measure, III)[103] shows that this understanding of Article I is anything but Marshallian and cannot express the constitutional design. Indeed, such a view reflects the fundamental topological error, discussed above, of ignoring the connections among the entities described in the Constitution.[104]

In their article, Professors Ackerman and Golove mention such major international agreements as NAFTA and the WTO Agreement, but they pointedly decline to analyze the terms of any particular agree-

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[99] Even many of those who approve of the consensus view have noted that the constitutional underpinnings of the congressional-executive agreement are less than clear. As Professor Henkin has explained:

> Constitutional doctrine to support Congressional-Executive agreements is not clear or agreed. The Constitution expressly prescribes the treaty procedure and nowhere suggests that another method of making international agreements would do as well. Congress, also, has no authority to negotiate with foreign governments; it can not, then, delegate any to the President. One might say that Congress can join its legislative powers in regard to the subject matter to the President's authority to negotiate with foreign governments, but international agreements are primarily international acts and make domestic law only incidentally. Many agreements, moreover, make no domestic law at all, and some of the agreements authorized or approved by Congress, *e.g.*, for participation in some international organizations, deal with matters that are not within any enumerated power of Congress or even its unenumerated power to legislate in matters relating to foreign affairs.

HENKIN, *supra* note 96, at 174 (footnote omitted).

[100] *See* Ackerman & Golove, *supra* note 10, at 919–20; p. 1275–76. Earlier defenders of the congressional-executive agreement also sought to align themselves with Chief Justice Marshall's approach to constitutional interpretation. *See, e.g.*, McDougal & Lans, *supra* note 67, at 213–14, 290–91.

[101] Ackerman & Golove, *supra* note 10, at 920.

[102] An analogous view informed the 1971 decision of the European Court of Justice that the European Community's power to enact domestic regulation concerning particular subject matters implied a power to enter international agreements covering the same subjects. *See* Case 22/70, Commission v. Council, 1971 E.C.R. 263 (1971). This decision has been justly criticized. *See, e.g.*, J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2416 (1991).

[103] *See infra* Part IV.D.2.

[104] *See supra* Part III.D.

ment. They need not do so under their broad theory, for that theory says that *any* international agreement related to foreign commerce, no matter how intrusive on state or national sovereignty, may be approved as a congressional-executive agreement through a simple bicameral majority. Under that view, if an agreement is related to foreign commerce, then precisely what the agreement would accomplish and how it would do so are *irrelevant* to whether the agreement must be processed as a treaty and subjected to the stringent requirement of supermajority Senate approval.[105] It is *this* proposition — not supported even by the administration that defended the WTO and its consideration by both Houses of Congress[106] — that I address below.

B. A Fly in the Article I Ointment: The "Veto Override" Clause and Its Mechanism for Bypassing the President

Let me turn at once to a particularly striking structural problem that the scholarly celebration of the congressional-executive agreement simply ignores. According to the defenders of the congressional-executive agreement as an all-purpose substitute for the treaty, Congress's legislative powers under Article I, section 8 include the power to approve bicamerally any international agreement dealing with a subject that Congress could have chosen to regulate through ordinary Article I lawmaking. The very term "congressional-*executive* agreement" indicates, of course, that these agreements are negotiated by the President. Yet the proponents of this view, in their apparent rush to justify the conclusion that they wish to reach, do not pause to ask whether Congress may approve an international agreement dealing with an Article I subject notwithstanding an *objection* by the sitting President. It is clear from Article I, section 7, clause 3, that Congress may, by two-thirds vote, override a presidential objection to *any* congressional action for which a vote of both houses is needed. The Constitution's text is unequivocal:

> *Every* Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, *or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill*.[107]

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[105] *See GATT Hearings*, *supra* note 11, at 324–25 (statement of Prof. Bruce Ackerman). Professor Ackerman's participation in the debate over the WTO Agreement leaves little doubt that this is what his theory entails. In his Senate testimony, Professor Ackerman expressly disclaimed knowledge of the terms of the agreement about which he was testifying and declined to address Senators' specific questions about it. *See id.* at 321.

[106] *See supra* note 98.

[107] U.S. CONST. art. I, § 7, cl. 3 (emphasis added). I shall refer to this clause as the "Veto Override Clause."

If Article I allows Congress to approve bicamerally all international agreements that deal with foreign commerce, then Article I on its face allows Congress to approve any such international agreement negotiated, say, by a prior President or introduced in Congress at the urging of a foreign nation, *even if the current President objects to that international agreement*.[108]

Neither Professors Ackerman and Golove, nor the scholars who trumpeted the omnipotence of the congressional-executive agreement in the 1940s,[109] have noted this problem directly. Under their brand of omnipotent "Marshallianism," we would "recognize both Article I and Article II for what they are: great and *independent* grants of power, each of which suffices to justify the creation of international obligations."[110] But Articles I and II are *not* "independent" grants of

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[108] It would be no answer to this problem to assert that the President could simply unilaterally terminate an international agreement to which he or she objected. Although strong arguments may be made that the President's powers under the Treaty Clause imply the power unilaterally to terminate a treaty, the Supreme Court has not definitively ruled on the issue. In Goldwater v. Carter, 444 U.S. 996 (1979), the Court let stand the President's termination of a treaty with Taiwan, but that case does not stand for the proposition that the President may always terminate a treaty; a plurality deemed the matter nonjusticiable, *see id.* at 1002 (Rehnquist, J., concurring in the judgment), and another Justice found the issue not yet ripe, *see id.* at 997 (Powell, J., concurring in the judgment). Serious questions might be raised by such unilateral termination if a treaty provided for termination exclusively by other means.

But the problem that would be posed by presidential termination of an agreement approved by congressional supermajorities over presidential objection is more difficult. If we suppose that Congress has the power to approve international agreements and that the Veto Override Clause allows this approval power to be exercised by congressional supermajorities over the President's objection, then the question whether the President may terminate an agreement approved by two thirds of both Houses of Congress over presidential objection is different in kind from the question whether the President may unilaterally terminate a treaty entered into under the President's Article II authority. The clear message of the Veto Override Clause is that Congress may by supermajority carry out all of its bicameral powers without the approval of the President. If one argues, as do Professors Ackerman and Golove, that Article I provides an independent congressional grant of authority for approving international agreements, then it would be incompatible with such an argument to assert, in the face of the Veto Override Clause, that the President could simply unilaterally undo a constitutional exercise of power by two thirds of both Houses of Congress. Any power of the President to terminate treaties would seem to be derived from the grant of treatymaking power in the Treaty Clause of Article II. If Article I authorizes Congress bicamerally to approve international agreements, then the Veto Override Clause clearly permits Congress to do so without the President's cooperation. Just as the President certainly could not "terminate" a statute enacted by two thirds of each House of Congress, so the President should have no authority to undo other exercises of Article I power by congressional supermajorities. These thoughts further suggest that the proponents of the congressional-executive agreement have failed to consider fully what it means to look to Article I as a source of power for the making of international agreements.

Because the Treaty Clause places the power to make treaties in the hands of the President, and because the Veto Override Clause applies only to orders requiring *bicameral* approval, a President may of course prevent a *treaty* from going into effect even after he has submitted it for Senate ratification, just as the President may withdraw the nomination of a principal officer. *See infra* note 122.

[109] *See, e.g.*, McDougal & Lans, *supra* note 67, at 186–88.

[110] Ackerman & Golove, *supra* note 10, at 920 (emphasis added).

power at all, at least not under any canon of construction recognizable to the legal community of constitutional interpreters in which these arguments are being offered. The two Articles must be read together; to ignore the whole of which both are parts constitutes argument, but not interpretation. It is thus striking that, although Professors Ackerman and Golove state that "there are . . . two ways of passing a statute — one with, and one without, the cooperation of the President,"[111] they do not even mention the extraordinary implications of this simple fact for their theory of congressional power over international agreements.[112]

Professors Ackerman and Golove have pointed to Article I, section 8 as though their reading of that text simply provides an alternative for the *President and Congress* together to follow in approving international agreements. But if Article I provides independent authority for Congress to render international agreements binding law, it follows under the Veto Override Clause that Congress may completely circumvent the President in the conduct of ordinary foreign relations. The clause, after all, encompasses "*Every Order*" needing the concurrence of both the House and the Senate.

It is one thing to propose that Articles I and II give the President two alternative paths for ratifying any international agreement dealing with foreign commerce. It is quite another to acknowledge, as one must in order to produce a coherent Article I-based view for this proposal, that Article I provides a path for ratifying any such international agreement even over the President's vehement objection. The proposition that Congress could bind the United States to an international agreement against the wishes of the President is dramatically at odds with the well-accepted principle that the President is the primary representative of the nation in foreign affairs.

In *United States v. Curtiss-Wright Export Corp.*,[113] Justice Sutherland offered pragmatic support for the President's unique constitutional role in foreign affairs:

> [The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy

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[111] *Id.*

[112] The problem that the Veto Override Clause poses for the congressional-executive agreement cannot be avoided by arguing that because the congressional-executive agreement route is never required, but is only an alternative to the treaty route, the Veto Override Clause does not apply, limited as it is to votes "to Which the Concurrence of the Senate and House of Representatives may be *necessary*." U.S. CONST. art. I, § 7, cl. 3 (emphasis added). Under the theories set forth to justify the congressional-executive agreement, if the Senate has not approved a treaty by supermajority vote, the concurrence of both Houses *would* be "necessary" for the agreement to be valid.

[113] 299 U.S. 304 (1936).

> in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.[114]

Although much of Justice Sutherland's language in *Curtiss-Wright* has been rightly criticized as unduly broad, this principle — that the President is the primary actor on behalf of the nation in its relations with foreign countries — seems well-grounded in the Treaty Clause and in unbroken presidential practice from our nation's beginnings. Moreover, Justice Sutherland's justifications for the President's role make clear the risks of Congress's entering binding international agreements against the wishes of the sitting President, who might have access to confidential information that cannot be shared with Congress.

Given the central role of the President in the conduct of foreign relations, the possibility that the Veto Override Clause would provide a path for the approval of international agreements without the cooperation of the President seems to cut decisively against a reading of Article I that permits the congressional-executive agreement at all. The proponents of that reading can overlook the radical change it would entail for the foreign policy architecture of our constitutional system only if they are determined to use the Constitution's text to justify circumvention of the Treaty Clause by the President and a willing Congress rather than genuinely curious about whether such circumvention is in fact allowed by that text.

If I am right about what drives their "reading" of the text, I doubt that proponents of the congressional-executive agreement would let their theory generate the awkwardly anti-presidential result set forth here. Rather, they would probably adopt an exception to the seemingly comprehensive Veto Override Clause. The basis for such an exception might be a claim that only the President, not the Senate or Congress, may *negotiate* with foreign nations. Indeed, the early advocates of the congressional-executive agreement held this pro-presidential view, although they did not focus on the problem posed by the Veto Override Clause.[115] Justice Sutherland in *Curtiss-Wright* also spoke in strong terms about the President's exclusive role in such negotiation:

> In this vast external realm [of foreign affairs], with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.[116]

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[114] *Id.* at 320.

[115] *See, e.g.*, McDougal & Lans, *supra* note 67, at 203 ("No one today doubts that the President has complete control of the actual conduct of negotiations in the making of all international agreements or that he is the appropriate authority to make final utterance of an agreement as the international obligation of the United States.").

[116] *Curtiss-Wright*, 299 U.S. at 319.

Thus, perhaps supporters of the congressional-executive agreement would argue that this exclusive presidential power of negotiation explains why the Veto Override Clause would not in the end permit Congress to approve an agreement absent the cooperation of the President.[117]

Such an exception to a clause that begins "*Every* Order" is of course highly problematic from a textual point of view. But it is also difficult to explain *why* the exceptionally broad, so-called "Marshallian" reading of Article I, section 8 set forth by Professors Ackerman and Golove would give to Congress the power to *approve* agreements negotiated and supported by the President, but would deny to Congress both the authority to *negotiate* agreements on its own and the authority to *act upon* agreements presented to it without the cooperation or approval of the President. Such a restriction would have to be based on the view that Article II implicitly imposes structural limits upon Congress's Article I powers. As Professor Henkin has explained, "the President's monopoly of communication with foreign governments derives in large part from his control of the foreign relations 'apparatus.'"[118] Among other things, the Appointments Clause of Article II, section 2, clause 2 gives *the President* the power to appoint and remove ambassadors.[119]

As my discussion of constitutional topology makes clear, I wholeheartedly accept the proposition that specific grants of power in Article II may indicate limits on Congress's Article I power. Indeed, the Treaty Clause plays just such a limiting structural role. But Professors Ackerman and Golove, it must be remembered, have portrayed Articles I and II as "great and independent grants of power." That portrayal was essential to the conclusion they sought. Yet, if these grants *were* truly "independent," then certainly accepting trade agreements presented to Congress by persons outside the Executive Branch could

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[117] Professor Henkin has noted, without endorsing, the possible argument that Congress may not override a presidential veto when it acts under the Necessary and Proper Clause to implement the powers of the President, rather than to implement its own independent powers. *See* Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 915 n.26 (1959). This notion — that Congress may not override a presidential veto when implementing powers granted to the Executive Branch — has a certain appeal, but it is squarely at odds with the text of the Veto Override Clause.

Among other remarkable consequences, this theory would mean that, whenever Congress legislates with respect to the great executive departments, the President would be able to exercise a veto that no congressional supermajority could override. To avoid this result in the field of international relations, the view described by Professor Henkin would have to posit a special rule for congressional legislation dealing with the President's foreign policy activities. But would this mean, for instance, that the President could kill, with a non-overridable veto, any law dealing with, say, the Department of State or the Department of Defense? That these questions have no satisfactory answers shows that the theory could not fly — even if one felt free to disregard its blatant inconsistency with the text of the Veto Override Clause.

[118] HENKIN, *supra* note 96, at 45–46.

[119] *See* Myers v. United States, 272 U.S. 52, 161–64 (1926).

be as "necessary and proper" for exercising Congress's foreign commerce power as would approving such agreements when the President presents them for Congress's blessing. It would be odd to look to the Appointments Clause of Article II for structural restrictions on Congress's Article I power to negotiate international agreements without expecting the Treaty Clause — contained in the very same sentence of Article II as the Appointments Clause — to imply structural limitations on Congress's power to approve international agreements. As I will discuss further below,[120] the text of the Appointments Clause is no more exclusive than the text of the Treaty Clause; neither contains the word "only." If Article II's nebulous connection to the subject of negotiation implies that Congress may not *negotiate* international agreements, then why should not the specific provisions of the Treaty Clause imply that Congress may not *approve* such agreements? Only because one has fixed upon the desired conclusion in advance and then proceeded to engage not in a relatively disinterested search for what the legal materials *mean*, but in a determined effort to make them *say* what one would like.

Advocates of the congressional-executive agreement might instead seek to draw a distinction between *approval* of an international agreement, which Article I would authorize as a congressional act, and the "*final utterance* of an agreement as an international obligation of the United States," which only the President may effect.[121] The Constitution is silent as to a "final utterance" requirement for international agreements. Although it may be reasonable to see such an utterance role as part of the President's treatymaking power,[122] once one has decided, as Professors Ackerman and Golove have, to turn to Article I as an independent source of power for the approval of international agreements, it is unclear why any product of Article I lawmaking should be subject to requirements nowhere articulated in Article I and not applicable to other legislative products. If the Veto Override Clause grants the status of "law" to the product of supermajority congressional action over presidential objection, it seems illegitimate to impose other requirements. The clear message of the Veto Override Clause is that, whenever Congress is authorized to take bicameral ac-

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120 *See infra* Part IV.D.1.

121 McDougal & Lans, *supra* note 67, at 203 (emphasis added). McDougal and Lans noted this distinction in the 1940s, though without reference to the Veto Override Clause. *See id.* at 202–03, 209, 211. Where McDougal and Lans did refer to the Veto Override Clause, they did so simply to note that joint resolutions are considered "the law of the land." *Id.* at 222 n.35 (internal quotation marks omitted).

122 Because the Treaty Clause defines a presidential power to make treaties, it would be reasonable to argue that, even after a Senate supermajority has voted its approval of a treaty, the President may still decide whether or not that treaty should be given effect. This view has wide acceptance. *See, e.g., id.* at 209, 211; *supra* note 108.

tion, Congress may do so without the cooperation of the President, given a sufficient supermajority vote.

All of these objections and counter-objections should drive home the basic point that the text and structure of Articles I and II are not nearly as amenable to the congressional-executive agreement form as has been suggested. If, as Professors Ackerman and Golove urge, we look to Article I as a wholly independent grant of power, then the Veto Override Clause would seem to allow Congress to enter into international agreements on its own (with appropriate supermajority support). But Article II's vesting of executive power in the President has long been understood as giving the President a controlling role in negotiating international agreements. Yet once one looks outside Article I to Article II for structural limits on Article I's grants of congressional power, one must also address whether the Treaty Clause of Article II places structural limits on Congress's Article I powers. Indeed, perhaps Article II precludes Congress not only from negotiating, but also from approving, international agreements. Considerations of constitutional topology demand that constitutional interpretation take into account the precise ways that powers under Article I and Article II intersect.

