The Implosion of American Federalism

Robert F. Nagel

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Anyone who reads both this book and any of the material from which it evolved will see that my larger theme took shape slowly and only after my examination of various particular issues. I am grateful to the people and institutions that provided me with opportunities to gradually work out what I had to say.

Boulder, Colorado

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1

Introduction: Explosion or Implosion?

I

Is the United States coming apart? To put the question more delicately, is the constitutional structure of the United States undergoing a dangerous shift toward disunification? Although a basic theme to be developed in this book is that in fact the opposite is happening—that is, our political institutions are collapsing into the center—at the outset it is important to acknowledge what certainly appear to be signs of fragmentation.

The most visible and disturbing of these signs is the appearance of deep and apparently insoluble cultural and political conflicts. Disagreement about issues like abortion, homosexuality, and the place of religion in public life is sufficiently profound and systematic as to suggest that Americans are split by two fundamentally different worldviews. The danger is that this division is too wide for discourse or compromise, indeed, too wide for any peaceful resolution.[1] Similarly, multiculturalism's unsettling claims about collective guilt and racial entitlement raise the possibility of a moral and perceptual rupture significant enough to evoke images of breakdown and bloodshed.[2]

Even without violence, intractable disagreements might produce fragmentation by undermining our sense of national identity.[3] At the least, the

idea of an American "people" is surely put under strain by the level of suspicion and animosity engendered by unbridgeable dissensus. Even a common commitment to that central tenet of our national political identity, the Constitution, has been undermined by intense struggles over the right to privacy, the meaning of equal protection, and the importance of freedom of speech.

Beneath the bland homogenization produced by modern commercial life, then, can be found a people sharply divided by class, religion, race, ethnicity, and gender. Indeed, at the end of his perceptive chronicle of ordinary lives lived just out of sight under the veneer of the "new South," the respected reporter Tony Horwitz asserts that the whole idea of an American people united by a commitment to basic principles is in question. He goes so far as to conclude that the issue posed by the Civil War—"Would America remain one nation?"—remains "raw and unresolved. . . ."[4]

To the extent that the psychological bases of nationhood are under strain, it is not unrealistic to expect eventual institutional transformation. Indeed, an obvious, if troubling, adjustment for a country that is too large, too diverse, and too riven would be to move toward some form of confederation, a move that (as we shall see) is commonly and urgently discussed in elite intellectual circles.[5]

Quite aside from the strains produced by multiculturalism and by the moral divisions referred to as the "culture wars," it is easy to see in modern events some bases for the fear of disintegration. Former states like the Soviet Union and Yugoslavia have broken up, while nearby Canada is threatened by linguistic and political divisions. Great Britain is decentralizing its governance in significant ways. In the United States, much of the news during the last half a century—violent resistance to school desegregation, periodic waves of urban rioting, occasional but horrific acts of terrorism, and the sinister presence of militia organizations—is unnerving. A sign of how unsettling this backdrop has been is that during the debates over the impeachment of President Clinton, his defenders repeatedly and earnestly characterized the process as an attempted "coup d'etat."

Less dramatic events and trends have also made disintegration seem possible. Technological innovations like the Internet, while powerfully cohesive in some ways, raise the specter of small, intensely organized groups scattering the precious resources of loyalty and commonality. These innovations also make possible international markets, which are giving rise to transnational institutions that could reduce the importance of traditional nation-states. Moreover, as Keith Whittington has observed, a range of important modern developments are undermining the centralized bureaucracy upon which national domestic power depends.[6] Some of these developments, such as the

growing distrust of the federal government and widespread acknowledgment of fiscal limits, have obvious implications. Others, such as the rise of special-interest politics and the development of postindustrial management techniques, have indirect implications, since they discredit the ethic of technocracy upon which the national administrative structure is based. It may even be, as Michael S. Greve (a founder of the Center for Individual Rights) has suggested, that in recent years a pro–states' rights coalition of disaffected, populist groups has emerged as a potentially sustained and significant political force.[7]

All these events and trends are converging on what is still a very young nation. It was only a few generations ago that the American experiment stood as a colossal failure as a massive and bloody civil war tore the nation apart. The potent and continuing centralization of authority that began with the New Deal is historically recent and still controversial both intellectually and, to a degree, politically.

This relatively young American political identity, beset (as it is) by unruly events and fundamental socioeconomic shifts, at its base is rooted in fear of disunity. The founding document, the Constitution of 1787, was debated against a backdrop of rebellion, defiance, and factionalism. Disintegration seemed almost a law of nature: "[I]n every political association which is formed upon the principle of uniting in a common interest a number of lesser sovereignties, there will be found a kind of eccentric tendency in the subordinate . . . orbs by the operation of which there will be a perpetual effort in each to fly off from the common center."[8] Proponents of the Constitution referred to this centrifugal principle not only in explaining the need for a stronger national government but also in minimizing the risks of centralization. Thus the authors of *The Federalist Papers* argued that there was a greater likelihood that the states would encroach on national authority than that the central government would usurp state authority. Again invoking the laws of physics, they repeatedly urged that human affection is "weak in proportion to the distance or diffusiveness of the object."[9] While the "strong propensity of the human heart would find powerful auxiliaries in the objects of State regulation," the operations of the national government would be less tangible and therefore "less likely to inspire an habitual sense of obligation. . . ."[10] Supported by the loyalty of their citizens, states would be "at all times a complete counterpoise, and, not infrequently, dangerous rivals to the power of the Union."[11]

All this might be dismissed as strategic argumentation on behalf of the new Constitution, but the ideas and sentiments were real and are enduring. Writing some four decades after ratification, Alexis de Tocqueville observed

that "the Union watches over the general interests of the country; but the general interests of a people have but questionable influence upon individual happiness. . . ."[12] He thought, therefore, that Americans had a greater stake in the states than in the Union. Tocqueville went so far as to say: "I am strangely mistaken if the Federal government . . . is not constantly losing strength, retiring gradually from public affairs, and narrowing its circle of action. It is naturally feeble. . . . On the other hand, I thought that I noticed a more lively sense of independence and a more decided attachment to their separate governments in the states."[13] Aside from the political psychology thought to flow from the division of regulatory authority between the states and the central government, Tocqueville, like the framers, was naturally moved by geographic considerations. In a vast country "still half wilderness" he thought that the Union could no more enforce its will militarily than could distant England during the American War of Independence.[14]

Indeed, what had seemed to the framers at the end of the eighteenth century to be natural centrifugal forces must have appeared during much of the nineteenth century to be a veritable explosion. Putting aside for a moment the most momentous event of that century, the Civil War, consider the enormous release of energy represented by the western expansion. In Frederick Jackson Turner's famous depiction, wave after wave of settlers, by necessity highly individualistic and fiercely attached to their new local governments, exploded into the vast western lands.[15] At least as a visual image, this wild dispersal seems a massive confirmation of the framers' natural principle that there is "a perpetual effort . . . to fly off from the common center."

With this kind of history, it is no surprise that the fear of disintegration is characteristically American. The historian Robert Wiebe has described how a deep and pervasive pattern of social "segmentation" in the United States has long aroused anxiety about political disintegration. Confidence in unity has been undermined by innumerable "small social units—primary circles of identity, values, associations, and goals."[16] These units can be governmental, but they can also be familial, religious, occupational, and ethnic. Of the unease created by this segmentation, Wiebe says: "It was as if each compartment, unable to hear or see clearly what lay beyond its walls, required constant reassurance that it was indeed connected with the next unit and the next and the next in a common, rewarding enterprise."[17] This "longing for cohesion" has, of course, had many kinds of consequences. Wiebe points out, for instance, that it has fueled a series of great national reform movements and that it has helped to create psychological dependence on law, courts, and constitutional myths. "Even a modern elite," says Wiebe, "require[s] the comfort that only an overarching form [can] provide."[18]

And, indeed, in the writings of the contemporary constitutional law elite can be found signs of deep anxiety about disintegration. Consider the frightened criticisms of *National League of Cities v. Usery*, a 1976 case that in fact turned out to have little legal significance and to pose no danger to the power of the central government. *National League of Cities* declared that the national government lacked authority to regulate the wages and hours of state employees. Justice Brennan, whose dissent was joined by two other justices, reacted to this decision by charging that the majority's analysis was "not far different" from the judicial doctrines that had threatened the New Deal. Did this sophisticated jurist really fear, as this comparison (and much of his analysis) suggests, that the Court might soon strip the national government of powers essential to its modern role, even including the power to cope with economic crises? Here are the words he chose to describe the Court's decision: "profoundly pernicious," "alarming," "startling," and "catastrophic." Despite acknowledging that as a practical matter Congress could evade *National League of Cities* by using conditional appropriations rather than commerce power regulations, Brennan's dissent depicted the Court's decision as "an ominous portent of disruption of our constitutional structure. . . ."[19]

