



Spring 2012

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Recommended Citation

Jill M. Fraley, *Stealth Constitutional Change and the Geography of Law*, 4 Drexel L. Rev. 467 (2012).

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ESSAY

STEALTH CONSTITUTIONAL CHANGE AND THE GEOGRAPHY OF LAW

Jill M. Fraley* †

ABSTRACT

Bruce Ackerman's recent book, The Decline and Fall of the American Republic, is a sudden shift from his previous scholarship on constitutional moments and the ability of social movements to generate minor revolutions. By acknowledging how constitutional change did not fit into his model of deliberate, deeply debated movements, Ackerman has shifted the scholarly lens to unintentional and unanticipated structural variations. Ackerman focuses his book on the political processes and events that have fostered potentially illegitimate constitutional remodeling. He acknowledges that certain features of legal scholarship have contributed to a lack of awareness of slow, structural drift, but he does not address the question in earnest, as I do in this Essay.

My intention is not only to explain how features of legal scholarship have failed to make us aware of structural constitutional drift but also to use the Essay as an object lesson to prove the possibility of interesting, original, and readable scholarship on slow, structural change. To accomplish this task, I use original research from the Lyndon B. Johnson Presidential Archives to tell a story of stealth change in our constitutional structures when the Appalachian Regional Commission was established.

In *The Decline and Fall of the American Republic*, Professor Ackerman calls for constitutional thought to “rethink its own boundaries.”¹ He diagnoses the problem as scholarship that “remains focused narrowly on the judiciary and fails to appreciate that our most

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† Due to the unique nature of the research conducted for this Essay, some sources cited herein were unavailable for review by the *Drexel Law Review* but have been verified by the author.

1. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 181 (2010).

serious constitutional problems lie elsewhere.”² Such a diagnosis mirrors a doctor’s finding of a gastrointestinal ailment—while accurate, the lack of specificity is frustrating. In this Essay, I reflect on why a focus on the judiciary undermines our ability to recognize a trajectory of constitutional change in our structures and institutions and why certain features of historical and constitutional scholarship contribute to this failure.

In light of Ackerman’s concern about the role of White House Counsel, I propose my arguments through analyzing an episode in American legal history where, rather than twisting law to meet presidential demands, in-house counsel warned the President about the dangers of structural constitutional changes: the creation of and amendments to the Appalachian Regional Commission (ARC). I do not intend to disprove Ackerman’s thesis regarding the power of executive counsel, but rather to use an episode where counsel’s warnings were ignored to highlight constitutional change through other mechanisms and tendencies.³

In particular, the ARC story demonstrates how the focus on the judiciary constrains constitutional thought to the question of a violation, and moreover, a violation of a specific constitutional provision. I suggest that this framework also creates a problem for effectively monitoring structural constitutional change. By operating in the framework of violations, we place the debate in a dichotomous framework: violation or no violation. Although higher court opinions are increasingly fractured and multifaceted, the question is framed fundamentally as yea or nay. As a result, even while our system is based on precedent, there is a limited awareness of trajectory. Incremental changes in our constitutional structures accumulate slowly and remain unnoticed as rights downplay opportunities for a considered evaluation of institutions.

As scholars and legal historians we are drawn to narrative history—to the details of lives and events. But in writing about the power of social movements, we neglect to recognize that social movements are also capable of producing unanticipated and unintentional structural constitutional changes. In the case of Appalachia, national outrage over poverty and inequality in the region placed President Johnson in a position where he felt unable to veto regional commis-

2. *Id.*

3. This analysis supports Ackerman’s claim, in his rebuttal to Professor Morrison, that we cannot expect executive counsel “to defend the rule of law when other institutional dynamics are propelling the presidency down a path toward illegality[.]” Bruce Ackerman, *Lost Inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. F. 13, 15 (2011).

sion legislation; this pressure persisted even while internal memoranda indicated that the Administration was deeply concerned about constitutional questions related to the creation of a new governmental structure that did not fit the traditional federal-state model and was not clearly accountable within the system.⁴ Notes from the end of his Presidency indicate that Johnson was deeply concerned over the lack of public interest in—or even awareness of—the vast expansion of the federal bureaucracy that had occurred during his tenure.⁵

In the beginning, though, Johnson jumped at the chance to reconsider governmental structures in light of “problems of unusual magnitude: mass education, hard core poverty both urban and rural, urban blight and renewal, air and water pollution, transportation.”⁶ Such issues simply did not, in President Johnson’s words, “respect State or county boundaries.”⁷ For the Johnson Administration, the crisis encompassed more than a catalog of urban and rural challenges; these issues reflected a more fundamental quandary: how to administratively and democratically structure solutions given the “irrationalities of present State and local jurisdictional boundaries.”⁸

Within a republican, federalist system, such boundaries are, of course, not simply lines on a map; the state lines and their accompanying arrangements for governance are embedded in the Constitution. Addressing such problems immediately brought changes that were centrally, as the National Conference of Governors put it in their 1967 resolutions, plans for “Constitutional Revision and Governmental Reorganization.”⁹

4. See Memorandum from Harold Seidman, Assistant Dir. for Mgmt. Org., Budget Bureau, (Nov. 12, 1963) (Presidential Papers, Legislative Background, ARDA, Box 1, Lyndon Baines Johnson Library, Austin, Texas) [hereinafter Memorandum from Harold Seidman].