C. Does Article I Authorize Congress to Approve International Agreements?

1. Structural Limits on Congress's Authority.— The problems with the Article I thesis would not disappear even if one could somehow overlook the case of the unwilling President. The trouble with the Article I thesis runs deeper. It grows out of the assumption that Congress's *legislative* power under Article I includes the power to approve international agreements simply because their *subject matter* falls within Congress's legislative competence. Given the numerous congressional-executive agreements concluded during the course of the last half-century, it may seem odd to question whether the power to make laws on a given topic automatically includes the power to approve international agreements dealing with that topic.[123] But the question is very much worth asking. No one can dispute that Congress might pass and label as a "law" a measure stating that Congress approves a particular international agreement. The Supreme Court, however, has rightly noted that "[w]hether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'"[124]

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[123] Indeed, commentators specializing in foreign affairs and foreign trade seem to think the question beyond the pale. *See supra* p. 1250 & n.98.

[124] INS v. Chadha, 462 U.S. 919, 952 (1983) (quoting S. REP. No. 1335, 54th Cong., 2d Sess. 8 (1897)).

Arguments in support of the constitutionality of the congressional-executive agreement suffer from a myopic focus on the substantive sweep of congressional powers under Article I, section 8, and a corresponding inattention to the surrounding legal context. The reach of the Necessary and Proper Clause has, of course, been understood since *McCulloch v. Maryland*[125] to be exceedingly broad, extending congressional authority to all "legitimate" ends and "appropriate" means. In addition, since the New Deal "switch," the Commerce Clause power in particular has been understood to be remarkably inclusive. Consequently, the universe of legitimate ends has expanded to such a degree that it now seems almost brazen to suggest that there is anything Congress may not do.[126]

However, *McCulloch* should not lull fans of congressional authority into a false sense of security when there are other constitutional provisions to be reckoned with. The Necessary and Proper Clause, which extends lawmaking power over all *substantive* fields fairly related to the enumerated powers of Congress and of the other branches of national government, does not speak at all to the *structural* or *procedural* requirements for particular exercises of power by the United States. For our generation, *Chadha* stands as a hefty recent reminder that not all means are procedurally appropriate for achieving legitimate ends — even in a field related to foreign affairs, such as immigration.[127] As *Chadha* teaches, congressional powers are not defined solely by Article I, section 8, but are limited by other structural constraints in the Constitution.[128]

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[125] 17 U.S. (4 Wheat.) 316 (1819).

[126] The Fifth Circuit, however, has been so bold of late, leading the Supreme Court to reconsider this Term whether there might in fact be judicially enforceable substantive limits to Congress's Interstate Commerce Clause power. *See* United States v. Lopez, 2 F.3d 1342, 1367–68 (5th Cir. 1993) (invalidating as beyond Congress's Commerce Clause power a federal criminal statute banning guns near schools), *cert. granted*, 114 S. Ct. 1536 (1994).

[127] The Supreme Court's decision in *Chadha* spelled doom for hundreds of legislative veto provisions in a wide range of statutes, including provisions of the Trade Act of 1974, 19 U.S.C. §§ 2253(c), 2412(b), 2432, 2437 (1976). *See Chadha*, 462 U.S. at 967, 1005 (White, J., dissenting).

[128] To Professors Ackerman and Golove, the Court's decision in *Chadha* is like a thorn in the side. The legislative veto, like the congressional-executive agreement, was a "twentieth-century innovation," Ackerman & Golove, *supra* note 10, at 926, that Congress chose to embody in a "series of framework statutes," *id.* The legislative veto was held to be at odds with Article I, section 7, clause 3, which I have here called the Veto Override Clause. *See supra* note 107. Professors Ackerman and Golove nevertheless try unsuccessfully to squeeze from *Chadha* support for their theory of congressional-executive agreements. They note that "[t]he [*Chadha*] opinion contains many resources for more constructive use. First and foremost is its emphasis on the central importance of Article I in the overall constitutional scheme." Ackerman & Golove, *supra* note 10, at 926. But the *Chadha* case concerned the validity of the legislative veto; no generalized principle flows from the fact that the Court based its decision on Article I — any more than Marbury v. Madison, 5 U.S. (1 Cranch) 135 (1803), stands for "the central importance of Article [III] in the overall constitutional scheme," or Mapp v. Ohio, 367 U.S. 643 (1961), stands for "the central importance of [the Fourth Amendment] in the constitutional scheme."

Just as *Chadha* established that proper subject matter cannot validate exercises of power that topologically alter constitutionally required procedures for the enactment of national law or for the delegation of federal governmental authority,[129] so too the Supreme Court's decision in *New York v. United States*[130] makes clear that subject matter is not dispositive of whether Congress has authority under Article I to alter constitutionally presupposed inter-sovereign relationships. In *New York*, the Court invalidated an act of Congress regulating interstate commerce in radioactive waste on the ground that it intruded into state sovereignty in a constitutionally impermissible way — by requiring the states to regulate in accord with Congress's instructions. Among other things, the Court stressed how the structure and history of Article I underscored the Framers' deliberate decision to limit Congress's lawmaking power to the enactment of laws applying generally and directly to the nation's people, as opposed to the enactment of directives commandeering the states as such (a limit not applicable, of course, to the treaty power).

The central teaching of *New York* is that structural considerations outside of Article I, section 8 limit congressional authority. This is so even of foreign affairs. That the *United States Government* as a whole has plenary authority over foreign affairs vis-a-vis the states in a way that is not necessarily limited to any set of enumerated powers[131] says nothing about the interbranch allocation of authority over foreign affairs within the federal government. At that level, Articles I and II together leave little doubt that Article I textually restricts *Congress's* power to regulate even foreign affairs;[132] the Treaty Clause, however,

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Professors Ackerman and Golove also point to *Chadha*'s "emphasis on the crucial value that deliberation by both Houses and the President plays in the enactment of binding law." Ackerman & Golove, *supra* note 10, at 926. *Chadha*, however, supports deliberation by both Houses *only* where the Constitution establishes bicameral process. It is true that the Court in *Chadha* invalidated the legislative veto at issue in that case because it failed to comply with the constitutional requirements of bicameralism and presentment. However, *Chadha* is a testament to the importance of strict adherence to the Constitution's structural commands and to the inability even of frequent and long-continued violations of constitutional requirements to validate such illegality — not a testament to the virtues of bicameralism *in those places, including the Treaty Clause, where the Constitution provides for one House to play a special role*. Indeed, the Court, acting in the immediate wake of *Chadha*, promptly invalidated *bicameral* legislative vetoes. *See* United States Senate v. FTC, 463 U.S. 1216 (1983); *id.* at 1218 (White, J., dissenting).

What *Chadha* stands for more than anything else is the importance of fidelity to the *complete* architecture established by the Constitution's text and structure. If the result in *Chadha* rested solely on "the intentions of the omniscient Founders of 1787," as Professors Ackerman and Golove suggest, Ackerman & Golove, *supra* note 10, at 926, then I might join them in their apparent opposition to what that decision really holds. But, as I have explained elsewhere, I regard the result in *Chadha* to be warranted by important structural considerations. *See supra* p. 1238.

[129] *See supra* p. 1238.

[130] 112 S. Ct. 2408, 2419–23 (1992).

[131] *See infra* note 161.

[132] *See infra* pp. 1268–69.

provides Article II authority for the President and the Senate together to exercise broader foreign affairs power than that delegated to Congress in Article I, section 8.[133] There is thus no reason to imagine, as Professors Ackerman and Golove do, that Congress may effectuate, through Article I legislation, the sorts of alterations in the relationships between the United States and foreign sovereigns that the President and Senate may effectuate by treatymaking under Article II.

2. Contrasting International Agreements with "Laws."— Furthermore, the Necessary and Proper Clause merely permits Congress to "*make all Laws*" ancillary to executing the power delegated by the Foreign Commerce Clause. This authorization does not appear to confer upon Congress any special role in *approving international agreements.* Although defenders of the congressional-executive agreement treat this distinction dismissively,[134] the Framers took it quite seriously. Alexander Hamilton noted:

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[133] This is not to suggest, however, that the Treaty Clause power is not itself subject to structural limitations. The Treaty Clause procedure is legitimate only for international agreements fairly related to foreign relations. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 reporters' note 2 (1986) (noting that the requirement that a treaty be related to foreign relations "may well be implied in the word 'treaty' or 'agreement'"). The President and the Senate could not, for example, create a fully operating national health care system in the United States by treaty with Canada, although establishment of a joint, binational health care system by a treaty followed by implementing legislation would presumably be possible.

The notion that structural considerations may limit what the President and Senate may achieve by treaty was the basis of the Court's inquiry in the leading case on the treaty power, Missouri v. Holland, 252 U.S. 416 (1920): "whether . . . some invisible radiation from the general terms of the Tenth Amendment" prohibited the treaty in question in that case. *Id.* at 433–34. Although the Court found no such prohibition there, it has long recognized that:

> The treaty power . . . is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.

De Geofroy v. Riggs, 133 U.S. 258, 267 (1890).

There would seem to be limits to how far a treaty can go in achieving certain kinds of self-executing changes in United States law. The House of Representatives, for example, has a special constitutional role to play in raising revenue. *See* U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives. . . ."). The President could not enter into a self-executing treaty that would directly impose taxes on United States citizens or draw funds from the public treasury. *See id.* art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). Although these clauses constrain the self-executing nature of treaties, they do not provide sound support for avoiding the Treaty Clause by involving the House in the non-legislative task of approving international agreements. Professors Ackerman and Golove are simply wrong in stating that the Origination Clause, art. I, § 7, cl. 1, "makes House participation especially appropriate" in approving major trade agreements, *see* Ackerman & Golove, *supra* note 10, at 923, for the necessary involvement of the House of Representatives or Congress as a whole in *implementing* a treaty cannot support the conclusion that one might as well replace the Senate's supermajority with a bicameral majority in the process of *approving* a treaty. Non sequitur.

[134] *See* Ackerman & Golove, *supra* note 10, at 919–22.

> [The treaty power] does not seem strictly to fall within the definition of either [the legislative or executive power]. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. . . . Its objects are CONTRACTS with foreign nations which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive.[135]

Under Hamilton's conception, the power to enact laws binding on those subject to the sovereign authority of the United States does not include the power to enter (or, by approval, to bestow binding status upon) contracts with other sovereign nations.[136] Of course, Congress could pass a law that embodies our nation's part of a reciprocal regime originally negotiated by the President. Congress might, for example, use its foreign commerce power to open our ports to the products of certain foreign nations, pursuant to an international agreement negotiated by the President. But it was clear to Hamilton, at least, that the making of international agreements was not a task for Congress. This again calls into question any claim that Article I provides an "independent grant[ ] of power" sufficient in itself "to justify the creation of international obligations."[137]

Some defenders of a congressional role in approving international agreements have sought support in Congress's practice since the 1870s of approving agreements between the United States and Native American tribes.[138] But Congress's practice of bicamerally ratifying agree-

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[135] THE FEDERALIST NO. 75, at 450–51 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[136] Indeed, the Supremacy Clause provides a bit of further textual evidence that these are distinct constitutional categories, for the Supremacy Clause separately mentions "the Laws of the United States which shall be made in Pursuance [of the Constitution]; and all Treaties made, or which shall be made, under the Authority of the United States." U.S. CONST. art. VI, cl. 2.

There is another possible indication that the treaty-making power, including the power to approve treaties, is not properly considered "legislative": Article I, section 1 provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Although *all* legislative power is vested in these two Houses, the Treaty Clause gives the President and the Senate the power to enter into treaties. (This argument rests on reading "herein" to refer to Articles I through VII, rather than just to Article I.)

[137] Ackerman & Golove, *supra* note 10, at 920.

[138] *See, e.g.*, Dellinger Memorandum, *supra* note 47, at 9–10. It is interesting that Professors Ackerman and Golove, who wish to uphold a congressional role in the approval of international agreements, should fail even to mention this practice, which began seven decades before the rise of the congressional-executive agreement in the 1940s. Perhaps they chose not to draw attention to this congressional practice because it does not enhance their depiction of 1945 as a radical break with the past and a moment of constitutional transformation.

ments with Native American tribes in no way implies that Congress has constitutional power bicamerally to ratify agreements with foreign nations.[139] Although the Supreme Court has approved congressional ratification of agreements between the Executive Branch and Native American tribes, the Court has taken care to describe this practice as an exercise of "Congress' plenary powers to *legislate* on problems of Indians."[140] Indeed, the Supreme Court has noted that what Congress has accomplished by agreement with Native American tribes could also have been achieved by mere legislation.[141]

Agreements between the United States and Native American tribes do not share the characteristic of treaties that Alexander Hamilton saw as distinguishing agreement-making from legislation. According to Hamilton, agreement-making is not a legislative act, for international agreements are "CONTRACTS with foreign nations" that "derive [the force of law] from the obligations of good faith," but "are not rules prescribed by the sovereign to the subject." Congress's relationship to Native Americans and Native American tribes, however, is that of "sovereign" to "subject." Thus, the ends accomplished since the 1870s through bicameral enactment of legislation purporting to ratify agreements with Native American tribes could just as easily have been achieved by legislation in exercise of Congress's powers over Native American matters. Because the sovereign-subject dynamic is absent from Congress's relations with foreign nations, Congress certainly may not accomplish, by mere legislation, all that the United States may em-

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[139] Before 1871, the United States governed and conducted affairs with Native American tribes both by legislation and by Senate-ratified treaties. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 108 (Rennard Strickland ed., 3d ed. 1982). In 1871, the practice of making Senate-ratified treaties with Native American tribes came to an end. *See id.* at 105–07. To secure a guaranteed voice in Native American affairs, the House refused to appropriate funds for new treaties with Native American tribes, and the Senate thereupon capitulated to a legislative provision that effectively ended the making of treaties with Indian nations. *See* Antoine v. Washington, 420 U.S. 194, 202 (1975); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra*, at 106–07. Congress declared that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Act of March 3, 1871, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1988)).

After 1871, Congress regulated affairs with Native American tribes both by legislating and by bicamerally ratifying agreements negotiated by the Executive Branch. *See Antoine*, 420 U.S. at 203; FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra*, at 107, 127–28.

[140] *Antoine*, 420 U.S. at 203. Congress's broad legislative power over Native American affairs is based upon the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3; the Property Clause, *id.* art. IV, § 3, cl. 2; the grant of authority over the admission of new states, *id.* art. IV, § 3, cl. 1; the grant of authority to make expenditures for the general welfare, *id.* art. I, § 8, cl. 1; and the provisions of Article I dealing with congressional war powers, *see id.* art. I, § 8, cls. 1, 11, 12, 15–17. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 139, at 207–12.

[141] *See, e.g, Antoine*, 420 U.S. at 204 ("Congress could constitutionally have terminated the northern half of the Colville Indian Reservation on the terms and conditions in the 1891 Agreement, even if that Agreement had never been made" (citation omitted).).

body in an agreement with a foreign nation.[142] Given the unique relationship between Native American tribes and the federal government,[143] the practice of casting legislation concerning Native American tribes as ratification of agreements does not support the constitutionality of bicameral congressional approval of agreements between the United States and foreign nations.[144]

3. Categories of International Agreements.— The distinction between legislative power (including the power to regulate foreign commerce) and the authority to enter or approve international agreements as such (including agreements dealing with foreign commerce) is not of solely historical interest and importance. Regardless of the level of one's devotion to original meaning or to the actual intentions of the Framers,[145] Alexander Hamilton's understanding of Congress's limited role in treatymaking finds explicit expression in the architecture of government established by the Constitution's text and history. Indeed, James Madison, in a speech to the First Congress, made clear that the Constitution provided no mechanism for Congress to approve treaty-level international agreements. Rather, he stated that "had the power of making treaties . . . been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of the constitution."[146]

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[142] Professor Henkin has expressed a different view. *See* Henkin, *supra* note 117, at 920–21 (asserting "that the foreign affairs power of Congress . . . can support enactment of virtually any provision contained in any treaty in the history of the United States").

[143] *See* Morton v. Mancari, 417 U.S. 535, 551 (1974) (noting both "the unique legal status of Indian tribes under federal law" and "the plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes").

[144] I save for another day the question of the constitutionality of the 1871 Act that put an end to the practice of making Senate-ratified treaties with Native American tribes. Congress, of course, has no power to strip the President and the Senate of a constitutionally delegated power. If the President and the Senate have the constitutional power to enter treaties with Native American tribes, then the 1871 Act, in my view, can be constitutional only as an exercise of congressional power to define which groups qualify as Native American tribes. Because the 1871 Act preserves the validity of pre-1871 treaties, *see* 25 U.S.C. § 71 (1988), there is room to question whether the statute truly represents a congressional determination of tribal status. Consequently, were the Senate today to ratify by supermajority vote a treaty negotiated by the President with a Native American tribe, it is hard to imagine that such action would be subject to legitimate attack based on the 1871 ban on such treaties. This would probably be true even apart from the doctrine that, as between an Act of Congress and a conflicting treaty, the last in time prevails. *See* Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 600 (1889); Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 599 (1884).

[145] *See supra* note 66.