Roughly twenty years later in *U.S. Term Limits, Inc. v. Thornton* we find virtually the same words, this time in a majority opinion. State-imposed congressional term limits, said the majority, "would effect a fundamental change in the constitutional framework." The Court went on to explain that state qualifications for national office would threaten the understanding that members of Congress "become, when elected, servants of the people of the United States." Or, as the Court also put it, state term limits would conflict with the principle that "representatives owe their allegiance to the people, and not to the States."[20]

Now, as with the issue at stake in *National League of Cities*, the actual operational significance of the constitutional issue in *Term Limits* is difficult to discern. No matter what the result in that case, voters, of course, can and do elect to Congress individuals whose loyalties are in part highly parochial. Our present "constitutional framework"—including the vast powers routinely exercised by the national government—has emerged from laws enacted by Congresses made up of such people. Nevertheless, five justices feared that term limits would undermine nationhood. Indeed, the majority felt it necessary to deny that this nation is "a collection of states" and that Congress is a "confederation of nations." Justice Kennedy, often described as moderate and thoughtful, went so far as to attack the notion that "the sole political identity of an American is with the State of his or her residence."[21]

Fear of disintegration is expressed more fully in *National League of Cities* and *Term Limits* than in most opinions, but the theme is taken up by various justices in a number of intervening decisions. Like rustling in the dark, they hear around them "the spirit of the Articles of Confederation,"[22] and they see lurking behind modern constitutional arguments the position that the United States does not "constitute a nation."[23] I recognize that overwrought language is a regular aspect of the adjudicative process, especially in constitutional cases. But it will not do to pretend that the particular words repeatedly chosen by the justices reveal nothing at all about their beliefs and fears. These words suggest that informed and intelligent justices believe that our nationhood is contested and fragile. Even as the huge apparatus of the U.S. government strides along at the apex of its regulatory powers, many justices are beset by a bleak vision of structural disintegration.

This judicial vision of national disunification is echoed by elite commentators. The Pulitzer Prize–winning journalist Linda Greenhouse, writing in the *New York Times* about the four justices who had voted to uphold state term limits, declared that "it is only a slight exaggeration to say that . . . the Court [is] a single vote shy of reinstalling the Articles of Confederation."[24] The depth of anxiety that is revealed in this sentence can be appreciated only by pausing to recall that if the Articles of Confederation were to be reinstalled, the national government would have to be dismantled. The House of Representatives, the presidency, the judicial branch (with the exception of the maritime courts), the Bill of Rights, national taxation, and the vast system of regulation based on Congress's power to regulate commerce among the states—all would have to be terminated. Obviously, Greenhouse has overstated more than slightly, but should we, then, dismiss her reporting as mere propaganda or burlesque? I think not. Even if her coy reference to "a slight exaggeration" is read as ironic, Greenhouse's apparent lack of embarrassment—her sincere sense of crisis—reveals how acutely and instinctively she senses weakness in our constitutional structure. In this she is not alone. Many other prominent journalists and scholars have reacted to recent federalism cases by openly worrying about the security of the New Deal and even Reconstruction.[25]

Not all observers are frightened by the prospect of significant decentralization. Roger Pilon of the Cato Institute approvingly said that "[t]he Court is reaching the question at the heart of it all: Did we authorize all this government?"[26] The conservative law professor Steven Calabresi approvingly described one important federalism case as "revolutionary."[27] Michael Greve has proposed that a "federalist revival" led by the Supreme Court is now a practical possibility.[28]

The belief that the courts may be on the verge of imposing important alterations in the federal system is understandable. As I will describe in subsequent chapters, the Supreme Court has issued a series of important, sometimes startling rulings that favor "states rights." Even sophisticated observers, those who are not inclined to overreact to every lurch in the case law or to overestimate the actual capacity of the Court to achieve its objectives, might well take the view that serious change is at hand.[29] After all, the fact that we are accustomed to living under a fairly centralized administrative state does not foreclose dramatic revisions to that structure; periods of radical transformation do occur. When intellectual themes in judicial decisions are not only potentially far-reaching but persistent and when those themes reflect wider social factors and historical trends, it is possible that the Supreme Court may be signaling, or even helping to induce, one of those transformations.

II

The disconcerting fact, however, is that—if we blink—both our current situation and our history can appear in just the opposite way. Today the United States is virtually unchallenged as the world's leading power both militarily and politically. The American people's loyalty to their central government has been cemented by the shared sacrifices of two world wars. The nation's constitutional forms are admired and copied around the world. And it is undeniable that a vast expansion and consolidation of national power has been under way for fully sixty years.

By now it is clear that some aspects of the writings of both the framers of the Constitution and later observers like Tocqueville significantly underestimated the forces that would favor centralization. They could not, of course, have foreseen how the physical conditions that created centrifugal forces at the time of the framing would eventually give way to a country linked by airplane, television, and computer. But even in their own time, the founders' claim that the operations of the national government would involve relatively abstract matters unlikely to generate "affection, esteem, and reverence towards the government"[30] ignored two of the most visible and potent powers of the national government: the power to make war and the power to spend public funds. Moreover, it was profoundly unrealistic for the framers to have argued that the tangible concerns of local government would be a source of popular allegiance *and* that these concerns would hold only "slender allurements" for the ambitions of national leaders.[31] It is doubtful that national leaders were ever too proud to seek power by attending to at least

some of the concrete needs of their constituents, and today, of course, national leaders routinely seek to build coalitions by catering to the public's desire for smaller classrooms, safer streets, cheaper prescription drugs, and so on endlessly.

Even aside from the obvious political incentives for invading areas of state regulation, there remains the great driving force of idealism. If the twentieth century holds no other lessons, it has emphatically taught that the rationalistic passion for engineered progress demands uniformity. To the extent that a political outcome is thought to be morally certain or intellectually required, it is natural that it should seem as compulsory for South Carolina as for Connecticut.

True, the United States is a relatively young nation. But the Articles of Confederation were replaced more than two centuries ago, and it has been over a hundred years since the Civil War ended—with the nation preserved. As for the nineteenth century, Frederick Jackson Turner accompanied his depiction of the physical explosion of settlers across the new land with an acute political and cultural analysis indicating that the perverse effect of the expansion was to strengthen national identity. Each migration freed some ethnic group from its roots, and "the crucible of the frontier" created "a composite nationality for the American people."[32] The frontier, argued Turner, encouraged personal traits such as individualism and optimism, as well as political skills and inclinations, all of which in the end aided nationalization. Indeed, the question that emerges from Turner's book is not whether the United States would "fly apart" but whether someday—with the frontier finally closed down—the nationalizing forces unleashed by westward expansion might lead to forms of political immaturity: "[T]he democracy born of free land, strong in selfishness and individualism, intolerant of administrative experience and education, and pressing individual liberty beyond its proper bounds, has its dangers as well as its benefits."[33] If excessive individualism can lead to centralization, a paradoxical possibility is that nationalization, having been set in motion by the opening of the frontier, is now being accelerated by its closing. From our modern vantage point, the danger unleashed by the closing of the frontier might be visualized as political and cultural implosion. That is, it may be that the prodigious energy of the American people, now physically confined, is breaking down those structures that allow the country's institutions to withstand the gravitational pull of the center. Today we may be witnessing the rapid realization of Tocqueville's foreboding vision of a mass of striving but disconnected individuals "endeavoring to procure the . . . pleasures with which they glut their lives" under the shadow of one "immense and tutelary power. . . ."[34]

The rest of this book is an effort to explore this possibility. The materials examined are primarily contemporary writings about our overarching form, the law of the Constitution. These materials are not, needless to say, a definitive basis for prediction. They are nevertheless highly appropriate because, as I will suggest in the course of this book, constitutional argumentation is one of the important activities to which the individualism, impatience, and perfectionism associated with the American frontier have now been transferred. It is, that is to say, one of the mechanisms breaking down the understandings and social structures that maintain federalism.

Short of this (perhaps) unlikely conclusion, I hope these materials provide a useful opportunity for reflection and perspective. They strongly suggest that the current focus on the Supreme Court as protector of states is a sign, not of resurgent state power, but of a depleted political imagination. The terms of constitutional debate, as well as a sober assessment of the outcomes of judicial cases, indicate that federal judges do not and cannot appreciate a robust federalism. Indeed, in many ways the Court's place in our governmental structure and, even more importantly, its intellectual and professional dispositions disqualify the justices from any significant part in nurturing a strong form of federalism. That so many of the hopes and fears arising out of contemporary federalism issues should be riveted on this supremely unlikely institution is itself a discouraging sign of implosion. While on a superficial level the courts may be protecting the constitutional role of states, at a deeper level they are at war with the intermediate structures and political understandings that can sustain significant levels of competition between the states and the nation.