5. See President Lyndon B. Johnson, Speech 8 (Harry McPherson’s unpublished notes of a speech delivered by President Johnson) (Aides Files, Office Files of Harry McPherson, Box 55, Lyndon Baines Johnson Library, Austin, Texas) [hereinafter McPherson’s unpublished notes on Johnson’s Speech].

6. THE NEW FEDERALISM (Mar. 1967) (unpublished White House pamphlet) (Aides Files, Office Files of Charles Maguire, Box 3, Lyndon Baines Johnson Library, Austin, Texas) [hereinafter THE NEW FEDERALISM].

7. *Id.* (quoting President Johnson’s address to the governors at the Conference on Federal-State Relations at the White House on March 18, 1967).

8. Memorandum from Charles L. Schultze, Exec. Office of the President, Bureau of the Budget, to Joe Califano (Sept. 12, 1967) (Aides Files, Office Files of Gaither, Box 3, Lyndon Baines Johnson Library, Austin, Texas) (emphasis removed from original).

9. NAT’L GOVERNORS’ CONFERENCE, RESOLUTIONS ADOPTED (1967).

Johnson concluded that the only option was, "a new kind of Federalism," a "creative federalism," which was "never contemplated by our Founding Fathers."¹⁰ Johnson and his supporters argued, first, that the federal system had always been changing to accommodate new social circumstances, and, second, that new social problems resulting from vast economic growth and the extraordinary development of local and metropolitan governmental structures necessitated structural changes.¹¹

With respect to the first argument, the Administration sought supportive, but abstract, quotes from former Presidents and founding fathers and incorporated these into pamphlets and speeches. The Administration offered precedents such as the Morrill Act of 1862, which was argued to be "an example of enlightened Federal action in behalf of the states."¹² Relying on these examples, the Administration claimed that "creative federalism is not a new concept. Indeed it has been a functioning reality for many, many years."¹³

The overall plan was to convince the public that, "we had moved more flexibly than most of us recognized to make our pluralistic system work."¹⁴ Johnson specifically cited instances in the national history when federalism had moved flexibly, entangling state and federal government to meet a particular crisis. Johnson cited President Roosevelt's use of the general welfare clause to create grants-in-aid to the states.¹⁵ He also cited the role of World War II in changing government contracts so that they would be more flexible and could create partnerships with both industry and universities for the sake of national defense.¹⁶

10. SELMA J. MUSHKIN & ROBERT F. ADAMS, STATE-LOCAL FINANCES PROJECT EMERGING PATTERNS OF FEDERALISM 12-14 (1966). This statement was repeated frequently in the press. See, e.g., Aides Files, Office Files of Ceil Bellinger, Box 4, Lyndon Baines Johnson Library, Austin, Texas (containing assorted newspaper articles referencing the statement).

11. See MUSHKIN & ADAMS, *supra* note 10. Subsequently, a shorter version of the article was published in the *National Tax Journal*. Selma J. Mushkin & Robert F. Adams, *Emerging Patterns of Federalism*, 19 NAT'L TAX J. 225, 225-47 (1966).

12. President Lyndon B. Johnson, Speech on the Federal Government's Relations with State and Local Government and the Private Sector 4 (Aides Files, Office Files of Harry McPherson, Box 55, Lyndon Baines Johnson Library, Austin, Texas) [hereinafter President Johnson's Private Sector Speech].

13. Orville L. Freeman, Sec'y of Agric., U.S. Dep't of Agric., Address at the Legislative Conference of National Association of Counties: The Need for Rural-Urban Balance 9 (Feb. 27, 1967) (Aides Files, Office Files of Frederick Panzer, Box 358, Lyndon Baines Johnson Library, Austin, Texas).

14. President Johnson's Private Sector Speech, *supra* note 12, at 4.

15. *Id.*

16. *Id.*

A Council of State Governments staff paper, *Mechanisms for Intergovernmental Cooperation*, provided more concrete legal precedents, particularly by calling upon scale precedents for regional governance, including: informal cooperation, interstate compacts, intergovernmental commissions, administrative agreements, interstate contracts, and reciprocal and uniform statutes.¹⁷ The report praised what had been accomplished through such mechanisms, but also more generally explained how those mechanisms established a legal basis for proposing new changes in the federal structure.¹⁸ The report pointed out that Interstate Compacts, which had been used nationally for such purposes as agreements to supervise parolees and probationers across borders, had also been frequently used regionally to deal with a specific problem that ran across borders.¹⁹ The report cited examples from metropolitan areas such as New York, Philadelphia, St. Louis, and Kansas City, and offered examples of the problems being address by such compacts, including construction of transportation facilities, pollution control, and operation of interstate parks.²⁰ Even more specifically, the report noted that there were also compacts between a group of bordering states and the federal government, such as the Delaware River Basin Compact.²¹ The report skipped over constitutional questions, finding that such arrangements could be put into action by simply creating coordinating legislation in the states and the federal government.²² According to the report, "It is legally possible to use a compact for any kind of joint or cooperative intergovernmental undertaking, simply because it is possible to write almost anything into statutes and contracts."²³ This approach took advantage of our preoccupation with rights, skipping over questions of the constitutionality of structural changes.