[146] James Madison, Speech to the House of Representatives (1791), *reprinted in* PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 10, 13 (3d ed. 1992). To be sure, Madison made this statement decades before Chief Justice Marshall announced his broad reading of the Necessary and Proper Clause in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Nevertheless, the question whether an act is legislative to begin with is distinct from the question at issue in *McCulloch* — the reach of the clearly legislative power of Congress.

In Professor Ackerman's Senate testimony and in a memorandum to 30 executive branch officials and members of Congress that was joined by 10 other law professors, Professor Ackerman

Of course, Hamilton's statement that the power to make binding contracts with foreign nations "does not seem strictly to fall within the definition of either [the legislative or the executive power]" is not a completely accurate account of the conduct of United States foreign policy. From the nation's earliest days, the President has been understood to have inherent power to make limited types of agreements with foreign nations — for example, for the settlement of claims against foreign governments.[147]

Given the early understanding of agreement-making as neither a purely legislative nor a purely executive task, why should we acknowledge an unenumerated presidential power to make *some* agreements with foreign nations while reading the Constitution to deny Congress *any* ex post role in making international agreements on behalf of the United States,[148] either with or without the President?

An answer begins to emerge when we observe that the Constitution expressly recognizes different categories of international agreements, some called "treaties," and some called "agreements" or "compacts." Although Article II explicitly provides a procedure whereby the nation may enter "treaties," the Constitution is silent as to how the nation might enter agreements that do not rise to the level of "treaties." Because the foreign affairs power of the United States is recognized to be plenary, the power to enter such agreements must lie in some branch or combination of branches.[149] Whereas the authority of the legislative branch is limited to enumerated powers, full executive power is vested in the President, who is thus recognized to have executive authority to enter non-treaty agreements on behalf of the nation.

To examine each of these propositions in turn, I look first at the Constitution's recognition of different categories of international agreements. Article I, section 10, clause 1 provides that "[n]o State shall

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seriously misrepresented a statement by James Madison as suggesting that the text of the Constitution "empowers the Congress to confirm Executive Agreements under Article one." Memorandum from Law Professors, *supra* note 40, at 2. Professor Ackerman and the professors who joined him cited as support a 1796 statement by James Madison that "nothing more was necessary on this point than to observe that the Constitution had as expressly and exclusively vested in Congress the power of making laws, as it had invested in the President and Senate the power of making treaties." *Id.* at 2; *GATT Hearings*, *supra* note 11, at 313 (statement of Prof. Bruce Ackerman). But Madison's statement concerned only the question whether the House of Representatives had a responsibility to pass legislation *implementing* the Jay Treaty, *not* whether the House had a role to play in the treaty's *adoption*. *See* Ackerman & Golove, *supra* note 10, at 812.

147 *See* Ackerman & Golove, *supra* note 10, at 815, 817.

148 Congress does have a role to play in approving or authorizing non-treaty agreements between states and foreign governments. *See infra* Part IV.C.5.

149 *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (identifying the power to make non-treaty international agreements as a power "inherently inseparable from the conception of nationality" (citation omitted)); B. Altman & Co. v. United States, 224 U.S. 583, 600–01 (1912).

enter any Treaty, Alliance, or Confederation."[150] Clause 3 of the same section, known as the Compact Clause, then provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact . . . with a foreign Power."[151] Article I thus makes clear a distinction between "treaties," which states may never enter, and other types of foreign "agreements," which states may enter with congressional approval. Thus, Article I, section 10 suggests that certain types of results — most likely, those that most seriously affect state or national sovereignty — should be regarded as the stuff of treaties rather than of mere agreements that the states may enter with congressional approval.

What the Founders saw as the precise definitions of treaties, alliances, confederations, agreements, and compacts is largely lost to us now.[152] Consequently, line-drawing in this area is especially complex. Although I do not explore that issue in detail here, a disinterested inquiry into the Constitution's treatment of agreements between the *United States* and foreign nations must consider how Article I treats agreements between the *states* and foreign nations. Professor Ackerman has indicated that he shares my view that the word "treaty" has the same meaning in Article I as in Article II.[153] Thus, we must acknowledge that there are types of agreements that do not rise to the level of "treaties" for purposes of either article. The distinction in Article I, section 10, between forbidden state treaties and permissible state agreements should track to some degree the distinction between Article II treaties, which require Senate supermajority approval, and those executive agreements that the President may enter alone in reliance on the President's inherent foreign affairs power.[154]

Although Professors Ackerman and Golove have disparaged as "ad hoc" all efforts to delineate the substance of the Constitution's treaty category,[155] the difficulty of drawing such a line does not mean that the distinction can be discarded. If pressed, even supporters of the congressional-executive agreement would likely concede that it is necessary to draw boundaries — whose precise contours are nowhere spelled out in the text of the Constitution — between state "agree-

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150 U.S. CONST. art I, § 10, cl. 1.

151 *Id.* art. I, § 10, cl. 3.

152 Indeed, what the Framers saw as the defining distinctions among agreements, compacts, treaties, alliances, and confederations was lost even on the generation that followed the Framers. *See* United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460–64 (1978).

153 *See GATT Hearings*, *supra* note 11, at 329 (testimony of Prof. Bruce Ackerman).

154 The correlation will not be exact, for Article I and the Supremacy Clause impose certain constraints on the states that are not placed on the President. But, in general, the features of an agreement *between a state* and a foreign country that would qualify it as a "treaty" under the Constitution are the same features that would make an otherwise identical agreement *between the United States* and that foreign country a "treaty" that, if negotiated by the President under Article II, would require Senate ratification.

155 *See* Ackerman & Golove, *supra* note 10, at 922.

ments" and state "treaties," as well as between those types of international agreements that the President may, acting alone, make binding on the United States and those agreements — "treaties" — that the President must submit for Senate or, under Professor Ackerman's view, congressional approval.

I have elsewhere explored ways of elaborating the distinction between treaties and other forms of agreements.[156] Whatever the details, the impact of an agreement on state or national sovereignty must ultimately determine whether the agreement constitutes a treaty, a point forcefully developed by Professor Anne-Marie Slaughter.[157] Beginning from the premise that sovereignty in our constitutional form of government "lies with the people," Professor Slaughter argues:

> The degree to which an international agreement constrains this [popular] sovereignty . . . depends on the extent to which the provisions of such an agreement have a direct impact on matters normally regulated by state and federal legislative processes. Where an international agreement effectively supersedes or directly constrains ordinary state and federal lawmaking authority, the people have in effect agreed to delegate their sov-

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[156] *See GATT Hearings*, *supra* note 11, at 302–11 (statement of Prof. Laurence H. Tribe). The WTO Agreement certainly should have been processed as a treaty. In approving its participation in the WTO, the United States committed itself to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided" in the Uruguay Round agreements. Agreement Establishing the World Trade Organization, art. XVI, ¶ 4, Apr. 15, 1994, 33 I.L.M. 1144, 1152 [hereinafter WTO Agreement]. The agreement also calls for state and local measures to comply with Uruguay Round obligations. *See id.*, Annex 1B, art. I, 33 I.L.M. at 1169. The WTO Agreement establishes an elaborate dispute resolution mechanism that includes a Dispute Settlement Body and an Appellate Body. *See id.*, Annex 2, arts. 2, 17, 33 I.L.M. at 1226, 1236. Were any national, state, or local measure found to violate United States obligations under the Uruguay Round, the United States would be bound by that finding unless it could persuade the parties to the relevant agreement to overturn the adverse decision by consensus. If a violation were found and the United States were unable to work out terms for suitable compensation to the complaining member nation, then the United States would either have to accept trade sanctions or change the offending law. *See id.*, Annex 2, art. 22, 33 I.L.M. at 1239–41. If the offending law were a state law, Congress could simply accept the imposition of trade sanctions, or the state could agree to change the law, or Congress could preempt the offending state law, or, under the implementing legislation, the United States could challenge the state law in federal court. *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102, 1995 U.S.C.C.A.N. (108 Stat.) 4809, 4815–19 (Dec. 8, 1994). These possibilities impose upon states considerable new burdens and vulnerabilities, which are exacerbated by the secretive dispute resolution procedures of the WTO. Although the final version of the implementing legislation provided some last-minute protections for the states and provided for the United States' possible withdrawal from the WTO if a United States panel determines that the results of the dispute settlement process repeatedly work to the unfair disadvantage of United States interests, *see id.* § 125, 1995 U.S.C.C.A.N. (108 Stat.) at 4833–34, participation in the WTO places substantial new burdens on state and national sovereignty. To say that an agreement that establishes such a *World Trade Organization* does not require processing as a treaty is to suggest a general rule regarding the Treaty Clause: trade agreements need not comply. *See GATT Hearings*, *supra* note 11, at 302–11 (statement of Prof. Laurence H. Tribe).

[157] *See* Letter from Anne-Marie Slaughter, Professor, Harvard Law School, to Sen. Ernest F. Hollings 2–10 (Oct. 18, 1994), *reprinted in GATT Hearings*, *supra* note 11, at 286–90.

> ereignty not to the state or federal governments, but to the federal government acting in concert with a foreign government or governments.[158]

Professor Slaughter then notes:

> The treaty-making process is an alternative legislative process to be carried out in conjunction with a foreign nation. The process involves both a delegation and a subsequent constraint on the sovereignty of the people of the United States under international law. It follows that the treaty-making process is hedged with special safeguards, requiring an unusual degree of deliberation and consensus. . . . The Senate is accountable to the people as a whole, but also ensures the equal representation of the states, sovereign entities in their own right. . . . Finally, the Senate must give its consent by a super-majority of two thirds, ensuring that the interests of the people and the states cannot be bargained away to a foreign nation by a simple majority.[159]

In deciding whether an international agreement is of the type into which the states may never enter and into which the President may not enter without the consent of a Senate supermajority, one must consider the degree to which an agreement constrains federal or state sovereignty and submits United States citizens or political entities to the authority of bodies wholly or partially separate from the ordinary arms of federal or state government.

However, the suggestion that there exists a presidential power to enter non-treaty agreements without Senate consent requires further constitutional explanation. Whereas Article II specifies how treaties are to be made on behalf of the nation, and whereas Article I explains how states may enter non-treaty agreements, the Constitution nowhere specifies a procedure by which the United States may enter non-treaty international agreements. Although this omission could in theory imply a genuine "hole" in constitutional "space," whereby *no* branch of the federal government is empowered to enter the United States into binding non-treaty agreements with foreign nations,[160] such a conclusion would radically limit the power of the federal government over foreign affairs.[161] Someone in the United States Government must certainly have authority to enter those types of agreements for the nation as a whole that Article I permits the states to enter for their own purposes with congressional consent.

If this unenumerated power to enter non-treaty agreements exists within the federal government, it seems clear that it is the President,

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158 *Id.* at 3–4, *reprinted in GATT Hearings*, *supra* note 11, at 287.

159 *Id.* at 4–5, *reprinted in GATT Hearings*, *supra* note 11, at 287.

160 James Madison argued that this would be the case with *treaty* commitments but for the Treaty Clause of Article II. *See* Levinson, *supra* note 44, at 16 & n.10; *supra* p. 1264.

161 *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315–16 (1936) ("The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.").

not Congress, who has the authority to exercise this power on behalf of the nation. Not only has this been national practice for two centuries, but there is an unmistakable — though not uncontroversial[162] — textual basis for such an allocation of authority. Although Article II delegates full executive authority to the President — "[t]he executive Power shall be vested in a President"[163] — Article I's delegation of legislative power to Congress is limited — "[a]ll legislative Powers *herein granted* shall be vested in a Congress."[164] Because of the broad delegation in Article II, the President is understood to have inherent power to perform all executive acts, subject, of course, to the specific limitations of Articles I and II and other constitutional provisions.[165] The authority to make international agreements that do not rise to the level of treaties has long been correctly recognized as one such inherent executive power.[166] The only role that Congress may play is to delegate still further authority to the President, pursuant to an enumerated power of Congress, that the President may in turn combine with his inherent power to enter non-treaty agreements with foreign nations. For example, Congress might authorize in advance a tax increase to become effective upon the President's proclamation that a particular type of non-treaty agreement has been reached with a foreign nation.[167] Nothing in this analysis, however, suggests that Congress may play an ex post role in *approving* agreements with foreign nations on behalf of the United States.

4. Congress's Enumerated Powers of Consent.— Further support for the view that the Constitution does not authorize Congress to approve international agreements to which the United States is a party flows from the list of congressional powers in Article I outside of section 8. Although all legislative power is invested in Congress, not all powers that Congress is authorized to exercise are "legislative" in the normal lawmaking sense. Specifically, Article I enumerates a variety

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162 *See infra* note 165.

163 U.S. CONST. art. II, § 1, cl. 1.

164 *Id.* art. I, § 1 (emphasis added).

165 Alexander Hamilton drew attention to this difference between the grants of power in Articles I and II and argued that the President's authority is not limited to enumerated powers in the way that Congress's authority is. I am inclined to accept Hamilton's widely accepted reading of these grants of power. *See also* Myers v. United States, 272 U.S. 52, 118 (1926) (noting that "[t]he executive power was given in general terms," not as a list of enumerated powers). Nevertheless, many have taken exception to Hamilton's interpretation of the grant of executive power, beginning with James Madison and extending to modern scholars of international law. *See* HENKIN, *supra* note 96, at 42–44 & nn.9–17; Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 53–55 (1953).

166 *Cf.* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (noting "the power to make such international agreements as do not constitute treaties in the constitutional sense"); *id.* at 319 (noting the President's unique role in negotiation, which "Congress itself is powerless to invade").

167 Because the powers of the purse are reposed in Congress, *see supra* note 133, the President could not effectuate such a tax increase under his own steam.

of actions, some of them quite distinct from legislation of the usual sort, for which Congress's consent is required. A serious textual analysis cannot simply slide past the brute fact that international agreement-making on behalf of the United States is not among these enumerated powers. Congress's consent is both authorized and required for any officeholder to accept any "present, [e]molument, [o]ffice, or [t]itle" from a foreign nation or ruler;[168] for any state to tax imports or exports;[169] and for any state to "lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in . . . imminent Danger."[170] Even recognizing the limits of *expressio unius* arguments, one must surely concede that the failure of the Constitution to mention any power of Congress to give bicameral consent to agreements between the United States and foreign governments suggests that the Treaty Clause is not simply an optional alternative to treaty approval by legislation. The approach of letting Article I, in the face of these arguments, swallow whole the structural arrangements contained in Article II and elsewhere is anything but Marshallian.

5. The Conundrum of the Compact Clause.— Although Congress's legislative powers under Article I, section 8 do not include the power to approve agreements that the President has negotiated with foreign countries, section 10 grants Congress the power to approve a specifically identified category of agreements and compacts — those between or among the different states, or between states and foreign governments — *but only when the latter do not qualify as "treaties."*[171]

To be sure, the enumeration of Congress's consent-granting power in this state-specific context says nothing definitive about Congress's power to bind the United States to the terms of international agreements. Perhaps section 10 expressly addresses consent-giving for state agreements but contains a gap when it comes to consent-giving for the United States' international agreements simply because the giving of such consent was understood, or tacitly assumed, to be included in Congress's section 8 powers. It is quite clear, however, that such consent was *not* thought to be so included for the first century-and-a-half of constitutional practice. This in turn makes it exceedingly difficult to argue that the power to approve international agreements was sim-

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168 U.S. CONST. art. I, § 9, cl. 8.

169 *See id.* art. I, § 10, cl. 2.

170 *Id.* art. I, § 10, cl. 3. Congress is also given certain powers outside Article I — for example, to regulate public records, *see id.* art. IV, § 1; to admit new states or consent to the formation of new states from other states or parts thereof, *see id.* art. IV, § 3, cl. 1; to "make all needful Rules and Regulations respecting the Territory or other Property" of the United States, *id.* art. IV, § 3, cl. 2; and to propose constitutional amendments, *see id.* art. V.

171 *See supra* pp. 1265–66.

ply "understood" or presupposed in section 8 by the Framers themselves. On the contrary, this language in Article I bears negatively on the question that Professors Ackerman and Golove address. A plausible, although by no means necessary, reading of the Compact Clause would be that, when the Constitution contemplates congressional supervision of *any* category of agreements with foreign nations, it explicitly provides for such supervision by granting Congress the authority to decide whether any given agreement within that category should be approved. The case for the validity of the congressional-executive agreement thus seems quite badly damaged by the fact that Article I provides specifically for congressional approval of state agreements without anywhere mentioning agreements between the United States and foreign countries.[172]

Nevertheless, Professors Ackerman and Golove write in their article:

> If Congress has any power to make internationally binding commitments on behalf of the United States, the source of this authority must be Article I. Once this point is conceded, *we do not see how the words of the Compact Clause* — designed for a very different problem — *are relevant in determining the scope of congressional power under Article I.*[173]

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[172] Professors Ackerman and Golove have made bizarre use of the Compact Clause in their effort to find textual support for their view that Congress has a role — though not mentioned anywhere in the Constitution — to play in the approval of agreements between the United States and foreign nations. Indeed, they seem to have applied the maxim *expressio unius est inclusio alterius* to the Compact Clause. In a letter to President Clinton, Professors Ackerman and Golove defended Congress's role in the ratification of international agreements. In a section of their letter entitled "Text," they *led* with the argument:

> [The Constitution] does not grant the Senate a constitutional monopoly over international agreements. It explicitly contemplates cases in which both Houses of Congress supervise the process of agreement-making. Consider the clause which expressly forbids the states from entering "any Agreement or Compact with another State, or with a foreign Power" unless they receive "the Consent of Congress."