This book is not primarily intended as a call for change. Indeed, a major theme in what follows is that we may well already be past the point of no return, that the great moral, political, and cultural mass at the center is overwhelming weak institutions and practices at the periphery and is likely to become more overwhelming by virtue of these successes. Seen from this vantage point, the Court's small but highly controversial efforts at promoting decentralization are significant mainly in revealing a partial awareness, shared by many around the country and applauded by most, of the powerful centralizing trends that are in place.

III

If most observers applaud the centralizing trends that are now in place, why—aside from quieting excessive fears of political disintegration and jeopardizing whatever legitimizing force the original constitutional understanding

entails—do these trends matter? Two law professors, Edward Rubin and Malcolm Feeley, put this question provocatively when they assert, "Most of our states . . . are mere administrative units, rectangular swatches of the prairie with nothing but their legal definitions to distinguish them from one another."[35] Rubin and Feeley go so far as to conclude that residual American concern about state sovereignty can only be explained as an indication of neurosis.

The professors' unblinking use of the word "neurosis" confirms the late Christopher Lasch's observation that the professional, managerial class which identifies so strongly with national political institutions has long viewed mainstream Americans as "inmates of an insane asylum."[36] Their reference to "rectangular swatches of the prairie" demonstrates less about the nature of local political communities in the United States than about the social insulation of many intellectuals. Contrast Rubin and Feeley's view, which sounds suspiciously as if it might be based at least in part on many hours of flying over the country, with the rich perceptions that can arise from living in and studying places where people live. The sociologist E. Digby Baltzell, for instance, has contrasted "puritan Boston" with his own "quaker Philadelphia."[37] He describes striking and persistent differences in family life, leadership patterns, architecture, education, and politics. Whether or not one fully accepts Baltzell's audacious claim that these differences can be traced back to the divergent religious worldviews held by early settlers in each area, the kind of detailed observations he provides should put to rest any superficial notion of complete national homogenization. To the extent that cultural, economic, and physical differences still exist in this large country, political implosion means that there is less likelihood that local needs and values will be served. Other important virtues of a federal system—such as the possibility of certain kinds of competition among governments, the opportunity for a wide range of entry points for political participation, and the option of "exit" for the disaffected—will also be jeopardized.

But beyond these conventional justifications for federalism lies another set of considerations that will emerge in the chapters that follow. Excessive nationalization, I will try to show, is both a result and a cause of some unfortunate changes in the character of the American people. I will explain how it reflects and induces a yearning for intellectual simplicity and closure, a panicky inability to tolerate conflict and variety, a servile and needy attachment to authority, and a childish, dishonest public discourse. These weaknesses, I will argue, are exhibited not only in the Supreme Court's federalism decisions themselves (which are discussed in chapters 1–5) but also in important cases involving judicial supremacy, the status of homosexuals, and

the right of privacy (which are discussed in chapters 6–9). Thus, the work product of the very institution so often seen as the defender of states' rights is actually an embodiment of cultural trends that are inimical to the federal system. Moreover, I will argue (in chapters 10–11) that the pervasiveness of these trends is evident in the nature of contemporary political debate, especially debate concerning that other institution deeply symbolic of national unity, the presidency. I close by examining the controversy over President Clinton's impeachment in an effort to demonstrate that contemporary American devotion to constitutional argumentation and legalistic solutions is itself an important sign of implosive cultural weaknesses.

In short, the reason to regret the implosion of American federalism—and to resist this collapse, at least to the extent that resistance is feasible—ultimately has to do with the quality of our society. The personal and institutional energy that has long kept our political system from being absorbed into its center has also helped to anchor our dealings in some degree of moderation, maturity, and realism. Even the many and palpable benefits of national unity, therefore, may well depend on those centrifugal political and cultural forces that are in decline.

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2

The Futile Idea of Limited Powers

I

The original theory behind our Constitution was that the natural operation of centrifugal political forces would ensure that the objectives of national policy remained defined and limited. Not only would the local loyalties and affinities of the people provide pressure against national regulations exceeding the scope of the powers enumerated in the Constitution, but state governments would stand ready "to mark the innovation, to sound the alarm to the people. . . ."[1] Indeed, once alerted, the people would be able—through their state governments—to create "plans of resistance," which ultimately would be backed by "trial of force."[2] To modern ears, of course, such references to armed resistance sound odd and unserious, but the argument was pursued doggedly by the proponents of the new Constitution. *The Federalist* contains projections of the likely maximum number of soldiers in a national army (not more than "twenty-five or thirty thousand men") and envisions an encounter between that army and state militias "amounting to near half a million of citizens with arms in their hands. . . ."[3]

This ferocious talk of conflict is easily ignored today; we are more inclined to credit legal and institutional assurances than arguments based on

the psychology of loyalty and the methods of popular resistance. The more primitive bases for decentralization, however, must have seemed plausible to a people who had fought a war for independence and then lived through a period of political chaos. At any rate, it is quite clear that the Constitution was enacted partly in reliance on the argument that the preservation of broad regulatory power at the state and local level would ensure a sufficient supply of centrifugal political energy to maintain a national government of limited powers. This, it was thought, would help preserve the people's liberties. Moreover, national representatives, concerned primarily with matters of state, would be deliberative while state officials would keep regulation of the "variety of more minute interests" aligned with local circumstances.[4] In this way our political structure would combine public-spiritedness with responsiveness.

This subtle and, in some ways, implausible theory has proven to be surprisingly successful in operation. Indeed, throughout our history state and local governments have exercised power over the ordering of everyday life so steadily and so routinely that this state of affairs is easy to overlook.

Even taking into account the continuing vitality of the states and their political subdivisions, however, it is simply no longer credible to believe that the national government is restricted to an enumerated set of powers. By degrees and for largely understandable reasons, the courts, the Congress, and the regulatory bureaucracies have gradually expanded the jurisdiction of the central government into all areas of life. It is not possible to get medical care or attend a public school or plan for retirement or seek support payments from an absent spouse or flirt with a coworker or find a parking space at a community recreational facility or advertise the availability of a basement apartment or prosecute an ordinary street crime—or do just about anything else—without running into at least the possibility of federal authority.[5]

This steady and by now vast expansion of the role of the national government has been sponsored by both conservatives and liberals. It grows at an accelerating pace partly because as each new issue is nationalized, old expectations, taboos, and beliefs fall away. As the range of issues assumed to be solidly preserved for local regulation dwindles, it is easier and easier to propose the next issue for nationalization. Indeed, the logic of political competition requires that one initiative for nationalization will often elicit another. If liberal jurists nationalize a right to abortion, congressional conservatives reply (drawing on theories originally designed to expand federalized voting rights) by attempting to expand the definition of "person" to include fetal life.

The growth of the central authority feeds on itself also because people's attention and emotional attachment tend to shift to the national government as it becomes the source of authoritative regulations affecting their immediate and concrete interests. Once the national government had established its moral status by vindicating the rights of racial minorities to equal housing and employment, it was only natural that the claims of other groups, like the disabled and homosexuals, should be resolved in the same forum.

In short, with each increase in the scope of national regulation, the intellectual and psychological resistance to further increases diminishes. This implosive cycle is still new enough that observers comment on it, people are a bit surprised by it, and on any particular policy some faction will resent it, but the great inertial weight of familiarity and normalcy has begun to shift decisively. State authority continues to exist and to be important, of course, but national authority increasingly fills the same jurisdictional space. The framers said that competitive political energies at the periphery would keep this from happening, but in this they were wrong.

It was against this backdrop that in 1995 the Supreme Court stunned the elite who practice and comment on constitutional law. In *United States v. Lopez* the Court attempted for the first time in five decades to impose a limit on congressional power to regulate "commerce among the states."[6] The *Lopez* decision, then, raises the possibility that the judiciary may be beginning the process of reversing the modern trend toward limitless national regulatory authority. In so doing, the Court might help to reestablish some of the political energy at the periphery that the framers assumed would be a by-product of the unique relationship that would exist between local governments and their citizens. For some, this raises the radical possibility of a reestablishment of the proper (but, by now, unfamiliar) constitutional structure, and for others it raises the possibility of a slide into disunification.

Lopez, therefore, is worth thinking about. But what a sober examination shows, I think, is that the idea of limited national power is not judicially enforceable. That is, despite the outcome in *Lopez*, the only effective constraints on national regulatory power are the ones that are already in decline.

II

The statute invalidated by the Court in the *Lopez* decision was a direct outgrowth of the modern mind-set that expects and desires an unlimited regulatory jurisdiction for the national government. Titled the Gun-Free School Zones Act of 1990, the law made it a federal criminal offense to possess a

firearm near a school. In legislating in this way, Congress asserted power over one of the most concrete and emotionally significant issues imaginable: the physical safety of children. The national government laid claim, then, to an issue powerfully evoking those "propensities of the human heart" that the framers had argued would allow state governments to earn the attention and the loyalty of their citizens. Moreover, in laying claim to an interest in maintaining order within school facilities, the national government sought to share power over what for most of our two-hundred-year history had in fact been a state and local concern.