On the other hand, even without precedent, novel problems were considered sufficient reason for novel solutions. With all due respect to the founding fathers, the Johnson Administration was positive

17. Staff Paper, Council of State Gov'ts, Comm. on Reg'l & Interstate Cooperation, *Mechanisms for Intergovernmental Cooperation* 2-5 (1967) (Aides Files, Office Files of Gaither, Box 8, Lyndon Baines Johnson Library, Austin, Texas) [hereinafter *Mechanisms for Intergovernmental Cooperation*].

18. *Id.*

19. *Id.* at 2-3.

20. *Id.* at 2.

21. *Id.*

22. *Id.* at 3.

23. *Id.*

that "[i]n the 179th year of our Federal Union, our remarkable system of government is confronted by problems of a kind and a magnitude never imagined by the drafters of the Constitution."²⁴ The heart of the argument, as summarized by Congressman Fountain of North Carolina in a speech to the National Association of Counties, was that "[c]hanging conditions give rise to demands for new and expanded activities, . . . and these, in turn, necessitate interlevel adjustments if a federal system is to operate successfully."²⁵ A headline in the *New York Times* captured this moment in history: "Nation is Warned Unrest in Cities Imperils System."²⁶

Modernity was to blame for any limit in choices. "One choice that is *not* available to us is to continue the old system of unmanageable city government, inadequate State government, an uncoordinated Federal Government[,] and disjointed relations between Federal, State[,] and local levels."²⁷ As Health, Education, and Welfare Secretary John W. Gardener argued to the press in 1967, creative federalism was required "to replace a 'dying, or dead' system."²⁸ In the words of Congressman Fountain of North Carolina: "The challenge is now ours to discover practicable new methods for further strengthening the federal system to better serve contemporary America and future generations."²⁹ While he described the efforts as "strengthening the federal system," the reality, he admitted, was that "[p]olitical inventiveness is sorely needed."³⁰

It was already too late to fight changing the federal structure: it had happened while we were not looking, the Administration rationalized. Congressman Fountain of North Carolina argued that "[t]he clear-cut division of functions between the States and the National Government that was appropriate in the early days of the Republic, in time gave way to a sharing of certain responsibilities in re-

24. THE NEW FEDERALISM, *supra* note 6.

25. Congressman L. H. Fountain, Chairman, House Intergovernmental Relations Subcomm., Remarks at the Presentation of National Association of Counties' "Creative Federalism Award" 1 (Mar. 1, 1967) (Aides Files, Offices of Frederick Panzer, Box 358, Lyndon Baines Johnson Library, Austin, Texas).

26. Ben A. Franklin, *Nation is Warned Unrest in Cities Imperils System*, N.Y. TIMES, Jan. 31, 1968, at 1.

27. President Lyndon B. Johnson, Speech Draft: The Choices Before Us 3 (Oct. 2, 1967) (Aides Files, Office Files of Harry McPherson, Box 55, Lyndon Baines Johnson Library, Austin, Texas) (emphasis in original).

28. Elizabeth Shelton, *HEW Secretary Gardner Says: Creative Federalism Replaces Dead System*, WASH. POST, Mar. 23, 1967, at B1.

29. Fountain, *supra* note 25, at 2.

30. *Id.*

sponse to the advent of new economic and social conditions."³¹ Similarly, Orville L. Freeman, Secretary of Agriculture, contended that the traditional boxed hierarchy of federal, state, and local governments was a myth. Instead, he claimed that our government is "like a marble cake, in which the several levels of government are intertwined and interlocked."³²

The Committee for Economic Development issued a report finding that the combination of "[s]weeping initiatives by the national government" and "failures at the local level" had "alter[ed] the basic character of the American federal system."³³ The problem it found was that "[l]ocal governments tend to become administrative mechanisms for implementation of national policies, rather than dynamic centers of authority in their own individual right."³⁴ The argument suggested that a power shift had already occurred in the federal system and that Johnson's proposed changes would address this by returning more power to the people. Ironically, the alternative was demonized as contributing to the "ever-expanding activities" of the federal government.³⁵

While the Johnson Administration was publicly cautious about its critiques of existing federal structures, many of its supporters voiced what the Administration wanted to say. As John Fischer, editor at *Harper's Magazine*, explained in a lecture at the University of California, Santa Cruz, "our traditional forms of government have broken down."³⁶ The problem was that the "inherited machinery for running our states and counties and cities [was] often no longer [] working very well."³⁷ Fischer was willing to replace the "old structures of government" with "something quite different."³⁸ He knew that change would be slow and difficult, and therefore that "old

31. *Id.*

32. Orville L. Freeman, Sec'y of Agric., Remarks at the National Legislative Leaders Conference (June 16, 1966) (Aides Files, Office Files of Ceil Bellinger, Box 4, Lyndon Baines Johnson Library, Austin, Texas).

33. COMM. FOR ECON. DEV., REPORT ON MODERNIZING LOCAL GOVERNMENT 9 (1966) (Aides Files, Office Files of Ervin Duggan, Box 11, Lyndon Baines Johnson Library, Austin, Texas).

34. *Id.*

35. President Johnson, *supra* note 27, at 7.

36. John S. Fischer, Speech at the University of California at Santa Cruz (John S. Fischer Papers, MS Group 850, Series IV, Box 49, Folder 253, Yale University Manuscripts & Archives).