Letter from Bruce Ackerman, Professor, Yale Law School, and David Golove, Professor, University of Arizona College of Law to President William Clinton 1 (Sept. 21, 1994) (on file with the Harvard Law School Library). Professor Ackerman and Professor Golove seemed to invoke the Compact Clause to suggest that Congress could approve agreements between the United States and foreign nations. There is an intuitive appeal to the idea that, if Congress can approve the states' agreements with foreign nations — presumably even an agreement involving all 50 states — then Congress should likewise be able to approve agreements negotiated by the President on behalf of the United States as a whole.

Nevertheless, what seems intuitively best may not be constitutionally provided. One can be puzzled that the Framers did not give Congress the power to approve at least some kinds of agreements made by the President with foreign nations — a power that I, too, once assumed must somehow exist. *See supra* note 47. But a puzzle does not constitute a source of congressional authority within a constitutional framework that treats Congress as having only those powers delegated to it by the document. Consider further that, as a direct result of the text of the Compact Clause and the Veto Override Clause, congressional supermajority approval suffices for states to enter certain international agreements — *but never treaties* — even against the wishes of the President. This renders all the more remarkable a constitutional interpretation that would allow Congress to make what amount to *treaties* over presidential veto.

[173] Ackerman & Golove, *supra* note 10, at 921 n.514 (emphasis added).

This is an astonishing claim. The Compact Clause is, after all, part of Article I.[174] Because of a nearsighted focus on the Commerce Clause and the Necessary and Proper Clause, Professors Ackerman and Golove do not even consider *other portions of Article I* — much less Article II — to be relevant in determining the constitutional parameters of congressional power. But peripheral vision seems essential for coherent structural argument in constitutional law — argument driven by a search for meaning rather than by a determination to justify a preordained result. Although one might argue that the Compact Clause was meant only to carve out for the states a narrow exception to the general rule of federal dominance of foreign relations, the preceding discussion suggests the relevance of the Compact Clause in answering important questions posed by the Treaty Clause of Article II: which kinds of agreements must a President submit to the Senate for approval in accordance with the Treaty Clause, and which kinds may the President, acting alone, render binding upon the United States?[175]

D. Does Article II's Internal Structure Shed Further Light on the Exclusivity of the Treaty Clause?

That the Treaty Clause was regarded as the exclusive method for treaty approval for much of our nation's history is beyond debate. Article II's own structure provides still further support for an exclusive reading of the Treaty Clause. In particular, it is instructive to compare the Treaty Clause with its next-door neighbor, the Appointments Clause.

1. The Appointments Clause and Alternative Consent Procedures.— Article II, section 2, clause 2 requires the "Advice and Consent of the Senate" for both treatymaking and appointments, but there is a telling difference between the Treaty Clause and the immediately adjacent Appointments Clause: *only the Appointments Clause provides for alternative consent procedures.* The Appointments Clause requires Senate majority approval of principal and inferior officers, but specifically allows Congress to *remove* the requirement of Senate approval for inferior officers. It is common ground that the Constitution's allowance of alternative approval methods for inferior officers does not extend to principal officers.[176] The fact that the text of clause 2 does not include the word "only" has never been thought to mean, *a la*

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[174] *But see GATT Hearings*, *supra* note 11, at 329 (testimony of Prof. Bruce Ackerman) (noting that the Constitution's ban on state treaties "does not touch the question of what the proper construction of Article I is").

[175] *See supra* pp. 1265–69. Of course, the Treaty Clause of Article II would also seem to make a "treaty" out of any agreement approved in accordance with the Treaty Clause's terms, even if the President would not have actually needed Senate supermajority approval of the agreement.

[176] *See, e.g.*, Weiss v. United States, 114 S. Ct. 752, 764 (1994) (Souter, J., concurring); Morrison v. Olson, 487 U.S. 654, 670–71 (1988); *id.* at 715, 723 (Scalia, J., dissenting); Buckley v. Valeo, 424 U.S. 1, 132 (1976).

Ackerman, that principal officers could, if Congress deemed it necessary and proper, be confirmed other than by the Senate.[177] Such an interpretation would involve the topological error of viewing gaps in the representation of an entity as actual holes in that entity — holes that may be filled in at will.[178]

Although the Constitution is not seamless and completely consistent, the Appointments Clause in the second half of clause 2 must at least be *considered* in interpreting the Treaty Clause in the first half of clause 2. For example, even without the restrictions of *Chadha*, no one believes that the Constitution would permit the Senate to surrender its unique role in confirming Supreme Court Justices simply because Congress had passed a law using the Necessary and Proper Clause of Article I coupled with Article III to create a special process of confirmation by a bicameral majority, or by the House alone, or by a congressional committee. Clause 2's affirmative authorization for Congress to alter the procedures for appointing inferior officers suggests that the Constitution would be explicit if the prescribed methods of confirming principal officers were not exclusive.

That the Constitution's provision for Senate confirmation of principal officers is understood to be exclusive (even though the word "only" does not appear) provides a strong argument that the Treaty Clause's provision for Senate treaty ratification by supermajority is also exclusive. Although arguments based on the traditional canon *expressio unius est exclusio alterius* have their limits, they would seem to carry their greatest weight when applied to provisions contained within a single sentence. Of course, the Senate, in the first instance, has a constitutional responsibility to decide whether its role under the Treaty Clause is being circumvented. But the procedure mandated by the Treaty Clause, like the Senate consent requirement for appointments of principal officers, cannot be abdicated by the Senate.[179]

Consistent with their overall approach to textual interpretation, Professors Ackerman and Golove deride as an "instruction in ad-

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[177] *See Weiss*, 114 S. Ct. at 767–68 (Souter, J., concurring).

[178] *See supra* Part III.B.

[179] *See* Freytag v. Commissioner, 501 U.S. 868, 880 (1991) ("Neither Congress nor the Executive can agree to waive this structural protection [of the Appointments Clause]. . . . The structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic."). This principle applies equally to the Appointments Clause's neighbor, the Treaty Clause.

This interpretation of clause 2 finds support in Justice Souter's concurring opinion in *Weiss*, in which the Supreme Court upheld the current procedure for appointing military judges. Insisting that the appointment of principal officers requires the consent of the Senate, Justice Souter emphasized that the Senate may not abdicate its constitutionally provided role in the appointments process, for the protections afforded by the Appointments Clause's structure belong to the entire country, not merely to the Senate. *See Weiss*, 114 S. Ct. at 766 (Souter, J., concurring). As Justice Souter noted, when the Constitution provides a structural framework for particular government decisions, that framework must be followed. *Id.* at 764.

vanced tea-leaf reading"[180] my suggestion that the Appointments Clause, contained in the *same sentence* as the Treaty Clause, should be considered in deciding the issue of the Treaty Clause's exclusivity.[181] But reading a sentence as a whole rather than in fragments is surely part of what it means to "read" it at all.[182] Return for a moment to the hypothetical argument that, if the Constitution had used digits rather than spelling out numbers in English, one could become a Senator at age twenty-four — the argument that the digits "30" could be read as though they were expressing numbers in base eight rather than in base ten.[183] It would be a fatal objection to the base eight view if the numeral "9" were used where the very same sentence adds that a Senator must have been a United States citizen for at least nine years.[184] Inasmuch as there is no digit "9" when numbers are expressed in base eight, an insistence on reading the constitutional sentence in its entirety would put the imagined argument to rest.

Consider the extraordinary ramifications of Professor Ackerman and Professor Golove's disjointed way of reading Articles I and II. Article II, section 1, clause 1 provides that "[t]he executive Power shall

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180 Ackerman & Golove, *supra* note 10, at 924 n.517.

181 *See id.* I have never suggested that the Appointments Clause provides a fail-safe proof of the exclusivity of the Treaty Clause procedure. Rather, I contend only that it is essential to the project of constitutional construction to consider how different parts of the Constitution fit together. Professor Ackerman has attempted to get enormous mileage out of the absence of the word "only" both in Article V and in the Treaty Clause. He should thus be prepared to explain why the absence of the word "only" in a clause such as the Appointments Clause — which he never suggests creates an *optional* procedure for the confirmation of principal officers — should not carry the same significance that the absence of the word "only" carries earlier in the same sentence, in the Treaty Clause.

I regard it as a wiser course in constitutional interpretation to begin with the presumption that those provisions of the Constitution that call into being the very architecture of our government provide specific and exclusive instructions, not mere options. *See supra* Parts III.B. and III.C.

182 The counterarguments offered by Professors Ackerman and Golove are deeply flawed. They suggest that the Appointment Clause's supposedly explicit restriction on congressional power with respect to appointments — what they label the "unmistakable language" of exclusivity in the Appointments Clause — might be seen as indicating that the Constitution is explicit wherever it intends to limit congressional power. *See* Ackerman & Golove, *supra* note 10, at 923 n.517. This argument is particularly odd, for the Appointments Clause provides no more "unmistakable language" of exclusivity than does the Treaty Clause.

Professors Ackerman and Golove also counter that, because the Appointments Clause expressly distinguishes between principal and inferior officers while the Treaty Clause only mentions treaties, there must be no distinction between treaties and other types of international agreements — those that perhaps need not comply with the Treaty Clause requirements. *See id.* This is downright silly. The Appointments Clause mentions both principal and inferior officers only because it makes separate provision for the appointment of each type. Indeed, the Appointments Clause explicitly provides for the appointments of "*all other* Officers of the United States, whose Appointments are not herein otherwise provided for." U.S. CONST. art. II, § 2, cl. 2 (emphasis added). The Treaty Clause, by contrast, makes no effort to provide for the approval of all types of international agreements. Rather, it provides only for approval of treaties.

183 *See supra* p. 1224.

184 *See* U.S. CONST. art. I, § 3, cl. 3.

be vested in a President of the United States of America." It does not contain the word "only." What if Congress thought it "necessary and proper" to delegate all executive power over matters affecting foreign commerce to, say, a nonremovable Secretary of Trade and Commerce? The same logic that Professors Ackerman and Golove would apply to the Treaty Clause would validate this act. Thus, having decided that a Secretary of Trade and Commerce independent of the President ought to have full law-implementing and law-enforcing authority over foreign commerce, Congress could ground that result in a determination that such delegation is "necessary and proper" to carrying out Congress's power over foreign commerce, notwithstanding the President's powers of appointment under Article II.

Let us further suppose that, to secure the independence of this new Trade Secretary, Congress in the exercise of its Article I powers determines to have her appointed by the Supreme Court. Even if one were to grant that this Trade Secretary would have to be deemed a principal rather than an inferior officer of the United States, the Appointments Clause's lack of the word "only" would, under Professor Ackerman's view, allow Congress, in an exercise of Article I power, to vest the appointment of the Trade Secretary in the Supreme Court. This result, of course, runs directly counter to established Appointments Clause jurisprudence.[185] Thus, it again calls into question Professor Ackerman's virtually unbounded view of Congress's legislative power.

2. A "Marshallian" Vision?— Recall that, because Professor Ackerman and Professor Golove's vision of Article I is based upon a broad interpretation of the Necessary and Proper Clause, they call their vision "Marshallian."[186] The label doesn't make it so. The great Chief Justice would likely distance himself from efforts to treat the absence of the word "only" in certain constitutional provisions as license for Congress to take actions that the Constitution elsewhere commits to other entities. Indeed, we need look no further than Chief Justice Marshall's opinion in *Marbury v. Madison*[187] itself, expressly holding that Congress lacks power to expand the original jurisdiction of the Supreme Court as described in Article III. It cannot escape notice that Article III's statement that "the supreme Court shall have original Jurisdiction" over certain enumerated types of cases *does not contain the word "only."*[188] Chief Justice Marshall nonetheless read this architectural provision exclusively. Contrary to what the approach of Professors Ackerman and Golove would dictate, Marshall

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185 *See supra* pp. 1272–73.

186 *See e.g.*, Ackerman & Golove, *supra* note 10, at 913–14.

187 5 U.S. (1 Cranch) 137 (1803).

188 *See* U.S. CONST. art. III, § 2, cl. 2; William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 30–33 (discussing this point).

did *not* interpret the Necessary and Proper Clause to give Congress power to expand the Supreme Court's original jurisdiction.[189] In short, Chief Justice Marshall, in sharp contrast to Professors Ackerman and Golove, never viewed the Necessary and Proper Clause as license to run roughshod over other constitutional provisions. It is flatly inconsistent with Chief Justice Marshall's legacy to conclude, from the absence of the word "only" in a constitutional delegation of power in Article II or in Article III, that Congress enjoys a concurrent and plenary authority to exercise parallel power under Article I.

E. The Implications of an Exclusive Treaty Clause

I have illustrated my approach to constitutional text, structure, and history with the analysis of the Treaty Clause set out above in full recognition that the real-world consequences of that analysis would be far-reaching and that my Treaty Clause views appear to place me in a minority position today. But far too little thought has been given to the textual and structural implications of accepting the congressional-executive agreement as a virtually complete substitute for treaties ratified in accordance with Article II, section 2.[190] Constitutional scholars should no longer treat as a foregone conclusion the interchangeability of the congressional-executive agreement with the treaty form.

Contrary to the ominous warnings of Professors Ackerman and Golove, however, accepting my position certainly would not spell doom for a vibrant and responsive American foreign policy. To the extent that those warnings require an assumption that the Senate will be irresponsibly isolationist[191] and insensitive to the needs of the emerging international order, their case remains unproved.[192] It is true, of course, that my position that Congress as a bicameral body has no role to play in the approval of agreements once they have been negotiated by the President may mean that the ex post approval of some of the most serious international commitments of the United States during the last fifty years did not comply with the Constitution's requirements. It does not follow, however, that this is so of all such important agreements. First, some of those agreements, such as the one bringing the United States into the WTO, were in fact ratified by over two thirds of the Senators present.[193] Second, the President has the power to enter into certain agreements with foreign nations on his own. Third, Congress may delegate authority to the President ex

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189 Although *Marbury* (1803) preceded *McCulloch* (1819), the Necessary and Proper Clause was there for use by Marshall even in 1803, and the holding of *Marbury* surely remains good law.

190 See, for example, the Memorandum from Law Professors cited above in note 40, which offers only a sparse treatment of textual and structural concerns.

191 *See* Ackerman & Golove, *supra* note 10, at 861–62.

192 *See supra* p. 1230.

193 *See supra* note 18.

ante that can somewhat broaden the scope of what the President may accomplish unilaterally as representative of the nation in foreign affairs. For example, Congress may make use of its foreign commerce power to authorize the President to trigger the effectuation of particular tariff schedules. However, the power to make significantly sovereignty-altering commitments is channeled solely through the Treaty Clause. And, under the principles of *Chadha*, Congress may not delegate to itself an ex post approval role — a role it does not enjoy, apart from such delegation, by virtue of Article I.[194]

Many provisions of those agreements that have purportedly been "approved" by Congress as congressional-executive agreements may well be of a type for which the President could have taken sole responsibility, or may be of a type that could have been accomplished by a combination of congressional delegation and the President's inherent power over foreign affairs. If so, those agreements would presumably be valid *independent* of, rather than *because* of, Congress's ex post approval. Taking apart and analyzing the key international agreements of the past half-century with this issue in view might well be tricky business. I have elsewhere explained why I believe American participation in the establishment of the WTO required a Senate supermajority under the Treaty Clause.[195]

Although I criticized Professor Ackerman above for failing to consider the substantive terms of NAFTA and the WTO in the course of pronouncing the method of their approvals constitutional, my purpose here has not included addressing the question "*Is NAFTA Constitutional?*" Rather, my goal in Part IV has been to demonstrate that the *specific terms* of any international agreement and its effects on state and national sovereignty — not simply whether it touches foreign

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[194] Professors Ackerman and Golove describe the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975), with its provision for "fast-track" processing of international agreements, as "one of the great successes of modern American government." Ackerman & Golove, *supra* note 10, at 906. On a practical level, the jury may still be out on that claim. The then-Chairman of the Senate Commerce Committee expressed doubt about Professor Ackerman's description of the process that produced the Uruguay Round of GATT as "the result of many years of fruitful collaboration between Congress and the Executive [that] should serve as a constitutional exemplar for future decisionmaking." *GATT Hearings*, *supra* note 11, at 323–24 (statement of Sen. Ernest F. Hollings) (complaining about "freebie[s]" in the Uruguay Round and noting "we cannot amend it, we cannot read it, we cannot discuss it, we cannot debate it").

As a matter of constitutional law, it seems plain that the Trade Act of 1974 or any similar legislation cannot give Congress approval power it would not otherwise have.