In its arguments before the Supreme Court, the government attempted to justify this assertion of power as an exercise of the enumerated power to regulate commerce among the states. Because a significant portion of the statutes establishing the modern regulatory state are based on this same justification, the Court's invalidation of the Gun-Free School Zones Act might at first glance appear to have far-reaching implications, and indeed, the logic of *Lopez* has already been used to set aside part of the Violence against Women Act.[7]

Like many first glances, however, this one would be misleading. I can begin to explain why by focusing on what seems to me to be potentially the most expansive aspect of the Court's opinion. The formal doctrine adopted by the *Lopez* majority "requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."[8] Like many judicial "tests," this has the ring of relevance and realism. While allowing latitude for federal laws that are really regulations of commerce, this requirement appears to draw a limit where, as a matter of verifiable fact, there is no substantial interest in interstate commerce. Since for many decades now the national government has been using the commerce power to achieve all sorts of moral objectives having little to do with commerce, the "substantial effects" test could conceivably be used to challenge a wide range of federal regulatory activity.

Anyone frightened or reassured by the expansive potential of the Court's main doctrinal formulation would have to be consternated to discover a page or two later in the opinion that the Court does not actually engage in the required analysis. I do not mean that the justices engaged in the inquiry superficially or unsatisfactorily; I mean they did not make the inquiry at all.

This failure is not something that requires subtle analysis to discover. It is apparent on the face of the opinion. The Court first summarizes the government's "essential contention." That contention was that possession of firearms in school zones can be expected to result in violence and that such violence can be expected to have economic consequences because it is costly in itself and also because it reduces the willingness of economic actors to

travel into dangerous areas. The Court also summarizes the government's contention that violence threatens the educational process and thus reduces productivity. Because the Court states these claims as if it is going to deny them, one can easily miss the fact that the opinion does not do so. Instead, the justices "pause to consider the implications of the Government's arguments."[9] Those implications are, according to the majority, that under the commerce clause the national government could regulate "all activities that lead to violent crime . . . [or affect] the economic productivity of individual citizens." Thus, the Court concludes, "[I]f we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate."[10]

Now, my point in detailing this part of the *Lopez* opinion is not to quarrel with the Court's conclusion, which seems to me to be accurate. My point is the entirely obvious one that the Court's conclusion is not an application of its announced test. In fact, the *reason* there is force to the Court's claim that the government's contention would prove too much is that it is logically possible—even, as a practical matter, highly likely—that such everyday matters as the quality of family life (or public schooling) do affect productivity. If these activities did not have economic consequences, their regulation would be readily distinguishable from the circumstance depicted by the government in *Lopez*. In short, the Court's argument effectively concedes, rather than refutes, the contention that regulation of guns near schools would have a substantial effect on commerce.

Thus, in my view the *Lopez* decision is not potentially far-reaching because it authoritatively announces the "substantial effects" test. It is potentially far-reaching because at a crucial point the justices abandon that test. To appreciate the full implications of the Court's approach, consider how it would have affected the outcome of *Katzenbach v. McClung*, in which the Court upheld the 1964 statute barring racial discrimination in public accommodations (like restaurants) as a regulation of commerce.[11] Under the actual analysis utilized in *Lopez*, it would not have mattered in *Katzenbach* that racial integration of public accommodations might have had—in fact, did have, as it turned out—a very substantial effect on the economies of southern states.[12] Even in the face of this strong connection to commerce, the *Lopez* logic would have required invalidation of the Civil Rights Act of 1964 because it is difficult to conceive of *any* aspect of race relations (including private racist acts and beliefs) that does not sour human interactions and depress economic activity.

I recognize that *Katzenbach* is formally different from *Lopez* in certain respects. The restaurant at issue in *Katzenbach* served food that had moved

across state lines, whereas there is no such "jurisdictional tie" regarding the guns regulated in *Lopez*. But with any conceivable object of regulation, *something* moves interstate. Everyone knows that schools, police departments, and families all purchase goods that have been a part of commerce. Therefore, the much-heralded "jurisdictional tie" is itself subject to the logic of *Lopez*: That is, the asserted tie to commerce would potentially allow national regulation of any imaginable activity.

It is also possible to depict cases like *Katzenbach* as different from *Lopez* by saying that they involved commercial enterprises, like restaurants, rather than education. But the *Lopez* approach, fully applied, would devour the distinction between commercial and noncommercial activities in the same way that it would demolish the significance of the jurisdictional tie. Even if the word "commerce" is used to mean only the production and sale of goods, there is no end to the local activities, such as your child's lemonade stand, that potentially could be subject to national regulation. Moreover, the majority itself points out that "depending on the level of generality, any activity can be looked upon as commercial."[13] This is true, of course. Schools and families, for instance, can be viewed as producers of economic participants who eventually sell themselves in the market. Under the analysis employed in *Lopez* the identification of this kind of conceptual slide means that the Court is not obliged to examine the scale of economic effects. This would lead to the absurd conclusion that commercial activities themselves are beyond the commerce power even when they have sizable economic consequences.

Certainly it is possible to criticize the Court both for failing to apply its own announced test and for the expansive potential that arises from that failure. That, however, is not my purpose. In fact, the point which I want to develop next is that the Court's behavior is quite understandable and, indeed, is even built into the interpretive process. What we are witnessing is only a normal and predictable doctrinal gyration. That is to say, the Court could build on *Lopez* to try to induce a significant political transformation only if it were to depart from judicial practices and strategies that are deeply ingrained and, in fact, are rooted in the ambiguous nature of federalism itself.

III

The aspects of the *Lopez* decision that I have been focusing on are understandable and predictable as soon as we consider the problem faced by the Court. The problem is that our Constitution only authorizes certain enumerated powers for the national government, but our Constitution also au-

thorizes some enumerated powers that are broad enough to allow congressional control over any aspect of human affairs. This dilemma has various subparts or versions. The best known is that Congress is delegated not only enumerated powers but also those extra powers necessary and proper for accomplishing its objectives. Another aspect of the dilemma is that, while it is possible to insist on a conceptual distinction between commercial activities and other kinds of activities, noncommercial behavior usually has large effects on the economy and thus on commercial sales and transportation across state lines. Moreover, even if it were true that some noncommercial activities have no effect on interstate commerce, Congress could (and does) regulate "commerce" in a literal sense when it prohibits the interstate sale and transportation of the goods produced by such activities. Congress can then control the underlying activity by waiving the prohibition on transportation if the activity is carried on in accordance with whatever standards Congress has imposed. A final aspect of the dilemma is that there inevitably are both commercial and noncommercial effects and purposes involved in any wise policy. Therefore, as long as the activity regulated is a part of commerce among the states, pinpointing a noncommercial purpose does not mean that Congress is not regulating commerce. Each of these conceptual problems is known to virtually all educated observers, but their insuperability is usually not fully acknowledged because most of those observers are committed to judicial review.

If, as the practice of judicial review requires, constitutional meaning is to be determined as a part of the adjudicative process, it is necessary that the content of the Constitution be coherent enough to yield singular answers. Puzzles, contradictions, omissions, mistakes, parallel truths, and similar blemishes must be interpreted away because the enterprise of interpretation is subordinate to the enterprise of authoritative dispute settlement. For obvious reasons it simply will not do for a judge to say, "The Constitution is ambiguous or contradictory on this point and cannot provide any single answer." The lawyers' task, therefore, is to help obliterate multiple meanings. Substantive dilemmas are the occasion for their work, not the objects of their curiosity. Lawyers and judges are so accustomed to this great intellectual constraint imposed by judicial review that they hardly notice it.

Suppose that we were not a part of the adjudicative process and we were studying the Constitution just to try to understand it. We would have to admit that under our system Congress may regulate any imaginable activity but that Congress has only defined, limited powers. We could, perhaps, attribute this contradiction to the framers' lack of economic sophistication or to changes in social circumstances since their time or to the nature of col-

lective decision making. If we were inclined to trust in central planning, we might be concerned that the fundamental charter places substantive limits on national regulatory power, but if we were in favor of decentralization, we might worry about the limitless power to regulate commerce. We probably would end with an accurate but banal insight into the extreme fallibility of human efforts to structure public decision making. What we could not do, if we were only interpreting and not adjudicating, is talk as if either horn of the dilemma were absent or unimportant.

Litigators and judges do not have the luxury of bemused inspection or full understanding. What alternatives are available to them? A number of options can be seen in the case law that has been built up over the decades.