37. *Id.*

38. *Id.*

forms of government” would never “disappear entirely,” and that “the emerging patterns” would not be uniform across the country.³⁹

Most importantly, Fischer divulged the true secret of creative federalism: “The outlines of our present states and counties will remain generally unchanged;”⁴⁰ however, “the functions which they used to perform, and the new functions which they are incapable of performing, are likely to pass into the hands of new instruments of government.”⁴¹ Those new instruments would come in two forms – the two options that proponents pretended were pitted against each other – the vast expansion of the federal bureaucracy and the development of the regional agency.

The ARC was not born of the Johnson Administration’s creative thinking in governmental structures. The Commission directly developed from a national outcry following John F. Kennedy’s visit to West Virginia during his campaign.⁴² Media reports showcased intolerable poverty and inequality with a strong public response. As Johnson would later explain, it was an issue of “human compassion.”⁴³ Poverty in Appalachia offended the republican sense of equality and was frequently portrayed in comparison “to the rest of the country.”⁴⁴ There was a strong social response to poverty in Appalachia because such conditions were viewed as inconsistent with the nation as a whole – Appalachia was economically lagging behind the rest of the country.⁴⁵

39. *Id.*

40. *Id.*

41. *Id.*

42. Despite having spent substantial time scouring the Kennedy papers, I have never found any material suggesting that Kennedy went to Appalachia to talk about poverty, or to use poverty awareness as a part of his campaign platform. Primarily, the Kennedy trip to West Virginia appears to have been planned to test whether a Catholic candidate would fare well in a rural, Baptist state. Having found little information in the papers regarding the source of Kennedy’s interest in Appalachia, I raised this issue during an interview with Lee White, who served as White House Counsel to Kennedy, and later, Johnson. White confirmed my conclusions from the Kennedy papers by saying that Kennedy’s interest in Appalachian poverty was a result of his trip and experiences in Appalachia, and not the reason the trip was planned. Telephone Interview with Lee White, White House Counsel (Jan. 30, 2009).

43. Letter from President Lyndon B. Johnson to John W. McCormack, Speaker of the House 1 (Apr. 28, 1964) (Presidential Papers, Legislation, Box 30, Lyndon Baines Johnson Library, Austin, Texas) [hereinafter Letter from Johnson to McCormack].

44. APPALACHIAN REG’L COMM’N, STAFF REPORT 1 (1965) (Presidential Papers, Box 384, Lyndon Baines Johnson Library, Austin, Texas).

45. *Id.* at 2. Spatial metaphors of an Appalachia “behind” and “below,” as well as “isolated” from the United States as a whole were common. *See, e.g.*, APPALACHIAN REG’L COMM’N, SECOND ANNUAL REPORT OF THE APPALACHIAN REGIONAL COMMISSION 3, 31 (Apr. 2, 1968).

Kennedy was responsive. Upon entering office, he quickly directed the formation of his President's Appalachian Regional Commission (PARC) to develop a plan to target poverty and inequality in the region.⁴⁶

Despite the multiplicity of impoverished rural areas across the nation, the PARC Report presented Appalachia as an area with unusual problems.⁴⁷ In arguing for an Appalachian Program, PARC described Appalachia as a "region apart" that must be treated as a unit to successfully deal with socio-economic issues.⁴⁸ The PARC report claimed to provide "a program tailored to the needs of the Appalachian Region."⁴⁹ This was necessary due to the "complex and difficult problems that beset the region."⁵⁰ The ultimate conclusion was that "the problem under study is first and last a regional one which will yield only to regionwide [sic] attack as broad in concept as it is in geographic area."⁵¹ The report proposed a regional commission to address the Appalachian problems.

The PARC Report, which was issued in 1964 shortly after Kennedy's death, was apparently a surprise to the Johnson Administration—particularly when it came to suggesting a new regional governance structure. Internal memoranda suggest that the Johnson Administration was frustrated greatly that it did not have time to offer revisions to the PARC Report—that the Administration was not even asked for input—before the report was issued, and, subsequently leaked to the public. Congress and the public responded swiftly to the report, and the Appalachian Regional Development Act came before the House and Senate.

The ARC has a unique structure, presenting as a hybrid between federal agency and multi-state commission.⁵² The Commission has an Executive Director, who is appointed, and who works to imple-

46. The governors began meeting in consultation with Kennedy in May of 1960 and were formally convened by the President on April 9, 1963. See APPALACHIAN REG'L COMM'N, ANNUAL REPORT 10-11 (1967).

47. PRESIDENT'S APPALACHIAN REG'L COMM'N, SUMMARY REPORT OF THE PRESIDENT'S APPALACHIAN REGIONAL COMMISSION 1 (1964) (Presidential Papers, Box 264, Lyndon Baines Johnson Library, Austin, Texas) [hereinafter PARC REPORT].

48. *Id.*

49. Remarks from Franklin D. Roosevelt, Jr., Under Sec'y of Commerce and Chairman of the President's Appalachian Reg'l Comm'n, to the President (Presidential Papers, Box 264, Lyndon Baines Johnson Library, Austin, Texas).