[195] *See GATT Hearings*, *supra* note 11, at 290–312 (statement of Prof. Laurence H. Tribe); *supra* note 156. I do not consider the specific terms of any other agreement in the limited space available to me here, and accordingly I offer no definitive assessments of other significant international agreements, such as NAFTA and our trade agreements with Israel and Canada. An analysis of those agreements might suggest that much of what they accomplish — such as the setting of tariff rates — would not so affect state or national sovereignty as to require Treaty Clause procedures. I invite other scholars both to consider my arguments about the constraints on Congress's Article I powers and to apply these arguments to specific international agreements.

commerce or some other subject that Congress may regulate under Article I — are of central relevance to the issue whether the rigors of the Treaty Clause must be followed for entering into that agreement. I have tried thereby to underscore the fallacies that mar a purported reading of the Constitution that circumvents that clause. At the least, I hope I have illustrated that invocation of Article I without regard to the structural relationships among various constitutional provisions is an inadequate mode of constitutional interpretation in this context, as it would be in most others.

To recommend searching constitutional inquiry each time the United States considers binding itself to the terms of an international agreement does not make one guilty of fostering international "destabilization," as Professor Ackerman has suggested.[196] Such questioning, rather, is a staple of constitutional law. It reflects a concern for the Constitution's division of authority and thus for the stability and balance of our own government. Nor should the possibility of discovering past error deter us from considering the Constitution's requirements afresh. Even people fully devoted to the requirements of constitutional text and structure may agree on rare occasions to accept the results of past mistakes if not to do so would be too disruptive to the orderly operation of government.

V. Invoking History to Defeat Text and Structure

A. Are Asserted Ambiguities Really There?

The preceding discussion shows that, contrary to the impression created by champions of the congressional-executive agreement, wide-ranging considerations of text and structure converge forcefully on the conclusion that the Constitution requires Senate supermajority approval for any agreement that the President cannot enter upon his own authority or with ex ante congressional delegation. Simple-majority approval by both Houses of Congress simply will not do. In their defense of the congressional-executive agreement, Professors Ackerman and Golove either dismiss or, in many instances, altogether ignore the textual and structural arguments that lead to this conclusion. In their view, the Treaty Clause, by omitting the word "only," leaves that clause's exclusivity undetermined. Professors Ackerman and Golove then seize upon that supposed indeterminacy as justifying their theory of the Treaty Clause.

In my view, textual and structural considerations leave no genuine doubt as to the exclusivity of the Treaty Clause. But even if the constitutional text were truly ambiguous, one should not view such ambiguity as license immediately to leap outside the discourse of text and structure. The cases are legion in which constitutional text is not com-

196 *See id.* at 315 (statement of Prof. Bruce Ackerman).

pletely free of ambiguity. Yet it is often the case that, although there may be more than one linguistically *possible* interpretation of a constitutional provision, one of those possible interpretations may be the *most plausible* by a wide margin in light of structural considerations viewed against the backdrop of the history of the provision's adoption. In such an instance, one should not resort lightly to external and extraordinary theories of constitutional lawmaking such as those favored by Professors Ackerman and Golove.

The reason is a straightforward one. In a constitutional community devoted to government in accordance with a foundational legal text, adherence to text and structure provide immeasurably valuable safeguards. These safeguards are best preserved by a commitment of the legal community to conduct our government in accord with the *best* interpretation of that text and structure. If each textual ambiguity is viewed as an open invitation to leap outside the realm of text and structure altogether, there will be great temptation first to imagine ambiguity where little or none actually exists, and then to magnify whatever ambiguity one finds into something of far greater moment than is really there. It is, after all, relatively simple to find indeterminacy if one looks carefully enough. There will always be a host of unprovided "only"s or other potential sources of ambiguity to be discovered in any text. As a constitutional community, we should place a high value not only on following the absolutely unambiguous commands of the Constitution, but also on seeking the *best reading* of any constitutional text, identified in terms of interpretive canons that are as immune as we can make them from the pushes and pulls of our own policy predilections.

Although Professors Ackerman and Golove play the game of textual interpretation — offering a minimal set of textual arguments to support the congressional-executive agreement — they are far too quick to seize upon a lack of complete textual determinacy. If Professors Ackerman and Golove were to consider even the best of the textual and structural arguments in support of the exclusivity of the Treaty Clause, they would likely respond that such arguments are capable of yielding at most a plausible interpretation, not a clear-cut constitutional command. Therefore, they would probably argue that we are largely free from constraints of text and structure.

That freedom would be a costly gift. For if we so readily consider ourselves liberated, we will have sacrificed the capacity of constitutional text and structure to provide meaningful constraints on government action. Indeed, although Professors Ackerman and Golove argue that the popular and political processes that they celebrate validated a particular *interpretation* of the constitutional text bearing on treatymaking and on congressional-executive agreements, Professor Ackerman's general theory is that even constitutional *amendment* is

possible through informal means of higher lawmaking by what he would describe as "the People." Under such a theory, the constraining power of text and structure is eroded almost to the vanishing point.

B. Historical Argument in Construing the Treaty Clause

Although I stress in this Article the importance of text and structure, constitutional interpretation would certainly be robbed of much if it were conducted in an historical vacuum — or even through historical lenses that could see only up to the point of a constitutional provision's adoption and not a moment beyond. Professors Ackerman and Golove are surely right that post-adoption history has a role in constitutional interpretation. They are surely wrong, however, in the way they invoke history in general, and in the way they invoke history to defend the congressional-executive agreement in particular.

Two sorts of historical arguments figure prominently in their defense of the congressional-executive agreement. The first is an argument based on political precedent. The congressional-executive agreement is constitutional in part because long-standing practice makes it so: "After a half-century of successful use of the Congressional-Executive Agreement, it is far too late to question Congress' powers under Article [I]."[197] The second type of historical argument is based upon Professor Ackerman's general theory of popular higher lawmaking: the congressional-executive agreement is constitutional because a series of events reflecting popular will made it so in the 1940s. The first argument is unpersuasive as to the congressional-executive agreement; the second argument would be unpersuasive in any context.

1. Practice as Precedent?— It would be foolish, of course, to consider the constitutionality of the congressional-executive agreement without analyzing its history. Indeed, any constitutional exploration of the power of the United States government to enter into international agreements must consider the post-1787 practice of executive agreements, which Presidents have signed since the nation's earliest days, despite the absence of any mention of such agreements in Article II. The Supreme Court recognized long ago that longstanding congressional or executive practice may be relevant to deciding constitutional questions. But an argument based primarily on congressional practice should rarely be persuasive unless that practice extends back to our nation's founding, rather than being adopted as a conscious end-run around constitutional requirements. Professors Ackerman and Golove spend much of their article establishing that the congressional-executive agreement *lacks* continuity with the first century-and-a-half of our nation's history. Indeed, they explicitly argue that the adoption of the

197 Letter from Bruce Ackerman and David Golove to President William Clinton, *supra* note 172, at 3.

congressional-executive agreement was essentially a revolution in the 1940s (albeit one they want to claim as legitimate in light of their theory of informal higher lawmaking).

For its part, the Supreme Court has certainly left no doubt that, although legislative or executive precedent may carry compelling weight when a given practice has existed from the nation's founding, a more recent practice — even one used hundreds of times for fifty years or more — is an unlikely candidate for upsetting otherwise convincing considerations of basic constitutional structure. In 1892 the Supreme Court upheld a proclamation statute — an act of Congress authorizing the President to take particular action upon finding certain conditions to be met — by relying in part on the value as precedent of legislative practice. The Court considered the question "[t]o what extent do precedents in legislation sustain the validity of the section under consideration?" and answered: "[i]f we find that Congress has frequently, *from the organization of the government to the present time*, conferred upon the President powers, with reference to trade and commerce, like those conferred by the [act in question], that fact is entitled to great weight in determining the question before us."[198] The Court's decision nearly a century later in *Chadha*, however, makes plain that an historical pedigree extending back only a matter of decades is insufficient to sustain the constitutionality of even a frequent congressional practice that conflicts with constitutional text and structure. Although the Court in *Chadha* recognized that 295 congressional veto procedures had been included in 196 statutes since 1932, the Court invalidated the veto at issue and explained:

> [T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives — or the hallmarks — of democratic government *and our inquiry is sharpened rather than blunted by the fact that the congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies*.[199]

If the Court found unconstitutional the legislative veto, whose use predates by well over a decade the rise of the congressional-executive agreement, then fifty years of Senate acquiescence in the use of congressional-executive agreements as an essentially all-purpose substitute for treaties is not much of an argument that Congress's post-1945 practice is constitutional.

It is not the prerogative of those who hold public office, whether elected or appointed, to abdicate constitutional protections essential to the architecture of our government. *A fortiori*, it is not within their

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[198] Field v. Clark, 143 U.S. 649, 683 (1892).

[199] INS v. Chadha, 462 U.S. 919, 944–45 (1983) (emphasis added).

power to bind the nation for all time by such abdication. A Senate with a majority of a different political persuasion than the sitting President might, for example, decide that a simple bicameral majority should suffice for conviction upon impeachment. But the American people should expect that their leaders will not treat so casually elements of the constitutional framework for government — such as the requirements that impeachment be by the House and that conviction be by a Senate supermajority.[200] Repetition of such casual treatment over time would simply compound error with error, not provide legitimacy.

The Constitution's architectural safeguards were specially designed to protect the states, citizens, and each branch of the federal government both from aggrandizement of power and from neglect of constitutional responsibility by those who temporarily hold public office — even when such aggrandizement or neglect seems wise as a matter of policy. Such constitutional protections are needed because seemingly benign and brief departures from constitutional protections tend to provide momentum for more enduring departures that may eventually result in the very harms that the constitutional architecture was designed to prevent. Although Congress had for five decades used the legislative veto, Jagdish Chadha was entitled to claim the Constitution's protections in challenging such a veto that threatened him with deportation. And the American people, whether regarded collectively or as the citizens of their respective states, are similarly entitled to the safeguards provided by the Senate supermajority requirement of the Treaty Clause.

2. Constitutional Consensus or Strategic Compromise?— In the end, then, historical argument based on the legitimating power of precedent proves unpersuasive with respect to the congressional-executive agreement. Even less persuasive, however, is the other, much broader historical argument provided by Professors Ackerman and Golove. In keeping with Professor Ackerman's theory of populist higher lawmaking, Professors Ackerman and Golove argue that a series of political events in the 1940s rendered constitutional a nonexclusive interpretation of the Treaty Clause. The people, the House, the Senate, and the President all agreed that international agreements should be confirmable by simple bicameral majorities, and this, according to Professors Ackerman and Golove, is just what it takes for "higher law" to be made. As Professor Ackerman describes it, legitimate constitutional change results when, in response to an impasse among government branches over a proposed change in constitutional practice, a "triggering election" provides an electoral mandate that is in turn embraced

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200 U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6.

by formerly resisting institutions of the national government who finally make a constitutional "switch in time."[201]

According to Professors Ackerman and Golove, "Pearl Harbor signalled the rise of the New Internationalist agenda" to which the Treaty Clause's supermajority requirement would stand as a practical obstacle.[202] Presidents Roosevelt and Truman then explored the possibility of circumventing the "constitutional status quo" by presenting international agreements for bicameral congressional approval, effectively substituting the requirement of a majority in the House.[203] The election of 1944 — influenced strongly by internationalist concerns — served as a "triggering election"[204] that provided "the kind of deep and broad mandate from the American people that our constitutional tradition demands as a precondition for legitimate change."[205] The election was supposedly a mandate not simply to cooperate in a new world order, but to do so by congressional-executive agreement rather than by treaty. The House thereupon approved a proposal for a specific constitutional amendment that would have put an official end to the Senate's exclusive role in treaty ratification. Faced with this daunting popular mandate for change, the Senate was confronted with "some hard choices in 1945": it would either have to "accept a compromise that included the congressional-executive agreement or . . . fight for its traditional monopoly in a highly visible struggle before the American people."[206] When President Truman offered the Senate the United Nations Charter as a treaty and offered both Houses of Congress the Bretton Woods Agreement (which established the World Bank and the International Monetary Fund)[207] as a congressional-executive agreement, the Senate compromised with a "switch in time," accepting the President's deal and averting a constitutional amendment that would have officially and permanently eliminated the Senate's special role in treaty ratification.[208] Finally, when the newly internationalist Republican Party gained control of the Senate in 1947, the Senate "cooper-

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201 *See supra* note 35; Ackerman, *supra* note 13, at 77–82; Ackerman & Golove, *supra* note 10, at 909–13.

202 Ackerman & Golove, *supra* note 10, at 913.

203 *Id.*

204 *See id.* at 883–89, 913.

205 *Id.* at 912.

206 *Id.*

207 The International Monetary Fund and the International Bank for Reconstruction and Development, or World Bank, are specialized agencies of the United Nations. The World Bank was established to provide financial support for long-term economic development projects; the International Monetary Fund was designed primarily to provide member nations with temporary assistance in making foreign payments. *See* GIUSEPPE SCHIAVONE, INTERNATIONAL ORGANIZATIONS 133–34, 155 (3d ed. 1993).

208 *See* Ackerman & Golove, *supra* note 10, at 911–13.

ate[d] with the House as the President codified the transformation" in favor of congressional-executive agreements.[209]

Apart from several obvious and commonly noted flaws with Professor Ackerman's theory — such as the enormous difficulty (if not impossibility) of ascertaining from a general election the "popular will" with respect to a single issue[210] — and apart from more fundamental flaws that I will discuss in Part V.C. below, the history that Professors Ackerman and Golove recount hardly provides reason to embrace, as a legitimate constitutional change, the practice adopted for the Bretton Woods Agreement in 1945. The attempt to use the events of 1945 to legitimate the congressional-executive agreement ignores the strategic nature of the Senate's move in 1945. The Senate acquiesced in bicameral procedure for the approval of the Bretton Woods Agreement only after the House voted in favor of a constitutional amendment that would have removed the Senate's exclusive role in treaty approval. In

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[209] *Id.* at 913.

[210] Professor Ackerman seems to have been far too creative about what, if anything, the people authorized in the election of 1944. *Cf.* Frederick Schauer, *Deliberating About Deliberation*, 90 MICH. L. REV. 1187, 1196 (1992) (reviewing 1 ACKERMAN, *supra* note 11) (describing as "strained" Professor Ackerman's "interpretation of what the people were actually talking about in 1787, 1791, 1866, or 1937"). Did the people truly wish to abandon an exclusive reading of the Treaty Clause, or did they simply wish to see the establishment of a lasting peace? Indeed, perhaps Professor Ackerman has read the moment all wrong and the events in the 1940s should be seen as providing popular ratification of the United Nations Charter rather than popular approval of the congressional-executive agreement form.

If, as Professor Ackerman has argued, We the People can amend the Constitution outside Article V, then should there not also be ways for "We the People" to take the lesser steps of approving a Treaty ourselves or of adopting legislation outside Article I? Professor Ackerman's distinction between ordinary politics and constitutional politics seems too artificial to explain what the people may accomplish outside the procedures specified in the Constitution. After all, the people could easily be more mobilized around an international agreement that would restore peace after a bitter war than they would be with respect to a change in the constitutionally mandated procedure for entering international agreements. Why, then, should not some combination of impasse, electoral mandate, and Senate acquiescence suffice to approve a treaty — much as Professor Ackerman has argued they justify circumventing the amendment process delineated in Article V? *See* Ackerman, *supra* note 13, at 78–79. Furthermore, what if this is all that the People intended in the elections of 1944 — not necessarily to change the meaning of the Treaty Clause, but just to approve the particular agreements that were then or would be soon pending, such as the United Nations Charter and the Bretton Woods Agreement?

Under Professor Ackerman's dualism, the People are not very involved in ordinary politics. *See* 1 ACKERMAN, *supra* note 11, at 230–31, 234–35. Thus, even if the people in 1945 did mean simply to approve these specific agreements, but subsequent leaders all mistook this limited mandate as a call for the general use of congressional-executive agreements, under Professor Ackerman's theory the people should have raised little or no protest because each subsequent individual international agreement would have appeared to be about only ordinary politics. Consequently, the People should be expected to have gone about their business with little regard for what their representatives were doing. A limited mandate to disregard the Treaty Clause just once could thereby mushroom into Professor Ackerman's vision of the all-powerful congressional-executive agreement.

The far sounder view is that, in our republican form of government, a general election provides no mandate for specific reform that can be seen as providing legal validation of that reform.

the context of total war and the desire for worldwide peace, the House's impatience with the Treaty Clause's requirements is understandable, and the House's efforts to amend this requirement through proper constitutional channels is to be respected. But the House's action indicates that many prominent government leaders in the 1940s recognized that the Constitution does not authorize bicameral approval of international agreements. The Senate's acquiescence was in large part a strategic move almost certainly designed to prevent complete loss of the Senate's distinctive role in the treaty-approval process; the Senate did not acquiesce because of any national consensus that the Constitution no longer required Senate supermajority approval for agreements such as Bretton Woods.