First of all, lawyers can pretend that one horn of the dilemma does not exist. The Court did this when it denied that labor unrest in the nation's coalfields was directly enough linked to commerce to justify national regulation of working conditions at the mines. This position, which focused on the ends for which national power may be exercised, ignored the existence of the necessary and proper clause and the undeniable, brute fact that instability in the mining industry had had an enormous impact on commerce.[14] As the ultimate abandonment of the distinction between "direct" and "indirect" effects suggests, the strategy of denial is difficult to sustain for long. It is (if my assumptions are correct) fundamentally and demonstrably untrue to the meaning of the document. Moreover, when applied rigidly in the real world, this strategy is likely to have disastrous consequences because there can be practical reasons for either centralization or decentralization depending on the time and the setting.

A second tactic is more flexible and also more credible. Using conventional legal justifications, the Court often devalues one or the other of the competing propositions. Common as it is, the overall logic of this approach is still worth examining. Conventional legal explanations, whether based on old-fashioned metaphors or modern balancing, acknowledge both horns of the dilemma and then provide various reasons they are not of equivalent importance in a particular case. For example, it used to be the position of the Court that Congress could not prohibit shipment of goods produced by child labor.[15] The case announcing this position acknowledged but devalued the proposition that the commerce power allowed regulation for moral purposes; it explained that national regulation was appropriate only when shipment of the goods created the moral harm or "polluted" the channels of commerce. The same method can be couched in more modern and realistic

terms. For instance, the substantial effects test announced in *Lopez* concedes that commercial regulations can have noncommercial consequences and that prohibiting guns near schools could have some effects on commerce. Under the test as announced, however, these points are devalued for the reason that the demonstrated effects on commerce are not large enough. The strategy of devaluation can, of course, also be used to uphold legislation. For example, the Court approved national regulation of agricultural production that admittedly might otherwise be defined as "local" (because the wheat was meant for home consumption) on the ground that the regulatory program in question was generally aimed at wheat destined for interstate shipment.[16] Here the practical necessities of administering a national program were a reason for devaluing the proposition that there is some regulatory authority that is beyond the power of Congress.

These kinds of explanations are familiar and therefore have a certain plausibility. But ultimately each depends on the assumption that "federalism" can be said to require one outcome or another in a particular case. To the extent that the underlying dilemma is, as I have claimed, unresolvable, the truth is that either outcome would be equally constitutional and (at the same time) equally unconstitutional. Hence legalistic devaluation of either of the two relevant constitutional propositions will always be intellectually unsatisfactory if examined carefully. This, I think, is one reason the substantial effects test was only announced—and not applied—in *Lopez*. Although most people are not accustomed to thinking about the connection between conditions in public schools and robust commercial activity, there surely is such a connection and in the future that connection might become as intuitive to the general public as the idea that working conditions in the mines affect interstate commerce. Moreover, even if the connection between public schooling and commerce were limited, nothing in the commerce clause dictates that Congress may regulate only those activities that have large effects on commerce.

The weaknesses in the strategy of denial and the strategy of legalistic devaluation create natural pressures toward what I will call successive validation, which is the method actually used in *Lopez*. Under this approach one horn of the dilemma is subordinated in the case at hand but the equivalency of the competing constitutional proposition is reasserted by a stated commitment to enforce that proposition in some future case. In its pure form, this strategy would take the form of randomized outcomes and thus is not compatible with traditional legal norms. Nevertheless, muted versions of this tactic can be seen at work in the cases. As the *Lopez* opinion reminds us,

each of the post-1937 cases approving congressional regulatory authority contained admonitions about the limited scope of the commerce power and indications that the Court might someday intervene if necessary to enforce those limits. These admonitions were, in my view, mostly incompatible with the logic of the opinions in which they appeared, but they did serve to reassert the overall equivalency of the proposition subordinated in those cases. *Lopez*, of course, also contains its own commitments emphasizing the continuing validity of the principle that it subordinated, namely, that under the commerce authority Congress can regulate all aspects of life. The Court strongly suggests, for instance, that Congress could regulate guns at schools if it could demonstrate credible factual findings or link its regulation to the movement of something across state lines.[17]

By promising future enforcement, these kinds of commitments reduce the pressure to devalue either of the competing propositions. Moreover, from a systemic perspective the strategy of successive validation allows some realization over time of both propositions. The great difficulty, however, is that the method is inconsistent with the legalistic ideals of consistency and authoritativeness. As I explained earlier, the *Lopez* opinion employs logic that is incompatible with finding virtually any statute to be a valid exercise of the commerce power. *Lopez* is written this way because it is an effort to enforce a constitutional principle that is irreconcilably at odds with the principle that was validated in those other cases. That is, precisely because under the method of successive validation the cases as a whole are true to the complexity of the Constitution, no one decision can be reconciled with all the others and each is partially (but deeply) unjustified.

The embarrassments created by these techniques force consideration of more extreme measures. One would be for the Court to withdraw from enforcing both horns of the dilemma. Indeed, until *Lopez*, many academic observers thought that the definition of "commerce among the states" was effectively a matter for congressional judgment. Judicial abdication, especially if explicit, would have its intellectual advantages. It would be consistent with the admission, as accurate as it is foreign to the legal mind, that either outcome of any particular case would be equally constitutional. Nevertheless, abdication is difficult to sustain over time because it conflicts with strong preferences in favor of judicial review.[18]

The difficulties with all these strategies suggest a final option. Weary of all efforts to enforce or to withdraw from enforcing the principle of enumerated powers, the Court can claim to enforce that principle while substituting for it some other, more tractable value, such as democratic accountability.[19] The strategy of substitution has, obviously, considerable potential

for intellectual embarrassment, but it is nevertheless sustainable to the extent that the courts' critics prefer whatever value the judiciary is enforcing over the values represented by federalism.[20]

There is nothing inevitable about any of the five adjudicatory strategies that I have outlined. In varying degrees and combinations the Court can and has used all of them in attempting to domesticate the irresolvable dilemma presented by the principle of enumerated powers. The method of legalistic devaluation is no doubt the one most congenial to the legal profession, but the Court's history is littered with one failed and discarded doctrine after another. This strongly suggests that the intellectual deficiencies connected with this strategy are, as my assumptions about the contradictory nature of the relevant constitutional propositions would predict, unavoidable and profound. Of the remaining three approaches that involve judicial enforcement of some constitutional value, the strategy of successive validation has been used, I think, most frequently and is truest to our actual, confused Constitution.

Given the intellectual and practical advantages of this method and given its wide use, *Lopez* is not at all surprising. In many cases since 1937 the Court has acknowledged both horns of an unresolvable dilemma and has repeatedly committed itself to the validation (in some future case) of the principle of limited national power that it was subordinating in the cases it was deciding. Although it would have been possible, of course, for the Court to have simply continued this pattern, the full intellectual and practical advantages of the strategy of successive validation require at least some variation in outcome. In short, that the Court in *Lopez* should have eventually redeemed its pile of pledges seems a natural part of the most attractive interpretive strategy available. That the opinion in which the redemption occurs is starkly inconsistent with many other cases is not necessarily a signal of radical change, for the inconsistency is a necessary part of the strategy and flows ultimately from the content of the Constitution itself.

This analysis will not reassure those who are agitated in one direction or another by the prospect of the Court's leading us into a transformation of our significantly centralized governmental structure. And I admit that as an abstract matter it would be consistent with the method of successive validation for the Court now to decide a whole series of cases significantly limiting national regulatory power (while committing itself to enforce in some future case the competing principle that Congress is effectively authorized to regulate any aspect of life).[21] My reasons for thinking this highly unlikely require me to try to put the strategy of successive validation in a wider context.

IV

Once we dispense with the notion that relevant constitutional propositions require any particular outcome in commerce clause cases, there are two assumptions under which *Lopez* might be seen as the beginning of a radical change of direction rather than as a quasi-random event. The first is that the beliefs and preferences of a majority of the members of the Court favor significant decentralization. The second is that external pressures in favor of such decentralization are now compelling enough to influence a significant number of their decisions.

The internal disposition of the justices toward decentralized authority is a subject that I will return to in subsequent chapters, but here I can indicate briefly why it seems doubtful that the values of a majority of the justices favor significant decentralization. Yes, it is true that a majority are Republican appointees and that augmenting state power is often associated with conservative politics. It is also true that at one time or another almost all the justices have written warmly about the importance to our system of vigorous state governments. However, general inclinations and beliefs count only insofar as they are focused and strong enough to influence case outcomes. By this measure, I think the Court's record as a whole casts significant doubt on whether decentralization is highly valued by most members of the Court.