50. *Id.*

51. PARC REPORT, *supra* note 47, at 2.

52. See APPALACHIAN REG'L COMM'N, 1976 ANNUAL REPORT (1977) [hereinafter 1976 ANNUAL REPORT].

ment policy.⁵³ However, policy decisions are made by a governing board with two co-chairmen.⁵⁴ The state governors or their appointed representatives are all members of the board.⁵⁵ One co-chairman is appointed as a federal representative.⁵⁶ The President controls this appointment, meaning that while Congress authorizes regular budgets with some strings attached, only the executive branch has a direct route to regional policy development.⁵⁷ The second co-chairman is elected from among the state governors.⁵⁸

Proposals may be initiated at the local level, but must be officially proposed by a state.⁵⁹ No proposals can originate at the federal level.⁶⁰ Funding for projects is intended to be derived equally from the federal government and the state governments, but there is some variation.⁶¹ According to the ARC, "Through the Commission device, it becomes possible for the States to consider policy jointly with a representative of the Federal Establishment and, in partnership, develop an approach to which the States and the Federal Government can both subscribe."⁶² This message is largely how the ARC was sold to Congress and to the American public: as an opportunity for federal and state governments to cooperate together on social programs.⁶³ More accurately, however, the ARC grounds power at the regional—not the state or local—level. This emphasis is clear in the decision-making mechanism for the Board; a majority of state governors and the federal representative must agree to any pro-

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. See APPALACHIAN REG'L COMM'N, 1978 ANNUAL REPORT 1 (1978).

60. *Id.* However, this statement is somewhat misleading; from the beginning, Congress laid the foundation for some projects, such as the development of the highway system, which would be region-wide. See Letter from Johnson to McCormack, *supra* note 43, at 1 (citing highway development as an important step in the Appalachian plan to be approved by Congress in the ARC bill).

61. Brinley J. Lewis, *New Subregional Budget Approach Gives States More Flexibility*, J. APPALACHIAN REGIONAL COMMISSION, Aug.-Sept. 1974, at 1.

62. *Governors' Views on Appalachian Regional Development Program*, APPALACHIAN, Mar. 1969, at 9, 10 (statement of Governor Mills E. Godwin of Virginia).

63. See, e.g., 1969 Amendments to Appalachian Regional Development Act and Title V Regions Under the Public Works and Economic Development Act: Hearings on H.R. 4018 and Related Bills Before the H. Comm. on Pub. Works, 91st Cong. 1-180 (1969).

positional, regardless of whether it is local or regional in origin and immediate scope.⁶⁴

Reactions to this proposal were not positive within Johnson's Administration. Harold Seidman, Assistant Director for Management and Organization, wrote on November 12, 1963, "We have most serious reservations about the proposal for an Appalachian Development Organization . . ." ⁶⁵ According to Seidman, "[T]he constitutional questions raised by the proposal . . . are very serious."⁶⁶ Seidman explained that it was not possible to allow "State governors to participate in the direction and control of a Federal agency."⁶⁷ Seidman raised two constitutional issues with the makeup of the proposed Commission's board of governors. First, Seidman objected to how "a limited number of State governors would be accorded authority with respect to Federal programs for which they could not be held responsible or accountable."⁶⁸ In addition, establishing governors as directors of the agency "would appear to conflict directly with Article 2, Section 2 of the Constitution which vests the appointment of Federal officers in the President, the courts of law[,] or the heads of departments."⁶⁹ As a result, Seidman described the ARC as not "responsive to Presidential direction and control," a problem compounded by the inability of the President to "remove any of the Corporation's directors."⁷⁰ Moreover, not only was the President unable to propose policy – since all proposals had to originate at the local level – but also an action "desired by the President" could be vetoed because "State representatives would have 50 percent of the vote."⁷¹

Seidman also noted, however, that objecting to the ARC's creation might not be politically desirable for the Johnson Administration.

64. 1976 ANNUAL REPORT, *supra* note 52, at 1.

65. Memorandum from Harold Seidman, *supra* note 4, at 1.

66. *Id.* The version of the PARC report that Seidman described was slightly different from the final bill that was passed – particularly in that there was no corporate form and no participation of federal agencies as directors. *See id.* Overall, Seidman's critiques were equally levied against both versions of the proposed commission. *See id.*

67. *Id.* at 3.

68. *Id.*

69. *Id.*

70. *Id.* Ironically, another shift of power has also occurred in this structure because, since 1965, many state constitutions, particularly in the Appalachian states, have been revised in a way that increases the role and powers of the governors. This, in turn, has resulted in corresponding decreases in the policymaking power of legislators and citizens. Page Ingraham et al., *States Strengthen Their Governments for Appalachian Development*, J. APPALACHIAN REGIONAL COMMISSION, June 1969, at 22, 25–26.

71. Memorandum from Harold Seidman, *supra* note 4, at 3.

Seidman explained that the PARC report had "already [been] leaked to the press and [was] being circulated to the governors in the Appalachian region for comment."⁷² Seidman concluded that "[i]f the proposal should receive the enthusiastic endorsement of the governors, it will be very difficult for the Administration to disavow the proposal or to obtain consideration of major modifications."⁷³

Not only were the Appalachian governors enthusiastic, the proposal met with so much public and legislative support that governors who had previously fought being included within Appalachia, such as Ohio,⁷⁴ sought to be included.⁷⁵ Support for the bill was so substantial that even as the bill was debated, discussion of the ARC's experimental structure was barely a footnote. And yet, minority views in the Committee on Public Works hearings on the House bill show that some members of Congress were concerned that the ARC was "a new federally controlled regional octopus."⁷⁶

In short, the focus was on poverty, and perhaps it was assumed impossible for a regional agency affecting only Appalachia to generate constitutional changes that threatened to change the national structure. Catch phrases triumphed over constitutional analysis. When constitutional questions arose, the changes were minimized. The ARC was described as an arrangement that would "promote more effective operation of the American federal system."⁷⁷ Rather than changing the existing system, the ARC exhibited a "new di-

72. *Id.* at 1.