We should not hesitate to question the manner of the approval of the Bretton Woods Agreement, and we may do so without suggesting that United States participation in the International Monetary Fund and the World Bank should be declared illegal. Acceptance of the results of specific prior errors need not entail either denying that they *were* errors or enshrining the casual treatment of constitutional text and structure as the norm.[211] Yet Professors Ackerman and Golove seem quite comfortable with the notion that, once the Constitution's text and structure have been ignored long enough, we can rationalize away textual commands and the existence of a clash between settled practice and long-ignored principle. Such an embrace of the momentum of history may come naturally to scholars whose theories of constitutional interpretation are built upon episodes that those scholars depict as having effected momentous constitutional changes outside the Constitution's procedure for amendment in Article V. But to those who see such episodes very differently — either as involving no evasion of Article V at all, or as resting on justifications that cannot defensibly be generalized to cover all major constitutional change[212] — the embrace of history as a substitute for genuine interpretation will continue to seem both forced and dangerous.

We should instead follow the path of rigorous constitutional interpretation. I am certainly not deterred by the patriotic and populist rhetoric to which Professors Ackerman and Golove resort in defense of the congressional-executive agreement as the most recent institution they would put virtually beyond constitutional critique. Professors Ackerman and Golove insist that "[the legal elite] have no authority to displace the judgments made by the American people with our own

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[211] *Cf.* Korematsu v. United States, 323 U.S. 214, 244–48 (1944) (Jackson, J., dissenting) (arguing that the Court should at least have avoided giving its blessing to the relocation of Americans of Japanese descent even if the Court felt bound not to interfere with the executive orders at issue).

[212] *See infra* Part V.C.

legal conceits."[213] According to them, a Supreme Court faced with the issue of the validity of the congressional-executive agreement form should adopt their view:

> [The Court should] endors[e] the considered judgment of the generation that fought the Second World War. These men and women supposed that they had decisively resolved the question of constitutional interpretation that the critics of the WTO seek to revive. Though the Americans who fought the war and won the peace are now rapidly leaving the political stage, there is no reason to forget their enduring contribution to our constitutional tradition.[214]

I am unmoved by this disappointing resort to homiletics over hermeneutics. Rather, I take it as an invitation to explore the larger war on constitutional text and structure of which Professor Ackerman's foray into the Treaty Clause is but the latest battle.

C. *Ways Not to Think About "Constitutional Moments"*

Regardless of how one views the particular historical events of 1945, the larger theory advanced by Professors Ackerman and Golove — the theory that constitutional change can be *constitutionally* effected by a particular pattern of events bearing no relation to the procedures of Article V — is fundamentally flawed.

Professor Ackerman has looked to history for more than it can genuinely offer. He has attempted to derive from certain historical events — the adoption of the Constitution, the ratification of the Fourteenth Amendment, the changes in Supreme Court jurisprudence in the 1930s, and now the rise of the congressional-executive agreement beginning in 1945 — a *paradigm* for legitimate constitutional change, a pattern that, when followed, must be respected as establishing binding constitutional law. But, as has been noted by one thoughtful critic of Professor Ackerman's conscious attempt to find "a deeper order than one might suppose"[215] in the history of the Constitution's development, "[t]heory and history have an uncomfortable relation."[216]

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213 Ackerman & Golove, *supra* note 10, at 924.

214 *Id.* at 929. Actually, the issues whether and why to follow the choices of a prior generation — especially when those choices are not enshrined in constitutional text — are far more complicated than this flag-waving sermon suggests. *See, e.g.*, Don Herzog, *Democratic Credentials*, 104 ETHICS 467, 473–75 (1994).

215 1 ACKERMAN, *supra* note 11, at 5.

216 Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENTARY 115, 115 (1994). Professor McConnell notes that, although "[s]ometimes theory derives from history," at other times "history trips up theory, when events stubbornly refuse to conform to the theory we have laid out." *Id.*

Professor McConnell has cogently illustrated the malleability of Professor Ackerman's theory of constitutional moments by demonstrating that the *end* of Reconstruction fits the criteria spelled out by Professor Ackerman for a constitutional moment. *See id.* at 122–40. Thus, Professor McConnell suggests that the elections of 1874 and 1876, combined with the Compromise of 1877 and the Supreme Court's decisions in a string of cases culminating in Plessy v. Ferguson, 163 U.S. 537

There are exceptional moments in our national experience — moments such as the nation's founding and its post-bellum Reconstruction — that can be assimilated into our constitutional history only by offering exceptional accounts of what is required to render legitimate an essentially new constitutional order. But this is not a context in which the greater includes the lesser — in which an account that is capable of illuminating cataclysmic events is therefore capable of shedding light on less momentous occurrences.[217] Even apart from the usual problems of deriving what "ought" to be from what "is" (or was), it is wrong to assume that theories that account for our nation's most extreme moments can generate principles capable of accounting, either normatively *or* descriptively, for more ordinary constitutional episodes.

To derive from the most extraordinary moments of our constitutional history a general theory of higher lawmaking that explains other significant changes in constitutional law or practice, Professor Ackerman points to alleged illegalities in the nation's founding and in the ratification of the Fourteenth Amendment to support a mode of constitutional change outside Article V. This mode relies on expressions of national popular will rather than on the state-sensitive procedures of Article V. Professor Ackerman has previously depicted the constitutional changes of the New Deal as an illustration of his brand of higher lawmaking, and now Professors Ackerman and Golove have jointly presented what they regard as a strikingly similar instance of constitutional change: events in the 1940s that led to the rise of the congressional-executive agreement.

It is certainly fitting that constitutional scholars should try to work out ways of discussing the legitimacy of the 1787 Constitution notwithstanding its arguable violation of the legal structure put in place by the Articles of Confederation. It is fitting, too, that such theorists should try to work out ways of addressing the discontinuity in our constitutional history that was written in blood during and after the Civil War. But we should be wary of applying the forms of analysis that fit such extraordinary moments of discontinuity to less drastic legal transitions, or to constitutional questions whose answers should properly be made to rest on the text and structure of the Constitution itself.

(1896), could be seen as casting constitutional legitimacy upon Jim Crow if we were to accept Professor Ackerman's credo that popular movements can grant constitutional status to something other than an amendment processed in accordance with Article V. *See* McConnell, *supra*, at 122–40.

[217] Physics is a field, in contrast, in which scholars hope that theories developed to explain extraordinary phenomena such as black holes will actually be part of a unified scientific theory that can explain "lesser" physical phenomena. *See* KIP S. THORNE, BLACK HOLES AND TIME WARPS 84–86 (1994). The science of Einstein is, after all, capable of explaining those things that Newton's more limited theory can also explain.

This instinct — that different levels of historical events call for different modes of explanation — is not entirely missing from Professor Ackerman's work. His dualist understanding of constitutional history itself rests upon a sharp distinction between ordinary politics, in which citizen involvement is assumed to be minimal, and so-called constitutional politics, in which citizen involvement is heightened and in which "higher lawmaking" is said to occur.[218] Nevertheless, Professor Ackerman has failed to appreciate that fundamental distinctions must also be drawn between different episodes of higher lawmaking. Not all constitutional change is created equal. The theories that one might adopt to explain 1787 or 1866 are not useful for analyzing the adoption of ordinary constitutional amendments. Still less do such theories explicate events that did not result in formal amendments to the Constitution's text, such as the New Deal "switch in time" or the rise of the congressional-executive agreement in 1945.

Thus, I question Professor Ackerman's entire enterprise of extracting a general theory of higher lawmaking outside of Article V from the circumstances surrounding the adoption of the Constitution in the eighteenth century and the Fourteenth Amendment's ratification in the nineteenth. Those events must be understood in their own right. As I discuss below, any alleged illegality in the Constitution's adoption or in the Fourteenth Amendment's ratification does not mean that the Constitution may be amended outside the procedures provided for in Article V.

Indeed, as I hope the following discussion of Professor Ackerman's supposed lessons of 1787, of the 1860s, of 1937, and of 1945 will show, the modes of argument and analysis Professor Ackerman employs as he moves back and forth among strikingly different sorts of historical episodes — and among demonstrably different kinds of questions about justification, legitimacy, and constitutional meaning — all suffer from a disturbingly loose approach to descriptive and normative matters alike. As we will see, under this approach, the deepest lesson of our nation's founding and of its sundering and reconstruction is that constitutional provisions governing modes of constitutional change need not be taken very seriously. Moreover, apparently the deepest lesson of more recent events in the 1930s and 1940s is that the same is true of *all* that the Constitution has to say, whether about its own amendment or about anything else.

1. The Supposed Lessons of 1787.— The adoption of the Constitution itself in 1787 is the first exceptional moment in our nation's constitutional history cited by Professor Ackerman to support his theory of constitutional change outside the procedures set forth in Article V. Professor Ackerman has fastened on a supposed illegality in the nation's founding and suggested that the Constitution's adoption in

[218] *See* 1 ACKERMAN, *supra* note 11, at 6–7.

violation of the amendment provision of the Articles of Confederation somehow strengthens his case for constitutional amendment outside the terms of Article V. He asserts that the Founders "played fast and loose with the existing rules" of the Articles of Confederation, violating its terms but "bootstrap[ping] their way to legitimacy by using old institutions in new ways to enhance their claim to speak for the People."[219] From the Framers' "unconventional adaptation"[220] of the then-existing legal institutions, Professor Ackerman would draw support for an asserted right of the people to move outside the parameters of Article V.

Professor Ackerman and Professor Amar — both of whom read Article V as nonexclusive of other means of constitutional amendment — have debated whether the adoption of the Constitution in 1787 was "legal" or "illegal" under the terms of the Articles of Confederation.[221] Ironically, while Professor Ackerman seeks to justify constitutional amendment outside of Article V by establishing the *illegality* of the Constitution's adoption, Professor Amar argues that it is the *legality* of the Constitution's adoption that supports extra-Article-V amendment.[222] The "all-roads-lead-to-Rome" character of this debate suggests that both Professor Ackerman and Professor Amar seek to draw

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[219] Ackerman, *supra* note 13, at 69. Professor Ackerman contends that Article VII of the 1787 Constitution, which provides that ratification of the Constitution by "the Conventions of nine States shall be sufficient for the Establishment of this Constitution," U.S. CONST. art. VII, violates the requirement in Article XIII of the 1781 Articles of Confederation that any change in the Articles be confirmed by the legislatures of all 13 states, *see* ART. OF CONFED. art XIII. *See* 1 ACKERMAN, *supra* note 11, at 168; Ackerman, *supra* note 13, at 68–69. In Professor Ackerman's words, "[i]f the Federalists had played the game defined by these rules, their Constitution never would have been ratified." *Id.* at 68.

[220] Ackerman, *supra* note 13, at 69.

[221] *Compare id.* at 68–69 (depicting the Constitution's adoption as a violation of the Articles of Confederation and as an example of an "unconventional" but legitimate process of institutional change) *with* Amar, *supra* note 72, at 462–94 (arguing for the legality of the Constitution's adoption and for the constitutional right of the people to amend the Constitution outside Article V).

[222] *See* Amar, *supra* note 72, at 462 & nn.12–13, 463 & n.14, 464–69. Professor Amar argues that there was no illegality in the method of the Constitution's adoption, because the Articles of Confederation had lost their legally binding character and because the people of the states had reserved their sovereignty in their state constitutions and so could consent to a fundamental restructuring of the legal order. *See id.* at 457–58, 469–75; *see also* Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1047–76 (1988) (putting forth an earlier set of arguments for the nonexclusivity of Article V).

Professor Amar argues that the Articles of Confederation, properly viewed as a *treaty* among independent sovereign states, was no longer binding, as a result of what James Madison identified as "numerous [and] notorious" violations of those Articles. Amar, *supra* note 72, at 465–66 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 315 (Max Farrand ed., rev. ed. 1937)). Professor Amar concludes that, "under well-established legal principles in 1787, these material breaches freed each compacting party — each state — to disregard the pact, if it so chose." *Id.* at 465. *But see* 1 ACKERMAN, *supra* note 11, at 41 n.4 (criticizing and rejecting Professor Amar's case for the legality of the Constitution's ratification); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1058 (1984) (labeling the Constitution's ratification "plainly illegal"); Bruce Ackerman & Neal K. Katyal, *Our Unconventional Founding*,

vastly more from the explosive historical event of the Constitution's adoption than that event will yield for purposes of deciding whether the Constitution may be amended outside Article V's procedures. If, within a given style of reasoning or argument, either the asserted legality of the 1787 Constitution or its alleged illegality may be deployed to support a nonexclusive reading of Article V, one is led to doubt the style of argument itself.

In arguing that the Constitution's text permits amendment outside Article V, both Professor Ackerman and Professor Amar point to the absence of the word "only" in Article V. Professor Amar adds other creative but ultimately unconvincing textual arguments that the Constitution itself — through the Preamble and the First, Ninth, and Tenth Amendments — enshrines principles of popular sovereignty to permit popularly called constitutional conventions and national plebiscites to ratify new amendments by simple majority vote.[223]

These theories of Professor Amar and Professor Ackerman are equally bizarre and inconsistent with the text and structure of the Constitution, which spells out in Article V the only *constitutional* method for its own amendment.

Beyond the error both Professor Ackerman and Professor Amar make in treating gaps in the map of our constitutional system as holes in the system itself,[224] both of them err as well by using the extraordinary "boundary" events of our Constitution's framing to generate theories that describe or provide for later, less fundamental constitutional change. In the end, both professors seem destined to fail in this effort at extra-textual justification, for the types of reasoning that we might employ to account for the legitimacy of the Constitution's adoption, or to cope with the import of its illegality, tell us nothing about how to interpret the provisions of the Constitution, including Article V, once we have decided that it does indeed represent the supreme law of the land.

Involved here is nothing less than the fundamental and indeed ubiquitous problem of self-reference. For the Constitution, however its boundaries are defined, cannot itself provide the criteria for its own legitimacy. Efforts to rely upon the Constitution's text for its own legitimacy inevitably founder on the shoals of infinite regress and para-

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62 U. CHI. L. REV. (forthcoming Apr. 1995) (providing an historical response to Professor Amar's claims).

As the debate between Professors Ackerman and Amar illustrates, whether inconsistency with Article XIII of the Articles of Confederation amounts to illegality depends upon what one views as the relevant preexisting law: the Articles of Confederation, or international law principles linking the perpetuity of treaties with their inviolate observation.

223 *See* Amar, *supra* note 72, at 487–94.

224 *See supra* Part III.B.

doxical self-reference.[225] As Wittgenstein saw so clearly, the giving of reasons must sometime come to an end.[226] Ultimately, one *must* step outside the Constitution — as with *any* legal text — to identify criteria for legitimating that body of law regardless of whether one chooses the preexisting Articles of Confederation, principles of international law, supposed axioms of natural law, or any other normative legal matrix.[227]

In my view, then, Professors Ackerman and Amar take profoundly wrong turns in their journeys toward supposed rights of the people to amend the Constitution outside the procedures of Article V. If one *were* to defend the notion that the Constitution may be amended outside Article V, it would be far more defensible to argue that such processes might in truly extraordinary circumstances be *legitimate* (based perhaps on "first principles" of natural law, or on international law principles of sovereignty) even if they are not *constitutional* (con-

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[225] *See* John M. Rogers & Robert E. Molzon, *Some Lessons About the Law From Self-Referential Problems in Mathematics*, 90 MICH. L. REV. 992, 1005–06 (1992) (analyzing the need to "step outside of the system" to answer meta-questions about constitutional amendability). This problem is not unique to the law. *Cf.* DOUGLAS R. HOFSTADTER, GÖDEL, ESCHER, BACH 20–21 (1979) (presenting several classic puzzles of self-reference). Hofstadter presents as one example of a problem of self-reference the "Grelling's paradox." *See id.* Suppose that we decide to divide the universe of adjectives into two types, those that describe themselves (for example, "pentasyllabic" and "awkwardnessful") and those that do not (for example, "bisyllabic" and "edible"). In which group does the adjective "non-selfdescriptive" belong? Think about it for a while and you will see that the answer is "neither." *See id.* This paradox is first cousin to the famous "Russell's paradox," which illustrates the well-known problems that can arise from trying to make sets contain themselves. *See id.* at 20. The mathematician Kurt Gödel showed that no finite, consistent axiomatic system can provide for the proof of its own consistency. *See id.* at 17–18, 24. Trying to show that legal systems establish their own legality can similarly lead to unresolvable problems. *See also* Frederick Schauer, *Amending the Presuppositions of a Constitution*, *in* RESPONDING TO IMPERFECTION, *supra* note 13, at 145, 145 ("Constitutions establish the grounds for constitutionality and unconstitutionality, and in so doing they simply cannot themselves be either constitutional or unconstitutional.").

[226] *See* LUDWIG WITTGENSTEIN, ON CERTAINTY § 200, at 27e (G.E.M. Anscombe & G.H. von Wright eds. & Denis Paul & G.E.M. Anscombe trans., 1969).

[227] See H.L.A. Hart's discussion of rules of recognition by which we can identify what is a law in H.L.A. HART, THE CONCEPT OF LAW 97–114 (1961). Frederick Schauer rightly notes that, with respect to what makes rules of recognition themselves valid, "the ultimate rule of recognition is a matter of social fact" and need not be a "rule." Schauer, *supra* note 225, at 150 (emphasis omitted). For Professor Schauer, "[t]he ultimate source of law . . . is better described as the practice by which it is determined that some things are to count as law and some things are not." *Id.* at 150–51. Professor Schauer concludes that whether the practices of citizens and public officials have in fact effected a constitutional amendment outside the Constitution's own provisions for amendment is "a question of social and political fact and not a question of law." *Id.* at 161.