Since 1937, in only two cases has the Court found a federal statute to exceed the scope of the commerce power. In fact, the Court has often enforced the commerce clause, but only to invalidate *state* laws deemed to be protectionist or insufficiently justified. In a few cases, the Tenth and Eleventh Amendments have been used to constrain Congress. One of these (*National League of Cities v. Usery*) has been overruled, and the others (as I explain in the next chapter) have only narrow significance.[22]

Against whatever importance might be attached to *Lopez* and these other cases must be set the cases where extensions of national authority have been approved. In addition to the famous decisions that began in 1937, in just the past two decades at least thirteen cases have validated national laws under the commerce clause.[23] There have also been, of course, many cases approving national statutes passed pursuant to other provisions, including the taxing and spending power and section 5 of the Fourteenth Amendment.[24]

It might be objected that the justices' putative preference for decentralization actually shows up in a different set of cases altogether, those in which constitutional rights are defined narrowly in order to make room for expanded state authority. Whether or not the federal sky is falling in this area—as so many legal academics are prone to assert—at most these cases show a

preference for decentralization as against federal judicial power to protect individual rights. Although it might be suggestive, this preference does not necessarily imply anything about judicial priorities when national regulatory power is the competing consideration. A justice's skepticism about the value of individual rights might be based in part on a belief that such rights unduly constrain the government's capacity to promote the general good. Belief in the importance of collective action is not, needless to say, incompatible with a belief in a centralized administrative state.

Individual-rights cases do usually tell us something about the justices' preferences when the right trumps a state's policy. This is because standard constitutional doctrines involve some degree of judicial assessment of asserted state interests; hence, the vindication of a right typically means that the judgments of state and local officials are being deprecated. In many cases the Court, including conservative members, has shown a continuing willingness to do just this. *Texas v. Johnson*, an opinion in which Justice Scalia joined, invalidated flag desecration statutes that had been enacted in forty-eight states.[25] His opinion in *R.A.V. v. City of St. Paul*[26] constricted state authority to secure order against what had always been considered an unprotected form of speech called "fighting words." In *McIntyre v. Ohio Elections Commission*, seven justices, including O'Connor, Kennedy, and Souter, voted to strike down bans on anonymous campaign literature that had been thought to be a good idea in forty-nine states.[27] In *Planned Parenthood v. Casey*,[28] the case to which chapter 7 is devoted, these three justices authored an extraordinarily vehement denunciation of efforts by states to resist the judicial monopolization of abortion policy announced in *Roe v. Wade*. And, subsequently, the Court (including Justices O'Connor and Souter) invalidated bans, which had been enacted in thirty states, on the procedure known as "partial-birth abortion."[29] In *City of Richmond v. J. A. Croson Co.* and *R.A.V. v. City of St. Paul*, conservative justices have displayed considerable readiness to second-guess government programs that attempt to compensate for or prevent racial injustices.[30] In *Saenz v. Roe*,[31] O'Connor joined with Kennedy and Scalia to displace significant state policies on public welfare, going further even than the high-water mark of Warren Court policy making.[32] In *City of Chicago v. Morales*, the Court put in jeopardy vagrancy laws common for over a hundred years.[33] Finally, in *Bush v. Gore*, seven members of the Court, including the most conservative, joined in a stunning decision that has the potential to undermine significantly the long tradition of state control over state ballot-counting standards and procedures.[34]

Recent cases pointing toward the termination of school governance by injunction can be cited as evidence of a movement toward states' rights, but

nothing in them creates any challenge in principle to the plenary authority of federal courts to "disestablish" state and local decision-making institutions if necessary to vindicate national interests.[35] Moreover, under these cases the precondition for termination of judicial supervision remains a finding that school officials are acting in "good faith" in all respects. Thus, skepticism about the motivations of local decision makers remains a touchstone in the school desegregation cases, and outward signs of subordination to the authority of federal judges are still a significant part of the measure of equality in education.

Justice Thomas's dissent in *U.S. Term Limits, Inc. v. Thornton* is also cited as evidence of a strong preference for states' rights. This case is treated at length in chapter 5, but it can be said here that those who are horrified (or delighted) to see that this dissent drew four votes seem less impressed with the corresponding fact that the majority opinion invalidating state authority over congressional term limits drew five votes. The majority position not only represents the established law of the land but is profoundly nationalistic. By insisting (at least in the setting of the case) that reserved powers are limited to those that existed at the time of the framing of the Constitution, this opinion comes close to requiring that states, like Congress, be specifically authorized to act. The majority also pushes very far the idea that the nation as a whole has an interest in who is elected from each state to be members of Congress. It is possible to say that these strongly nationalistic themes need not be expanded to their full potential, but that reply could also be given for the states' rights positions taken by the four dissenters.

I recognize that there are many majority opinions containing rhetoric on the importance of judicial deference to state decision makers and that in a sizable number of cases claims of individual rights based on the national Constitution are defeated. My point here is only that the record as a whole is mixed enough to cast doubt on the idea that devotion to decentralized decision making is now an overriding value for most members of the Court. This is hardly surprising. One would expect officials of the national government, including judges, to be suspicious and jealous of competing centers of power in the states. One would expect jurists to be especially put off by decentralization because, as I will argue at length later, the unruly, unplanned world created by real decentralization is an affront to the decorous, rationalistic, perfectionist impulses that are so much a part of the culture of American legalism.

Even if I am right that the instincts and beliefs of most of the justices are unlikely to result in any important changes in the scope of national regulatory power, it is true that their preferences could be overborne by

external political pressures and changes in the general intellectual climate. It does seem to be true that sooner or later the Supreme Court goes along with the dominant trends of the time. What those trends might be is, of course, a matter of conjecture. It is at least possible that current signs of dissatisfaction with the national government represent an epiphenomenon and that the deeper political and cultural pressures favor further centralization.

It is true that a significant segment of the public is disaffected from the government in Washington, D.C. But many of these people are bitter and cynical about all government. To the extent this is so, they may oppose responsible proposals that might help to make decentralization respectable to mainstream voters.[36] Even where angry groups do support enhanced state authority, they may do so by supporting policies that continue the long association of states' rights with moral positions, like unrestricted gun ownership, that are not attractive to many Americans. At the extreme, antigovernment zealots might undertake—and to some extent already have undertaken—acts or threats of violence that are very likely to enhance specific powers of the central government and generally to discredit the states' rights movement.

Against the forces, many of them cynical and embittered, that can be expected to congregate around the states' rights banner will be arrayed a cultural elite that is well entrenched in the universities, in the press, in the bureaucracies, and in the leadership of many interest groups. These people tend to be highly educated, respectable, and adept at influencing public opinion; many of them are cut off from or even hostile to local communities and local politics. Since their dominant ideology involves the ambitious use of government for social reform, in general their power is maximized by minimizing the number of places where control needs to be exercised. They have been and will continue to be an effective force for centralization.

The struggle over decentralization must necessarily take place against a formidable backdrop of existing centralization. This means that, if predictions about radical decentralization are to be realized, Congress must cede power back to the states. It can be expected that some part of this devolution will be more apparent than real, as appears to be the case already with the Unfunded Mandates Act.[37] When real power is returned, it would only be natural for Congress to be inclined to select those issues that are most intractable, like welfare. This could mean that eventually state governments would suffer the political consequences of being responsible for highly visible, failed policies while the national government—relieved of its disasters and clinging to its successes—could soon regain its stature as the effective level of governance.

The sorts of considerations and possibilities that I have been mentioning would not be especially important if it were true that the general political culture of the United States were strongly supportive of decentralization. While we do have deeply held habits and beliefs about political practices at the state and local level, during this century many aspects of the culture have favored centralization. Some of these, such as the psychic effects of the national government's association with the war power and with a vast capacity to tax and spend, are built in. Other causes of our nationalized political culture are not inevitable but seem close to it. These include high rates of mobility, nationwide channels of communication, and an optimistic, pragmatic spirit that does not easily abide the variations and imperfections that are an inevitable consequence of decentralization.

Still, perhaps, something about the culture has changed or is changing in a way that will promote significant decentralization.[38] Along with factors like the growing frustration with "Washington" and its interest-group politics, however, other broad cultural trends must be considered. To some extent, American life is increasingly characterized by political passivity, impersonal relationships, weak family life, and moral insecurity. While logically all these trends might point to the need for a resurgence of local associations and local government, their psychological and emotional implications might point in the opposite direction. Much of the remainder of this book is an effort to explore the possibility that some of the weaknesses already present in our culture encourage further centralization. Here I want only to illustrate this implosive dynamic. Despite the fact that cynicism, isolation, and anxiety might be alleviated by stronger local communities, these conditions could lead to immature longings for reassurance of a sort that has sometimes inclined Americans to see their president as an intimate father figure, their Congress as a bottomless guarantor of material welfare, and their Supreme Court as a churchlike arbiter of moral truths.

Against this backdrop of complex, imponderable political and cultural forces, the *Lopez* decision—and indeed, the justices themselves—recede into relative insignificance. What *Lopez* confirms is that the national government is for all practical purposes already a government of general regulatory powers and that, given the social forces unleashed by that fact and given the contradictory nature of the legal document that judges must appeal to if they are to defy those forces, there is little that the judiciary can be expected to do about it. Those who perceive in that decision much to fear or much to hope for are, I think, seeing that decision and the Court's overall record inaccurately; more important, they are looking for the future in the wrong place.