73. *Id.*

74. Memorandum from President Lyndon B. Johnson to State Governors 1 (Apr. 28, 1964) (Presidential Papers, Legislative Background, ARDA, Box 11, Lyndon Baines Johnson Library, Austin, Texas). Indeed, the Ohio governor was skeptical of the wisdom of lumping Ohio in with Appalachia, but he faced such strong political support for the idea that he found himself with little choice but to yield. Both Ohio senators resolved that if the governor did not agree to bring Ohio in "voluntarily," then they would "propose amendments to bring the state in." Memorandum from Lee White to President Lyndon B. Johnson 1 (Apr. 27, 1964) (Presidential Papers, Legislative Background, ARDA, Box 1, Lyndon Baines Johnson Library, Austin, Texas).

75. Both Mississippi and New York would later follow suit. Mississippi's governor wrote to the White House seeking inclusion. See Memorandum from Harry C. McPherson, Jr., to Joe Califano (Jan. 4, 1967) (Presidential Papers, Box 264, Lyndon Baines Johnson Library, Austin, Texas). After a study of rural upstate New York counties, New York was invited to join the ARC through an early resolution. See Appalachian Regional Commission, Resolution No. 3, Aug. 18, 1965, Papers of Senator Jennings Randolph, West Virginia State Archives.

76. COMM. ON PUB. WORKS, APPALACHIAN REGIONAL DEVELOPMENT ACT OF 1964, H.R. REP. NO. 88-1641, at 36 (1964).

77. *Appalachian Governors Consider Future Regional Development at Tenth Annual Meeting*, J. APPALACHIAN REGIONAL COMMISSION, Oct. 1969, at 22 (quoting governors' resolution).

mension to the administration of the American federal system."⁷⁸ A report from the National Governors' Conference, for example, minimized the ARC's governmental changes by elaborating the limits of the Commission's power—its inability to own property or undertake regulatory activities—but neglected to analyze the ARC's affirmative grants of power.⁷⁹

President Johnson signed the ARC bill into law, never mentioning his constitutional concerns in public. Johnson could not risk being seen as opposing poverty relief or abandoning Kennedy's treasured program. Indeed, evidence suggests that some political actors were well aware of the power dynamics and took advantage of the President's weakness in this regard. Seidman, Assistant Director of Management and Operations, complained that the staff had "expressed . . . concerns to PARC staff and suggested a number of alternative courses of action," but found that their "advice and suggestions ha[d] been almost completely ignored."⁸⁰ And later, when Senator Jennings Randolph of West Virginia proposed major structural amendments to the ARC, he did not even contact the Johnson Administration before releasing his proposals to the public.⁸¹

If Johnson was angry, he treated the situation as if the glass were half full, choosing to characterize the ARC in many speeches as though it was a creation of his Administration that fell within his overall vision of creative federalism. Indeed, he capitalized on support for the ARC for his own program of creative federalism. And indeed, in spirit, the ARC fits with many of Johnson's initiatives

78. *Id.* (quoting Ralph R. Widner, Executive Director of the ARC).

79. Mechanisms for Intergovernmental Cooperation, *supra* note 17, at 3.

80. Memorandum from Harold Seidman, *supra* note 4, at 1.

81. Jennings' approach is clear from the Administration's reaction. See Memorandum from Bureau of the Budget to President Lyndon B. Johnson 1 (Jan. 26, 1967) (Presidential Papers, Legislation, Box 30, Lyndon Baines Johnson Library, Austin, Texas) [hereinafter Jan. 26 Memorandum from Bureau of the Budget to Johnson]. Such political tactics by leaders may, however, have resulted in problems for the ARC staff, who found that the executive office was increasingly distant and non-responsive in their working relationship. In 1966, John Sweeney of the ARC would write to Harry McPherson in the Administration that "[t]here has been some apprehension on the part of the Governors of the Appalachian States about a waning Presidential interest in the Appalachian program." Memorandum from John Sweeney to Harry McPherson, Jr. 1 (Feb. 1, 1966) (Presidential Papers, Box 264, Lyndon Baines Johnson Library, Austin, Texas). There is some evidence to support such a cooling in the relationship—one memo suggests that the Administration wished to "avoid getting entangled" in the details of the ARC's proposed changes and would have preferred to only offer general support to the continuance of the ARC. Memorandum from Harry C. McPherson, Jr., to Joe Califano, *supra* note 75.

such as the aligning of regional units of federal agencies,⁸² and the requirement that regional units cooperate and share information with local governments.⁸³ Coyly hinting at authorship, Johnson called the ARC "the truest example of creative federalism in our times."⁸⁴

But the ARC's constitutional story does not end with Johnson's signature on the legislation. Barely two years later, Senator Randolph proposed substantial amendments. On January 26, 1967, President Johnson received an analysis of Randolph's amendments from the attorneys in his Bureau of the Budget office. They concluded that "[t]he bill (S. 602) which Senator Randolph has introduced would make major and highly undesirable changes in the present Act."⁸⁵ The Administration was deeply concerned that "several provisions of his bill raise serious issues of policy and precedent--and may present constitutional questions."⁸⁶

The scope of the problem was not obvious from the text of the amendments themselves. The amendments eliminated one restriction in the original ARC structure: the provision stating "that no programs or projects shall be recommended by the Commission until submitted to and approved by the President or such Federal officer the President may designate."⁸⁷ This provision had, however, been a substantial limit on the power of the Commission to make recommendations that were then funneled through the appropriate federal agency, in essence slating the body to planning without effect. With the new amendments, appropriations would be made to the President who would pass them on to the ARC, allowing the agency to develop its own programming with independent funding.