My view of Article V as providing the only methods of amendment that meet the Constitution's own requirements is consistent with Professor Schauer's point. I take exception, however, to the arguments of Professors Amar and Ackerman that the text of the Constitution is rightly seen as *itself* allowing alternative modes of amendment and the suggestion that the legality or illegality of the Constitution's adoption speaks to Article V's exclusivity *as a matter of constitutional law*.

sistent with constitutional text and structure).[228] The method of the Constitution's adoption — *occurring when the Constitution itself was not in force* — simply cannot tell us whether similar procedures would be constitutional within the terms of the Constitution that was then adopted.

Professor Ackerman's arguments for the illegality of the Constitution's original ratification are of little consequence in the face of over two centuries in which that document has been regarded as the supreme law of the land.[229] Whatever makes the Constitution legitimate now, it must be more than the process of its original adoption. The question of the Constitution's legitimacy is thus dramatically distinct from, and sheds no light on, the question of the constitutionality of later change.

2. The Supposed Lessons of the 1860s.— Professor Ackerman similarly seeks to draw far more than can properly be derived from the history of the Reconstruction amendments. Professor Ackerman's theory that national forms of popular higher lawmaking may supplement the state-centered amendment procedures of Article V is based in large part on his view that the irregularities of the Reconstruction era enshrined into law the principle that the national body politic may enact fundamental law independently of the will of the states.[230] Anyone seriously committed to constitutional law as a text-centered enterprise, however, must emphatically reject such a view.

It is no doubt a troubling aspect of our constitutional history that the Republican-dominated Reconstruction Congress conditioned the

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[228] David Dow draws a useful distinction between the *power* to change a government and the legal *right* to do so, and suggests correctly that the Constitution speaks only to the latter. *See* Dow, *supra* note 64, at 117, 123–25, 136–39; *see also* Kent Greenawalt, *Dualism and Its Status*, 104 ETHICS 480, 484 (1994) (noting that attempts to change the Constitution might be "considered justified in *political morality*" though in excess of "*legal* authority").

[229] Indeed, even if one follows Professor Amar and finds the 1787 Constitution's ratification to be *lawful* because the states under the Articles of Confederation had retained their independent sovereignty and because sovereignty within the states rested with the people, the ratification of the Constitution — given the exclusion of women, slaves, Native Americans, and the propertyless — never *was* a genuine exercise of truly popular sovereignty. *See* Laurence H. Tribe, *Federal Judicial Power and the "Consent" of the Governed*, *in* THE UNITED STATES CONSTITUTION: ROOTS, RIGHTS, AND RESPONSIBILITIES 207, 209 (A.E. Dick Howard ed., 1992). Because particular groups were excluded from political participation in the ratification and amendment of the Constitution, "consent is an ultimately illusory source of legitimacy for the enterprise of constitutional interpretation." *Id.*

Professor Sherry has suggested that the Founding and Reconstruction might not even meet Professor Ackerman's requirement that a constitutional moment of higher lawmaking involve more deliberation than mere ordinary politics. Professor Sherry writes that there may be historical evidence that "although certain mobilized elites pushed through their proposals, general popular participation may have been no wider or deeper than usual." Sherry, *supra* note 38, at 928 n.31; *see also* Bobbitt *supra* note 72, at 1899 (noting that the Framers and ratifiers of the Constitution did not envision a public actively involved in politics, but "were sensitive to [majoritarianism's] dangers and erected many barriers to majorities").

[230] *See* Ackerman, *supra* note 13, at 72–80.

Southern states' full return to the Union upon their ratification of the Fourteenth Amendment, especially given that the votes of some of those very states had previously been counted for ratification of the Thirteenth Amendment.[231] Whether or not this Republican tactic went so far as to "press the rules of Article V beyond their breaking point," as Professor Ackerman suggests,[232] this pivotal event in our nation's history certainly warrants special scrutiny by constitutional historians. Indeed, speculation that Article V alone may not provide for the legitimacy of the Fourteenth Amendment does not seem altogether unwarranted.

But what of Professor Ackerman's claim that popular support for the adoption of the Fourteenth Amendment somehow established the constitutional validity of a national, popular process of higher lawmaking outside of Article V?[233] To make that claim, Professor Ackerman must extrapolate far too much from the extraordinary events of Reconstruction:

> [B]oth the substance of the Fourteenth Amendment and the process through which it was enacted are grounded on the very same point: that We the People of the *United* States were now a nation that could express itself politically on fundamental matters independently of the will of the individual states.[234]

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[231] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 276 (1988). Although lawyers may not have given adequate attention to those "irregularities," historians took note decades ago. *See, e.g.*, JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 174–76 (1965); William W. Fisher III, *The Defects of Dualism*, 59 U. CHI. L. REV. 955, 962 & n.12 (1992) (reviewing 1 ACKERMAN, *supra* note 11) (citing J.G. RANDALL & DAVID DONALD, THE CIVIL WAR AND RECONSTRUCTION 633–37 (2d ed. 1961)).

[232] Ackerman, *supra* note 13, at 73. As I write this piece, the second volume of Professor Ackerman's series, *We the People: Transformations*, remains unpublished. Professor Ackerman has promised that in this second volume he will explain in detail his understanding of the events surrounding the ratification of the Fourteenth Amendment and the significance of those events for constitutional theory. *See id.*

[233] *See id.* at 77–78.

[234] *Id.* at 78. Professor Ackerman seems far too impatient with state-centered forms of national decisionmaking. Like Professor Amar, he has sought to sidestep the state-centered amendatory process of Article V. Professors Ackerman and Golove also seem unconcerned with the Treaty Clause's commitment of decisionmaking to the Senate, the only legislative body that represents the states equally. *See* Ackerman & Golove, *supra* note 10, at 870–71. But the congressional elections of 1994, which yielded a Congress that seems likely to be committed to a devolution of power to the states, may serve in part to validate the earlier observation of Thomas Landry that "the continued demand by the People of the States for local sovereignty cannot be ignored. The case for national popular sovereignty for amendments is hard to make when we have not abandoned the principles of equal state representation in the Senate and limited national powers." Landry, *supra* note 74, at 288–89 (reviewing 1 ACKERMAN, *supra* note 11) (citation omitted). The national majority does not always rule under our constitutional form of government, for on many matters the nation is not authorized to express its will independently of the states. Our Constitution's architecture contains *no* mechanism through which the nation's people act directly as an unmediated collectivity. *See id.* at 288 n.84 (countering Professor Amar's challenge to the concept of state sovereignty in Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426–27, 1519–20 (1987)).

It seems far more reasonable to view the events of the 1860s as a demonstrably singular, historical instance in which the United States expressed its political will independently of the true will *of the renegade states that had illegitimately made war upon the Union*. It is manifestly inappropriate to generalize from this historical anomaly to more normal historical periods[235] — periods in which no state has forsaken its claim to be fully counted (as some once did, arguably, by attempting to secede from the Union). Professor Ackerman's conclusion that the Republican Congress's strong-arming of the Southern states in 1867 effected a "fundamental . . . shift toward nation-centered patterns of higher lawmaking"[236] thus cannot be accepted, especially given the use of Article V procedures and state ratification for Amendments Fifteen through Twenty-One before Professor Ackerman's next "constitutional moment" in 1937.

Professor Ackerman suggests that, *unless* we agree that the Constitution allows for amendment outside the procedures of Article V, we risk "delegitimizing the Fourteenth Amendment."[237] Hardly. No doubt the constitutionally catastrophic events of the Civil War led to the employment of Article V in ways that did not fully satisfy that provision's requirements as they would be understood in ordinary circumstances. But if we accept the decision of the constitutional actors of 1866 to treat the Fourteenth Amendment as law, we do not thereby waive the right to insist that compliance with Article V is necessary for any future constitutional amendment. We should reject any attempt to hold the Fourteenth Amendment hostage. We should similarly reject any attempt to treat the history of the Fourteenth Amendment as providing justification for constitutional change outside the procedures provided for in Article V.

3. The Supposed Lessons of 1937.— Professor Ackerman has exacerbated the potential errors of reasoning from the boundary events of constitutional history by applying his theory of "constitutional moments" — a theory derived in large part from the examples of the Founding and of the Reconstruction Amendments — to occasions that

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[235] Professor Robert Lipkin shares this view:

> [T]hough the Fourteenth Amendment was ratified in an atypical manner, it would be foolish to canonize this event by making it an exemplar of future informal amendments. Nothing should follow from these extraordinary circumstances, certainly not a change in the procedure for Amending [sic] the Constitution.

Robert J. Lipkin, *Can American Constitutional Law Be Postmodern?*, 42 BUFF. L. REV. 317, 352 n.102 (1994). It is also doubtful that Reconstruction Republicans saw themselves as creating a new method for constitutional amendment. *See* Greenawalt, *supra* note 228, at 487. As Thomas Landry notes, the very determination of the Reconstruction Congress to force the South to ratify the Fourteenth Amendment *through Article V procedures* suggests that it is improper to read the history of the Fourteenth Amendment as license to *circumvent* Article V. *See* Landry, *supra* note 74, at 285.

[236] Ackerman, *supra* note 13, at 78.

[237] *Id.* at 73.

entail nothing akin to national birth, or death and rebirth, and that are said to "amend" the Constitution not only without going through its own processes for formal amendment, but sometimes without even producing new constitutional text. In this regard, Professor Ackerman's theory seems to lack a sense of constitutional proportion. It conflates genuinely constitutive occasions such as the Civil War and its aftermath, which some have at times described as the Second American Revolution, with almost any major shift in constitutional understanding, such as the basic shift in approaches to economic regulation in the 1930s, or the less basic (but still significant) shift in approaches to international agreements in the 1940s.

Regardless of one's position in the debates about the legality of the Constitution's adoption or of the Fourteenth Amendment's ratification, the effort to transplant the forms of analysis appropriate to those truly nation-defining events to the kind of legal transition that our system experienced in 1937 — with the return to a broader vision of congressional power than had prevailed since the 1880s and with the demise of *Lochner*[238] — requires an unwarranted leap across an unbridgeable chasm. I remain unconvinced by Professor Ackerman's claim that 1937 was the sort of discontinuous moment for which "normal" constitutional argument becomes ill-suited, and which we ought to address as we do the birthpangs of 1787, or the death and rebirth of the Republic in the 1860s.

Professor Ackerman is certainly right to note — as most observers have — that 1937 was in many respects a "constitutional moment" of great import.[239] But regardless of the importance of the changes of 1937 — changes that have likely proved to be of more practical significance than many formal amendments of the Constitution's text — the Supreme Court's New Deal shifts were matters of legitimate if controversial constitutional interpretation. They simply did not entail any sort of architectural alteration that would require a textual change in the Constitution. Comparison with the 1860s is thus suspect from the start.

To be sure, the choice between a central government with powers limited to those *expressly* delegated (as with the national government established by the Articles of Confederation) and a central government endowed with *implied* powers as well is an architectural matter that should ideally be specified in constitutional text. That the latter was in fact the choice made by the Constitution should have been clear from the beginning; the Framers reserved to the states those powers not "delegated" to the national government, rather than reserving to the states those powers not "expressly delegated" to the national gov-

[238] Lochner v. New York, 198 U.S. 45, 53 (1905) (invalidating state maximum-hours legislation for bakers under the "liberty" prong of the Due Process Clause of the Fourteenth Amendment).

[239] *See* Ackerman, *supra* note 13, at 82.

ernment, as had been done in the Articles of Confederation.[240] Between 1895 and 1937, the Supreme Court's rhetoric in numerous cases did seem at times to favor the "express delegation" view of the Articles of Confederation.[241] If such a view had been pivotal to those decisions, then the 1937 overturning of cases like *Hammer v. Dagenhart* and the Court's return to *McCulloch* could perhaps be seen as an architectural change that might best be effected through a constitutional amendment.[242] But in truth, the express delegation rhetoric of Justice Day in the *Child Labor Cases*[243] was just that — rhetoric. What was really at issue in those cases was the *breadth* of Congress's implied powers under Article I's delegations, and that is a question of degree, not of basic architecture. From a policy perspective, of course, it matters enormously whether we pursue a broader or a narrower vision of Article I. But not all that glitters is constitutional gold: it is a category error of the first magnitude to treat every truly significant shift in our nation's approach to governance as if it were or should have been an amendment to the Constitution.

Nor was the death of *Lochner* — the other half of the 1937 upheaval[244] — the kind of change that should have required a formal amendment.[245] *Lochner* never really died; it just changed its clothing.[246] Liberty still has substance. The 1937 watershed marked a

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[240] As Chief Justice Marshall noted in his great opinion in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819), the omission of the word "expressly" from the Tenth Amendment was designed to avoid "the embarrassments resulting from the insertion of this word in the articles of confederation." *Id.* This deletion, along with the text of the Necessary and Proper Clause, showed that the federal government has powers implied by the Constitution's express delegations. For the view that *McCulloch*'s interpretation was nonetheless so radical as to be an amendment in disguise, see JAMES B. WHITE, WHEN WORDS LOSE THEIR MEANING 263 (1984).

[241] *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 275–76 (1918).

[242] Even then I would question the propriety of *demanding* an amendment simply to effectuate what was, after all, only a correction in a temporary course of judicial interpretation.

[243] *See Hammer*, 247 U.S. at 275–76.

[244] *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398–400 (1937) (upholding Washington's minimum wage legislation). There were two significant changes in Supreme Court jurisprudence in 1937 that, hand in hand, cleared the way for much economic legislation by both Congress and the States. The Court not only signed on to a broad interpretation of the Commerce Clause, *see, e.g.*, NLRB v. Jones & Laughlin, 301 U.S. 1, 34–41 (1937), which enabled Congress to pass wide-reaching economic legislation, but also retreated from Lochnerian restrictions on the permissibility of government infringements on freedom of contract, *see West Coast Hotel Co.*, 300 U.S. at 391–93.

[245] Professor Ackerman describes the *Lochner*-displacing opinions of the New Deal Court as "the functional equivalent of formal constitutional amendments," Ackerman, *supra* note 13, at 82, and claims that their effects will be undone, if at all, only by "a higher lawmaking process comparable to the one led by President Roosevelt in the 1930s." *Id.* Behind his language is the suggestion that any other avenue of change, such as a course-reversing Court opinion, would somehow be illegitimate — regardless of the legal merits.

[246] In fact, I am inclined to agree with Professor Ackerman's more recent view that *Lochner* and Griswold v. Connecticut, 381 U.S. 479 (1965), have much in common. *See* Ackerman, *supra* note 43, at 524 (crediting Jennifer Nedelsky for this broad insight). In both cases, the Supreme Court spoke as though it were protecting a state of nature rather than recognizing that it was

change in how courts interpreted that substance. But after 1937, just as before, the Constitution's mandates that life, liberty, and property not be denied "without due process of law" and that no state deny any person the "equal protection of the laws" continue to provide not merely procedural protections, but substantive protections as well.[247]

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giving priority to one particular set of legal arrangements over another, whether the economic contract or the marriage contract.

[247] I mean this proposition purely as a description of current constitutional doctrine, rather than as an endorsement of the underlying textual interpretation at issue. In fact, despite my own prior efforts to justify the doctrine of "substantive due process" — the doctrine that certain government deprivations of life, liberty, or property might be condemned as violative of "due process of law" because of the substantive content of the rule the government is applying, and regardless of the procedures by which the rule is applied to particular persons — I am far from committed to the preservation of that entire doctrine. Dean Ely's stylish denunciation of the very notion of substantive due process as an oxymoron, rather like "green pastel redness", *see* JOHN H. ELY, DEMOCRACY AND DISTRUST 18 (1980), goes a bit far, but his basic linguistic point has great force. *See also* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 353–60 (1981); *id.* at 356 (criticizing the "due substance school of judicial review"). Yet it is unclear why a purely linguistic analysis should be decisive — particularly for those like Professor Monaghan, who stress the importance of interpreting all constitutional text in accord with its "original meaning." *See, e.g.*, *id.* at 396; Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, Tanner Lectures at Princeton University (Mar. 8, 1995). From the perspective of such "originalists", it should make all the difference that the ***historical*** evidence points strongly toward the conclusion that, at least by 1868 even if not in 1791, any state legislature voting to ratify a constitutional rule banning government deprivations of "life, liberty, or property, without due process of law" would have understood that ban as having substantive as well as procedural content, given that era's premise that, to qualify as "law," an enactment would have to meet substantive requirements of rationality, non-oppressiveness, and evenhandedness. By 1855, the Supreme Court was certainly writing as though such a requirement were implicit in the Due Process Clause of the Fifth Amendment. Thus, in Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855), the Court observed that due process "is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will." By the time the Supreme Court, in its infamous decision in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), treated the Fifth Amendment's Due Process Clause as imposing substantive limits on congressional legislation, even if the Court was departing from the understanding as of 1791, it was building on a considerable body of prior judicial and extra-judicial writing that treated the requirement of due process of law as mandating not only fair procedure in the ***application*** of legal rules, but also acceptable substance in their ***content***. Although the Fourteenth Amendment of course overruled certain key aspects of *Dred Scott* — principally its holding that slaves, former slaves, and their descendants could not be citizens for federal purposes — there is no evidence that the Fourteenth Amendment was understood by anyone to be overruling *Dred Scott*'s structural premise that not every formally proper legislative enactment meets the constitutional definition of "law." Accordingly, the Supreme Court probably reflected the understanding at the time the Fourteenth Amendment was ratified, and in the decades following, when, in 1884, it analogized due process to Magna Carta's "guaranties against the oppressions and usurpations" of government power. Hurtado v. California, 110 U.S. 516, 531 (1884). It was in *Hurtado* that the Court elaborated:

> Law is something more than mere will exerted as an act of power. . . . [Law thus excludes] as not due process *of law*, acts of attainder, bills of pains and penalties, acts of confiscation . . . and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.