3

Domesticated Federalism

I

Even if I am right to believe that the idea of limited national regulatory authority is being buried by the realities of day-to-day life and is unlikely to reemerge, that idea is only one component of the structure of our federal system. After all, there were larger purposes behind reserving to the states a generalized regulatory role. Since one objective was to enable states to form a special bond with their citizens and thereby to have the political resources necessary to compete with the national government, it is possible that federalism can be promoted by protecting other prerequisites to citizen loyalty. Accordingly, as constitutional law has developed in the modern era, much attention has focused on protecting governmental status itself.

There are solid reasons for this focus. The Constitution does not preserve states as powerful private organizations or as departments of the federal government. It preserves them as governments of limited sovereignty—with independent elections, independent power to organize themselves, and independent authority to tax, spend, and regulate. Both the substance and the symbolism of sovereignty have direct and obvious connections to the attitudes of citizens—their willingness to participate in local governmental ac-

tivities, their respect for the actions and pronouncements of state officials, and their sense of affection and loyalty. Without some degree of sovereign status, states would not have the capacity to act as a "counterpoise" to federal power. It is, as Madison put it, "the existence of subordinate *governments* to which the people are attached [that] forms a barrier against the enterprises of ambition. . . ."[1]

At a more abstract level, the reservation of sovereign status for the states is an expression of the idea of the authority of the Constitution itself. As the law professor Akhil Amar has demonstrated, the framers thought that "[w]ithin the sphere of . . . delegated powers, government agents could legitimately compel obedience in the name of their sovereign principal, but those agents lacked authority to go beyond the scope of their [constitutionally defined] agency. So long as the People at all times retained the ability to revoke or modify their delegations, such agency relationships were in no sense a surrender or division of ultimate sovereignty."[2] The Constitution, that is, does not vest ultimate sovereignty in the national government. That is retained by the people, who can judge when their governmental agents have exceeded constitutional limits and can use "the independent and preexisting organizational structures of state governments . . . as incipient pockets of resistance . . . to unconstitutional federal conduct."[3]

The sovereignty of the states, then, was a vehicle for maintaining the ultimate sovereignty of the people themselves. The moral authority necessary for this high purpose is now largely gone. Nevertheless, it remains true that states are generally (if dimly) perceived to have some degree of sovereign status. The Supreme Court has hesitantly embarked on a series of decisions designed to protect this status. These cases have some modest potential, I think, to help sustain the federal system.[4] Moreover, as I shall explain, if there is any area of the law of federalism where the modern Supreme Court might be expected to pursue an ambitious or even radical agenda of decentralization, this is it. For this very reason, the Court's actual record helps us to understand why judges are unlikely to appreciate—let alone revive—a robust form of federalism.

II

The story begins back in 1976. William Rehnquist was still a decade away from becoming chief justice. Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, and Clarence Thomas were not yet on the High Court. Nevertheless, Justice William Brennan was in despair. He believed, as

I indicated in chapter 1, that in *National League of Cities v. Usery* his brethren had undertaken an "alarming" restructuring of our system of government. In the name of preserving "the essential role of the States in our federal system," the Court had invalidated a statute establishing national control over the wages and hours of employees of state and local governments. This, Brennan asserted, delivered "a catastrophic judicial body blow at Congress' power under the Commerce Clause." The future of our constitutional structure looked "so ominous . . . as to leave one incredulous."[5]

Why in 1976 did Brennan (and many others) so intensely fear judicial enforcement of the principle of federalism? By the early 1970s new Republican appointees were beginning to dominate the Court, and it was widely anticipated that our constitutional law would soon reflect this new conservatism in dramatic ways. For a number of reasons it was natural to assume that a central part of the Burger Court's program would be an energetic revival of the principle of federalism.

Federalism, first of all, was strongly associated with opposition to New Deal liberalism. As Justice Brennan pointedly emphasized in his dissent in *National League of Cities*, "[T]he Court invalidated legislation during the Great Depression . . . primarily under the Commerce Clause and the Tenth Amendment."[6] It was true that in 1976 the Court had only immunized the governmental apparatus—the states' employment relationships—from federal regulation. But Brennan assumed that the essence of state sovereignty lay in the authority to enact and enforce legislation of general applicability; the apparatus of the state exists, he thought, in order to carry out substantive policies. Therefore, he did not believe that the significance of the case could be restricted to federal regulation of the state itself. The Court's decision to protect state "sovereignty" would eventually drive it to conclude, as it had during the New Deal, that the Tenth Amendment restricts the power of Congress to displace general state regulations. Brennan charged that federalism would then serve as a "cover" for blocking national policies with which conservatives disagreed.

Conservative opposition to national regulatory programs need not, of course, be cynically reduced to mere policy preferences. Despite the contradictions and imperfections in the Constitution's text discussed in the last chapter, it is as clear as such things can be that the framers' intention was to confine the national government to powers that were to be (as Madison put it) "few and defined."[7] If the new justices believed in an originalist jurisprudence, much in the framers' thinking at least arguably supported reining in the growing central government. Moreover, if they believed in judicial

restraint, federalism helped to justify deference to local majoritarianism. And if modern life seemed excessively individualistic and morally chaotic, the values behind decentralization affirmed humanity's social nature.

In 1976, then, federalism was consonant with more than specific conservative policy preferences. Therefore, to many liberals, including Justice Brennan, judicial enforcement of federalism seemed both politically and philosophically dangerous. It was only natural to conclude that an increasingly conservative judiciary would find the principle not only alluring but irresistible. Today many academic leftists still believe that "states' rights" lie near the dark core of the Rehnquist Court's schemes—a suspicion that dovetails with the more generalized anxieties about disunification discussed in chapter 1. But the Court's record after *National League of Cities* suggests a strikingly different—and more complicated—story.

Between 1976 and 1992, the Supreme Court largely abandoned the task of protecting the principle of federalism. For a number of years, the Court assiduously distinguished and limited its decision in *National League of Cities*, sustaining one federal regulatory program after another. Then in 1985, it "revisit[ed]" the specific holding that Congress could not apply the Fair Labor Standards Act to state and local employees. In *Garcia v. San Antonio Metropolitan Transit Authority*, it repudiated *National League of Cities*, announcing as a general rule that the position of the states is "more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[8] In short, the Court asserted that Congress could be counted on to protect the constitutional status of state governments. Except for a cryptic proviso regarding the possibility of "failings in the national political process," the Court withdrew from enforcing the Tenth Amendment against encroachments arising out of the congressional power to regulate commerce.

No doubt aware that it is uncharacteristic for the Supreme Court to cede to Congress primary authority to enforce any constitutional limitation, dissenters in *Garcia* predicted a quick return to the norm of judicial oversight. It did not happen. In 1987 the Court held that Congress could condition federal highway funds on states' adoption of minimum drinking age laws, despite the fact that the Twenty-first Amendment reserves this subject matter to state authority.[9] The majority opinion was written by Chief Justice Rehnquist. In 1988 the Court ruled that the federal government can impose nondiscriminatory taxes on interest earned from state bonds.[10] The decision, written by a now-mollified Justice Brennan, emphatically reaffirmed that the Tenth Amendment imposes only structural, "not substantive," limits on con-

gressional authority over the states. Where there is no showing of a defect in the national political process, "the Tenth Amendment is not implicated."[11]

Three years later the Court held that the Federal Age Discrimination in Employment Act does not cover state court judges.[12] Justice O'Connor's opinion bravely noted that it is through control over the character of its "constitutional officers" that "a State defines itself as a sovereign." She then lamely concluded that "to upset the usual constitutional balance of federal and state powers," Congress would have to make its intent clear.[13] Under this odd variation on the reasoning in *Garcia*, specific congressional intention to alter the constitutional structure becomes, not a reason for invalidation, but an authoritative justification. Perverse as it may sound, this rule could serve as a disincentive against tinkering with the constitutional design. This would be so under the plausible assumption that when the Court requires explicit and definite indications of legislative purpose for any category of legislation, congressional action becomes somewhat less likely. O'Connor could find only three other justices to support even this mild form of constraint on congressional sovereignty.

It was not until 1992, sixteen years after Justice Brennan first denounced the Court's "catastrophic" blow to national power in *National League of Cities*, that the justices decisively acted to protect the sovereign status of state governments.[14] Because of his retirement, history will not officially record whether Brennan regarded this decision, *New York v. United States*, as confirmation of his dire predictions. However, another proponent of strong central government, Justice Byron White, was still on the Court and we do know his reaction to the case. Although White's dissenting opinion attacks the majority for its "formalistically rigid obeisance to 'federalism,' "[15] it is fairly optimistic about the future. The *New York* opinion, he notes, "sends the welcome signal that the Court does not intend to cut a wide swath through our recent Tenth Amendment precedents. . . ."[16] Even Justice Brennan, one suspects, would have remained calm in the face of this second effort to protect state autonomy, for in the decision can be heard only the faint stirrings of a jurisprudence of federalism.