82. On November 11, 1966, Johnson issued instructions to all of the federal agencies involved in state assistance to provide opportunities for the local governments "to advise and consult in the development and execution of programs which directly affect the conduct of state and local affairs." *THE NEW FEDERALISM*, *supra* note 6.

83. Johnson pushed for the "[u]tilization of common boundaries for planning and development districts and regions assisted by the Federal Government." He sought "consistency of such districts with established State planning development districts and regions." See W.K. Brussat, Remarks at the National Association of Counties Legislative Conference, Washington, D.C. 4 (undated draft) (Aides Files, Office Files of Frederick Panzer, Box 358, Lyndon Baines Johnson Library, Austin, Texas).

84. President Lyndon B. Johnson, Remarks at the Signing Ceremony on the Appalachia Bill (Mar. 9, 1965) (Aides Files, Office Files of Ceil Bellinger, Box 4, Lyndon Baines Johnson Library, Austin, Texas).

85. Jan. 26 Memorandum from Bureau of the Budget to Johnson, *supra* note 81, at 1.

86. *Id.*

87. *Id.*

Allowing the ARC to directly implement programming without the approval of individual federal agencies meant the creation of a powerful new regional unit—a hybrid where power vested in a federal representative and a committee of state governors. The problem, in the words of the Johnson Administration, was that Randolph’s amendments would “[c]onvert the Commission into a new type of governmental organization not clearly accountable to any responsible Government official or unit—Federal, State, or local.”⁸⁸ Moreover, this publicly unnoticed constitutional change held another threat for the Presidency: to appropriate funds and authorities directly to this Commission would set a very dangerous precedent for many others that would form later.⁸⁹

The Administration analyzed the situation and concluded that it could not risk the negative publicity of the President opposing amendments that were generous to the ARC. John Sweeney, the federal co-chair of the ARC, recommended that Senator Randolph’s bill be allowed to proceed “with no Administration opposition.”⁹⁰ Sweeney concluded that “the legislation is bound to come out the way Senator Randolph is proposing it, and that the Administration should not oppose it.”⁹¹ The President had been vocally supportive of poverty relief in Appalachia, even touting his grandparents’ roots in eastern Kentucky.⁹² To oppose the amendments would risk appearing uncertain and uncommitted, or worse, as a turn-coat.⁹³

With no powerful opponents to Randolph’s bill, hearings for the amendments failed to raise constitutional questions. When the House Committee on Public Works issued its report on August 8, 1967, the Committee recommended the bill for passage. Ironically, the Committee began its report with a commentary on the unique structure of the ARC: “The Appalachian Regional Development Act of 1965 was experimental in several respects. The creation of a Federal-State commission to administer the program was an innovation in federalism.”⁹⁴ The Committee went on to conclude that the

88. *Id.* at 2.

89. *See id.*

90. Memorandum from Bureau of the Budget to Lyndon B. Johnson 2 (Jan. 17, 1967) (Presidential Files, Legislation, Box 30, Lyndon Baines Johnson Library, Austin, Texas) [hereinafter Jan. 17 Memorandum from Bureau of the Budget to President Lyndon B. Johnson].

91. *Id.*

92. *President Johnson Has Kentucky Roots*, PARK CITY DAILY NEWS, Nov. 24, 1963, at 14.

93. And, indeed, the Administration conceded that the ARC had “done a very good job in developing reasonable programs and making hard decisions.” Jan. 17 Memorandum from Bureau of the Budget to President Lyndon B. Johnson, *supra* note 90, at 2.

94. H.R. REP. NO. 90-548, at 1 (1967).

amending bill “provides only minor changes in the structure of the Commission.”⁹⁵ Avoiding the question of a structural change or an enlargement of powers, the Committee spoke of a “redefinition of the responsibilities of the Commission.”⁹⁶ In describing the original powers of the ARC, the Committee on Public Works explained that, “[t]o safeguard the interest of the Federal Government, the act presently provides that all Commission actions on projects and programs are in the form of recommendations to departments of the Federal Government.”⁹⁷ The Committee explained that, for example, mine reclamation projects were “subject to the authority of the Secretary of the Interior.”⁹⁸

To explain the proposed amendments, the Committee found that “[i]t was probably wise to adopt this system for a 2-year trial period,” but that “[t]he considerations which prompted it [have] pas[sed].”⁹⁹ Without questioning the constitutionality of such changes, the Committee simply found that “[t]he Commission’s record of accomplishment during the 2 years of its existence has established clearly that it is capable of making sound decisions,” and therefore, that it was appropriate for the amendments to provide that “the Commission’s judgments shall be final and not subject to further review by the Federal agencies carrying out such program[s].”¹⁰⁰ Rather than receiving programmatic suggestions from the ARC, the federal agencies were now ordered to work through liaisons with the ARC, which would develop and implement its own programs.¹⁰¹

Simultaneously, the Committee also recommended an amendment consolidating funding for the ARC, which had previously been funded through the individual federal agencies with oversight powers.¹⁰² The Committee’s recommendations were deeply ironic given that three years earlier it had justified the ARC bill by saying that the ARC was “not . . . an operating agency” precisely because it would have “no authority over other agenc[ies].”¹⁰³

95. *Id.* at 5.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 5–6.