Because both prongs of 1937 involved reinterpretation of existing constitutional text, rather than actual amendment of the Constitution

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Id. at 535–36 (emphasis added). For those who insist that constitutional provisions be interpreted the way they were understood at the time they were ratified, it thus appears that the Fourteenth Amendment's requirement of due process of law, even if not the parallel requirement of the Fifth Amendment, compelled more than the procedural fairness that the words connote to the modern ear.

Whether that historical perspective justifies the modern practice of giving substantive content to the due process clauses is, however, another matter. For if one reads the phrase "due process of law" *without* that historical filter — if one reads the word "law" as late twentieth-century speakers use that word rather than as late nineteenth-century speakers did — then one cannot easily explain how something that has the *form* of law, and that was *enacted* in accord with all relevant structural requirements for lawmaking by the relevant juridical entities, is to be treated as something less than "law" simply because its substantive content flunks various tests, either static or evolving, for how lawmakers may regulate various spheres of economic or social life.

There is considerable irony here. The same people who insist on reading the word "law" in this modern way, in support of their conclusion that substantive due process cannot possibly be justified, typically ground their interpretive approach on the theory that constitutional terms must be read in accord with their original meaning. And conversely, the same people who reject the demand that constitutional terms must be read in accord with their original meaning — in order to treat words like "liberty" and phrases like "equal protection of the laws" as referring to broad principles or concepts with evolving content rather than to specific rules whose content was frozen at the date of ratification — must insist on reading the words "of law" as they would have been understood in 1868 to escape the alleged linguistic incoherence of substantive due process.

It might be argued that the words "of law," referring as they do to the architecture of government, are properly read in a static, time-frozen manner while words like "liberty," referring as they do to the content of rights, are properly read in a fluid, time-evolving manner. Yet such an approach — reading part of the Fourteenth Amendment's first section through an 1868 lens and part of the same section through an evolving lens — seems more than a bit schizophrenic. And the fact that opponents of substantive due process are guilty of the same sort of sin — that they must read part of section 1 in a static manner and another part in a dynamic manner — cannot justify a two-faced approach by proponents of substantive due process.

What, then, is to be done? One possibility would entail forthrightly tossing substantive due process overboard, conceding that its historical pedigree cannot suffice to overcome the linguistic awkwardness of the concept in the modern world. Thus, if a state or local government were to outlaw all speech critical of those in power, or all prayer, for example, those actions could not be struck down as deprivations of liberty without due process of law, which would henceforth be deemed to refer to procedure alone. In my view, such measures, as applied to U.S. citizens, would nonetheless be unconstitutional because they would constitute state abridgments of the "privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1. It does not trouble me that the Slaughter-House Cases, 83 U.S. 36 (1872), would have to be overruled to reach that result. I have elsewhere explained my view that the *Slaughter-House Cases* incorrectly gutted the Privileges or Immunities Clause. *See* TRIBE, *supra* note 50, §§ 7-2 to 7-4, at 550–59; *see also* DAVID A. J. RICHARDS, CONSCIENCE AND THE CONSTITUTION 204–32 (1993) (arguing that the *Slaughter-House Cases* incorrectly interpreted the Privileges or Immunities Clause). The conventional wisdom is that this clause does not apply to resident aliens, but only to citizens. Yet the Equal Protection Clause of the Fourteenth Amendment, guaranteeing protections for "any person," U.S. CONST. amend. XIV, § 1, would suffice in most instances to invalidate, as applied to aliens, measures that would violate the Privileges or Immunities Clause as applied to citizens. There would remain the problem of Bolling v. Sharpe, 347 U.S. 497 (1954). Given the absence of an Equal Protection Clause applicable to Congress, is there anything in the Constitution to prevent the federal government from engaging in the grossest forms of racial apartheid? The answer may well be "yes." I have elsewhere explained an interpretation of the Bill of Attainder Clauses sufficiently broad to condemn as unconstitutional any state or federal measure singling out readily

or even the sort of reinterpretation that should have been effected by such an amendment, a single theory probably cannot explain both the 1860s and 1937, even apart from the apples-and-oranges move entailed in likening the remaking of the Union to the New Deal.

Nevertheless, Professor Ackerman has looked to the constitutional changes of Reconstruction and the New Deal as though they established a paradigm for higher lawmaking. In Professor Ackerman's theory, if the Fourteenth Amendment is to be legitimate, then the pattern of change it established also legitimates the constitutional changes of the New Deal era. But the New Deal's changes, however profound in effect, were the stuff of ordinary constitutional interpretation and require no justification based on Professor Ackerman's paradigm for higher lawmaking.[248]

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identifiable and closed classes of persons (in other words, classes from which one is unable voluntarily to withdraw) for stigmatizing disabilities. *See* TRIBE, *supra* note 50, § 10-4, at 643–44, 646 & n.25. I have no doubt that laws forcibly separating the races in public education, and laws forcibly relocating persons based on their national ancestry, are precisely of this character.

[248] If I didn't know better, I would assume that Professor Ackerman was just trying to be provocative when making his climactic argument that the New Deal represents an informal amendment that both explains and legitimates the two most important substantive rights-protecting decisions of the post-1937 Supreme Court. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (establishing a right for married couples to use contraceptives); Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (finding school segregation unconstitutional). I find entirely unconvincing Professor Ackerman's attempt to recast the Court's determinations in those cases — that decisions about intimate sexual and reproductive matters are presumptively private and that official segregation of the races denies equal protection — as corollaries of the interpretive shifts authored by the New Deal Court. *See* 1 ACKERMAN, *supra* note 11, at 131–62. Rather, the legitimacy of the *Brown* decision rests far more straightforwardly on the only defensible reading of the Equal Protection Clause, *see* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421 (1960), a reading that was correct (but neglected) in 1896, when the Court erroneously decided Plessy v. Ferguson, 163 U.S. 537 (1896), four decades before the constitutional shift of 1937. *See Plessy*, 163 U.S. at 552–64 (Harlan, J., dissenting).

Likewise, *Griswold* stands for the proposition that there are some personal matters that only a tyrannical state can purport to control — a libertarian proposition that the Supreme Court misapplied in *Lochner* and that is as old as the Republic. *See* Charles L. Black, Jr., *On Reading and Using the Ninth Amendment*, *in* THE HUMANE IMAGINATION 186, 196–200 (1986); Louis M. Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1030–31 (1987). Professor Ackerman's effort to attribute the legitimacy of these two rulings to the 1937 upheaval and thus to underscore the alleged status of 1937 as an informal amendment makes far too much of that admittedly seminal advance in our constitutional history.

Professor Ackerman's descriptions of *Brown* and *Griswold* are part of his overall depiction of the Supreme Court as preservationist — as implementing the will of the people even in the Court's most dramatic decisions. Professor Ackerman sees the *Brown* decision as an "interpretive synthesis" of Reconstruction and New Deal principles, *see* 1 ACKERMAN, *supra* note 11, at 142–50, and he describes *Griswold* as a synthesis of Founding and New Deal principles, *see id.* at 150–58. *But see* Landry, *supra* note 74, at 287 n.83 (noting that, if "both *Brown* and *Griswold* owe their constitutional force to the New Deal," then "the amendatory fraud perpetrated on the People (and the States) during the New Deal is of immense and perhaps immeasurable proportions").

For a broad criticism of Professor Ackerman's preservationist account of *Brown* and *Griswold*, see Jennifer Nedelsky, *The Puzzle and Demands of Modern Constitutionalism*, 104 ETHICS 500, 503–12 (1994). Professor William Fisher has criticized as historically inaccurate Professor

4. The Supposed Lessons of 1945.— Like the thirteenth chime of a clock that makes one doubt all that has gone before, the recent attempt by Professor Ackerman to treat 1945 as yet *another* moment akin to 1787, the 1860s, and 1937[249] simply leaves me less persuaded about the "moments" that preceded it.[250] Even if one were to accept Professor Ackerman's radical extension from the purported principles of the 1860s to the interpretive revolution of 1937, there would be no reason to assume that a similar analysis should govern the kinds of questions raised by the congressional-executive agreement in 1945. Despite the story Professor Ackerman tells about the struggles for foreign affairs supremacy among the President, the House, and the Senate in the wake of World War II,[251] nothing about the Treaty Clause question remotely qualifies for treatment by anything other than the normal rules of constitutional interpretation. For the type of decision that must be made in resolving the Treaty Clause issue involves quite specific constraints of constitutional text and structure. One must study the interlocking relationships of various provisions such as Article I and Article II — as I have tried to do in Part IV — to assess adequately Professor Ackerman's constitutional defense of the shifts that occurred in the 1940s.

Professor Ackerman's argument regarding the Treaty Clause is particularly troubling because — despite his efforts to square his approach with the text — he ultimately suggests that public consensus, or a period of disregard for text and structure, may suffice to erase

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Ackerman's efforts to portray other landmark decisions, such as *Lochner* and Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), as preservationist. *See* Fisher, *supra* note 231, at 967–72. For example, far from preserving the principles of the Framers, Chief Justice Taney's decision in *Dred Scott* clearly departed from the understandings of the Framers that blacks could be state citizens, that Congress had broad powers over the territories, and that the Due Process Clause was about procedure. *See id.* at 968–70. In short, contrary to Professor Ackerman's preservationist portrait, "'Taney constructed his own peculiar version of American history to serve his judicial purpose.'" *Id.* at 970 (quoting DON E. FEHRENBACHER, THE DRED SCOTT CASE 370 (1978)).

[249] *See* Ackerman & Golove, *supra* note 10, at 873, 909–13.

[250] One almost wonders whether the clock has not struck yet a fourteenth chime. After all, the political earthquake represented by the ascendancy of the Republican Party to the control of both Houses of Congress in November 1994 for the first time in 40 years can hardly be ignored by someone with Professor Ackerman's views. Yet, when the newly composed House of Representatives took the comparatively modest step, under the clause permitting each House to set its own rules, *see* U.S. CONST. art. I, § 5, cl. 2, of requiring that any increase in income tax rates, before it is deemed to have passed the House, must receive a three-fifths majority, *see* H. R. RULE XXI, Professor Ackerman first opined that this was certainly unconstitutional (despite the Constitution's silence on this precise point), *see* Bruce Ackerman, *Gingrich vs. the Constitution*, N.Y. TIMES, Dec. 10, 1994, at 23, and then launched a lawsuit on behalf of some members of the House of Representatives seeking a judicial declaration that his view is correct. *See* Jerry Gray, *Congressional Roundup: Taxes; Legal Challenge to Voting Rule*, N.Y. TIMES, Feb. 9, 1995, at A18. Assuming that the judiciary overlooks the obvious ripeness and political question problems posed by the suit, should the court in which the suit is pending evaluate the merits of the claim by asking whether yet another "constitutional moment" is upon us? I would hope not.

[251] *See* Ackerman & Golove, *supra* note 10, at 889–96.

language or architecture from the Constitution. If so, the Constitution has failed in its central mission — to establish a framework for government enduring enough to withstand winds of public opinion, however strong and deep, that are not channeled through the mechanisms of legitimate change carefully created by the Constitution itself. Nor should our constitutional order be vulnerable to some sort of desuetude, in which a long-enough period of popular indifference strips the people of their right to invoke the Constitution.

As we have seen above,[252] adoption of the Bretton Woods Agreement as a congressional-executive agreement (rather than as a treaty) in 1945 was thought even then to require a formal constitutional amendment,[253] because of purely structural concerns about the interface of Articles I and II. Indeed, the House had already approved a proposal for just such an amendment to the Constitution.[254] In other words, 1945 was not *at all* like 1787, the 1860s, or 1937. The Senate's acquiescence in 1945 to the House's demand that it be permitted a role in approving major international agreements, and that bicameral approval by a majority be used instead of supermajority Senate ratification on that occasion,[255] represented not an agreement to *change* the Constitution's text or meaning, but rather an apparent willingness to *circumvent* what national leaders still widely saw as its unambiguous command.[256] Popular support did not make the Senate's acquiescence in 1945 right as a matter of constitutional interpretation; popular support simply made political fallout unlikely. Professor Ackerman fails to explain why the jockeying for power among the political actors in 1945 should be deemed relevant to the proper determination of a question of constitutional meaning. The questions Professor Ackerman asks about 1787, the 1860s, and 1937 are thus not the questions raised by 1945 at all.

VI. CONCLUSION

Professor Ackerman's latest application of his theory of higher lawmaking illustrates the hazards that some commentators all along sus-

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252 *See supra* Part V.B.2.

253 *See* Ackerman & Golove, *supra* note 10, at 889–91.

254 *See id.* at 889.

255 *See id.*, at 892–93.

256 The academy, naturally, was divided on the constitutional question. *Compare, e.g.*, Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664, 666–67 (1944) (arguing for an exclusive view of the Treaty Clause); Edwin Borchard, *Treaties and Executive Agreements — a Reply*, 54 YALE L.J. 616, 616 (1945) (same); Herbert W. Briggs, *The UNRRA Agreement and Congress*, 38 AM. J. INT'L L. 650, 651 (1944) (same) *with* EDWARD S. CORWIN, THE CONSTITUTION AND WORLD ORGANIZATION 31–54 (1944) (making the case for the congressional-executive agreement form); McDougal & Lans, *supra* note 67, at 186–88 (same); Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pt. 2), 54 YALE L.J. 534, 615 (1945) (same).

pected his theory might pose. In his earlier descriptions of the constitutional changes of 1937, Professor Ackerman discussed his theory of constitutional moments as though it provided a source of legitimacy for a change that most of us regarded as legitimate anyway, simply as a matter of textual interpretation. In applying his theory to the rise of the congressional-executive agreement in 1945, however, Professor Ackerman, along with Professor Golove, has used his dubious theory of higher lawmaking to buttress an already highly problematic interpretation of constitutional text. The resulting whole is less than the sum of its separately troubled parts. One gets the distinct impression from Professor Ackerman's heavy reliance on arguments of precedent and higher lawmaking that, but for the conclusion he wishes to buttress, even he would see how shaky the status of the congressional-executive agreement is as a matter of constitutional text and structure. But because Professor Ackerman would accept even *amendment* of the Constitution in accord with the informal pattern he has described, he seems unconcerned by the prospect that constitutional text and structure might be ignored or treated casually whenever the People have spoken in a process akin to the one he has described.

Those of us committed to the project of constitutional government under law should regard Professor Ackerman's latest application of his theory as compelling proof that, whatever its value as a tool of historical inquiry, it has no role to play in resolving any question of constitutional interpretation.

Near the close of their article, Professors Ackerman and Golove succinctly sum up their approach to constitutionalism with a question: "Efficacy, democracy, legitimacy: who can ask for anything more?"[257] Who? Anybody who takes text and structure and, for that matter, history, seriously — that's who. If the Constitution is law, and if we are trying to interpret that law, then the claim that a particular governmental practice, domestic or international, is efficacious, is consistent with democratic theory, and is in some popular or moral sense "legitimate" just doesn't cut much ice when the question before us is whether that practice is *constitutional*.

Dean John Hart Ely once suggested that a "neutral and durable principle may be a thing of beauty and a joy forever,"[258] but if it lacks basis in the text or structure of the Constitution, then we have no business proclaiming it as a norm of constitutional law.[259] Dean Ely and I might disagree about what the text and structure of the Consti-

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[257] Ackerman & Golove, *supra* note 10, at 916.

[258] John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 949 (1973).

[259] *See id.* ("[I]f [a principle] lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it.").

tution support in one area or another,[260] and fierce debate over just such questions is (or ought to be) the stuff of constitutional discourse. But changing the subject to the meaning of the American Revolution, of the Civil War experience, of the New Deal, or of the New World Order, should not be confused with just another interesting conversational gambit. Rather, that change in subject — whatever its other values — should be seen for what it is: a complete departure from the enterprise of interpreting the Constitution of the United States.

That enterprise is not always an easy one. Neither its precise ground rules nor its proper conclusions are likely ever to become matters of very broad consensus; indeed, if they do, I will be among the first to insist that something very peculiar indeed, and probably most unhealthy, has occurred. But, for all its difficulties, the enterprise of construing text and structure is a worthy one. Disciplined by basic notions of constitutional topology, the enterprise may be pursued with considerable rigor. And, at times, part of what it means to take that enterprise seriously is to protest in no uncertain terms when undertakings of a different sort altogether are put forth in its name.

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[260] *See* TRIBE, *supra* note 50, § 15-10, at 1347–49; Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 *passim* (1980).