101. *See id.* at 6; Exec. Order No. 11,386, 33 Fed. Reg. 5 (Jan. 3, 1968).

102. H.R. REP. NO. 90–548, *supra* note 94, at 5–6.

103. COMM. ON PUB. WORKS, *supra* note 76, at 4 (emphasis removed from original).

In short, public support for anti-poverty programs, and a willingness to trust an agency that had behaved well, combined to overpower constitutional concerns. Only one of the original constitutional safeguards remained after the 1967 amendments: while funds were consolidated rather than being dispersed within other federal budgeting plans, the ARC funds were still appropriated to the President rather than to the agency directly.

In 1998, when the ARC was again amended, the last constitutional safeguard fell away without debate when funds were “authorized to be appropriated to the Commission to carry out this Act.”¹⁰⁴ A provision that was once added to allay fears of unconstitutional changes to our structures and institutions fell by the wayside through a slow shift of power over three decades.

Both scholarship and public attention focus on narrative history and human agency. Unfortunately, there is no democratic constitutionalism to be found here. The ARC’s constitutional history is more about inaction than action, more about disinterest and omission than debate and emotion. For the public, inattention is a product, in part, of modern media. Such histories do not fit within sound-bytes, even though without them we are unaware of “where we have come from and how we have become what we are.”¹⁰⁵ For scholars and historians, our pull to narrative history blinds us. We focus on “human responsibility, on individual personalities and on unique public happenings,” for such things are easier understood and easier published.¹⁰⁶ The realities are not sexy; they are complicated. As Martin Loughlin observed, “[c]onstitutional theory does not involve an inquiry into ideal forms, since otherwise it would be completely absorbed into political philosophy.”¹⁰⁷ Our structural changes have been incremental, non-textual, and more likely the by-product of successful mobilization than the product of sustained dialogue. Yet, during some periods, such as Johnson’s Presidency, the changes have been remarkably rapid.

At the end of his Presidency, as Johnson reflected on how both executive power and the federal bureaucracy had rapidly expanded as well as how the ARC had been established with little concern for

104. Economic Development Administration and Appalachian Regional Development Reform Act of 1998, Pub. L. No. 105-393, § 221, 112 Stat. 3596, 3625 (1998).

105. GORDON S. WOOD, *THE PURPOSE OF THE PAST: REFLECTIONS ON THE USES OF HISTORY* 16 (2008).

106. *Id.* at 40.

107. Martin Loughlin, *Constitutional Theory: A 25th Anniversary Essay*, 25 OXFORD J. LEGAL STUD. 183, 186 (2005).

a new governance structure that broke the federal-state dichotomy of our system, the tone of notes and memoranda begin to shift. The President was not simply concerned; he was angry. Johnson had signed the ARC Act and subsequent amendments even though his advisors cautioned that the Commission would be “a new type of governmental organization not clearly accountable to any responsible Government official or unit—Federal, State, or local.”¹⁰⁸ No one called him on it. Johnson had built executive power and federal bureaucracy to respond to issues such as crime waves, urban blight, and multi-district environmental problems, but in the end there was a sense that the President looked at his creation fearfully, as though it was something unintended and uncontrollable.

Near the end of his Presidency, Johnson met with his aide, Harry McPherson, to develop ideas for a capstone speech. Johnson and his aide would never finish this speech, but I do not particularly lament that fact, as McPherson’s notes would likely have been transformed into something polished and careful. Instead, the record we have is almost certainly a series of direct quotes from Johnson—an unclouded window into his thinking on federalism and the growth of the executive branch, which likely would never have been presented to the public.

At the end of his Presidency, Johnson worried about the “nuts and bolts” of governance and, in fact, he was deeply concerned about the new patterns of government that had developed during his time in office. At the end of his tenure, Johnson understood that structural constitutional changes can take place under the radar, slowly and incrementally, in ways that eventually stress the original balance of powers. Most of all, Johnson was alarmed that substantial, structural constitutional change had occurred and that *the American public had not even noticed*. In his final presidential words, Johnson wanted to exhort Americans to pay attention: “[T]his is a self-governing society, and you too must be preoccupied with statecraft.”¹⁰⁹

Johnson’s temporal word choice is critical. He asks Americans to be *preoccupied* with statecraft—to not only think deeply but to think continually. We want and need for our structures to be flexible and responsive, as Sanford Levinson and Jack Balkin explained in their

108. Jan. 26 Memorandum from Bureau of the Budget to Johnson, *supra* note 81, at 2.

109. McPherson’s unpublished notes on Johnson’s Speech, *supra* note 5.

recent article on constitutional dictatorship.¹¹⁰ But those structures must also be resilient, able to elastically return to their previous proportions when a crisis has passed. Unfortunately, bureaucracy moves to fill vacuums, and power wielded is rarely casually surrendered; incremental shifts are likely to endure unless explicitly revoked.

If Ackerman prescribes vigilance, Johnson would have agreed. For scholars, such a commitment requires us to take constitutional thought beyond the narrow bounds of judicial decision-making, beyond the dichotomous framework of a constitutional violation, and beyond precedents to trajectories, and open our minds to the possibilities of unintentional constitutional change.

110. Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789 (2010).