The case involved a complex scheme aimed at getting each state to achieve self-sufficiency in the disposal of low-level radioactive waste. The statute provided a set of target dates, with a schedule of charges and restrictions on the out-of-state dumping of waste produced in noncomplying states. None of these rules coerced the states (although they did, of course, burden private waste producers and thus put pressure on state governments), so the Court upheld them as unexceptional exercises of the commerce power. One

provision, however, fell directly on noncomplying states, which were required eventually to become owners of the waste produced within their borders and to become liable to the generators of the waste for damages resulting from failure to take timely possession of this property. Thus, states were obliged either to take title to radioactive waste or to regulate it in accordance with federal standards. Writing for the Court, Justice O'Connor said that either option "would 'commandeer' state governments into the service of federal regulatory purposes. . . ."[17] While it is constitutional for the national government to encourage states to enact and enforce federal policies, according to the *New York* decision Congress exceeded its authority in coercing states to do so.

Although even the dissenters did not claim that the Court's opinion would have wide-ranging practical effects, in at least two ways its reasoning does begin the intellectual resurrection of the law of federalism. First, the Court insisted on the importance of an elementary truth: that as a constitutional matter, the states are supposed to have some kind of limited sovereign status. (This, of course, is not only vague but a contradiction in terms—problems that must be attributed, not to Justice O'Connor, but to the pragmatic and creative individuals who drafted the Constitution.) Whatever else this "sovereignty" means, said the majority, it means that states cannot be made into mere subdivisions or administrative agencies of the national government. To coerce states into enforcing a federal program is, said the Court, inconsistent with their constitutional status.

Second, *New York* helps to dissipate a confusion between the interests of state governments and state officeholders (on the one hand) and the interests of states as constitutionally recognized parts of the federal system (on the other). This confusion is traceable to the *Garcia* Court's solicitude for political decision making. Politics can be expected to protect federalism only if state officials generally understand and seek to protect the constitutional interests of their states or if these interests and the interests of the officials are in fact the same. The *New York* opinion disputes both of these assumptions by showing how it can be in the interest of politicians to avoid responsibility on controversial issues like radioactive waste.

The important themes in *New York*, then, are that the Constitution requires states to have some status as independent governments and that political self-interest does not ensure the protection of that status. These ideas have had some significant implications in subsequent cases. But in the *New York* opinion itself the themes are presented in a limited and muted way. They are announced as if they had no obvious applicability to most Tenth Amendment cases (including *Garcia*) because in most cases Congress "has

subjected a State to the same legislation applicable to private parties."[18] By its terms *New York* applies only to the unusual circumstance where a federal statute singles out state governments for special regulation.

Moreover, the opinion is unclear and, to some extent, unpersuasive in explaining the bases for its federalistic themes. Justice O'Connor claims that "it makes no difference" whether the issue is the scope of the power delegated to Congress to regulate commerce or the meaning of "sovereignty" to be inferred from the Tenth Amendment. When she encounters difficulty with one explanation, she moves toward the other. The result is that she does not convincingly develop either.

A section of the opinion argues that the framers did not intend Congress to have the power to regulate commerce by directly coercing state governance. This evidence is intriguing, but much of it demonstrates only that the framers intended to expand national power by authorizing Congress to regulate individuals directly. As Justice Stevens noted in dissent, it does not necessarily follow that the framers intended to forbid Congress from regulating states if that should be necessary. Why, when they were generally moving to increase the powers of the national government, would the framers in this one respect have intended to decrease those powers from what they had been in the Articles of Confederation?

Another section of the opinion bases the states' immunity on the need for political accountability. And, of course, it is true that when the federal government orders state governments to regulate, voters may be confused about which legislature is responsible for the resulting policy. Again, this is an arresting idea, but its relationship to state sovereignty is not satisfactorily developed. If the states were literally made into administrative agencies for the central government, political accountability would be clear enough. It is federalism that muddies the waters. Even in the circumstances of the *New York* case, the fact that the states retained some governmental status (with respect to radioactive waste policy) was what created complex and confusing lines of authority.

To say that there are intellectual limitations in *New York v. United States* does not, by itself, say much about the potential impact of the case. Many decisions that are far weaker have had major influence on the shape of American law and culture. And in recent years the influence of *New York* can be seen in a number of cases. In the 1997 case of *Printz v. United States* the Court applied the "no commandeering" rule to protect state executive officers by invalidating the provision of the Brady Handgun Violence Prevention Act that had required local police to conduct background checks on handgun buyers.[19] The impulse to prevent state governments from being turned into

subordinate departments of the national government was also at work in a surprising case that protects the judicial branches of state governments. In *Alden v. Maine*, decided in 1999, the Court declared that Congress could not require state courts to hear certain federal statutory claims naming the state itself as defendant.[20] Justice Kennedy, writing for the majority, declared that Congress must treat states as "joint participants in the governance of the Union" rather than as "mere provinces." States, he said, must "retain the dignity . . . of sovereignty."[21] Finally, the importance of the sovereign status of the states has been affirmed, at least at a symbolic level, in a series of cases enforcing their immunity (but not the immunity of individual state officials) from suit in the federal courts. In a case with the cumbersome name of *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the justices went so far as to restrict Congress's power to expose states to suit even when Congress was attempting to enforce rights protected by the Fourteenth Amendment.[22] In an opinion written by Justice Scalia the Court asserts as "the theory of our Constitution" that the growth of national power beyond limits set by the principle of federalism "is a menace."[23]

Was Justice Brennan, then, right after all back in 1976 when he saw the possibility that an increasingly conservative Court would undertake a significant—to him "alarming"—restructuring of our modern system of plenary national power? To get a fuller perspective on the Rehnquist Court's federalism jurisprudence it is necessary to look again at its record where the issue is how the rights of individuals should be defined and enforced. The brief examination of this record in chapter 2 casts doubt on whether even conservative justices have much respect for the discretionary policy decisions made at the local level. Here we look at the decisions on individual rights for a different reason. To look at this wider context is to see that what is missing in *New York* and other recent federalism decisions is an appreciation for the role of conflict in our constitutional system. To understand this is to begin to see why the Court is not going to become an important defender of federalism.

III

For many of the same reasons that a conservative Court was expected vigorously to enforce the Tenth Amendment against the regulatory powers of Congress, it was predicted that the Rehnquist Court would define individuals' rights narrowly. Most expansions of rights, as I have already said, work a corresponding constriction of the power of self-government at the local level. The prospect looked so bleak as Republican appointees began to dominate the High Court that some academic progressives thought the Constitution

itself would "vanish," while others went so far as to propose that those on the Left should turn their attention away from adjudication to politics.[24]

Anyone still paying attention to Supreme Court adjudication at the turn of the century, however, has discovered that the sky did not fall. In fact, rights continue to grow (as they say) at a moderate pace. The Rehnquist Court has held that it violates the establishment clause to have a nondenominational prayer at the graduation exercises of a public school or, for that matter, a student-led prayer before a football game; that local officials cannot be trusted to determine the rate at which to charge for parade permits; that hate-speech codes, even when aimed only at "fighting words," are unconstitutional if based on distinctions about content; that the duty to achieve racial balance in previously segregated public schools applies to predominantly black state colleges and universities; that a state's purpose in authorizing discrimination against homosexuals must have been based on irrational animus rather than traditional moral considerations; that sexual segregation in public education is unconstitutional even when the school is a highly intense military academy; that the right to privacy protects abortions performed on living, partially delivered fetuses. These kinds of results are not anomalous; they come on the heels of earlier decisions expanding rights—most notably, the invalidation of Richmond's affirmative action contracting program and of Texas's flag desecration law.

It is true, on the other hand, that in recent years some major protections for individuals' rights have been trimmed and that, as a consequence, local officials have wider discretion on some issues. For example, state authority to apply general criminal prohibitions to religious conduct has been expanded. To some extent, authority over police searches and interrogations has been returned to local officials. Governmental control over nonobscene pornography has been approved, at least where children are involved. And in its most publicized change of direction, the Court has given some measure of policy making on abortion back to the states.

Like "cutbacks" in the federal budget, some of these decisions are actually reductions in the rate of increase. Some, however, are true rollbacks. In either situation, they share one important limitation. They do not overrule any case establishing a new right. The landmark rights decisions of both the Warren and the Burger Courts, including *Miranda v. Arizona, Green v. New Kent County, New York Times v. Sullivan, Baker v. Carr*, and *Roe v. Wade*, are still the law of the land. In light of the often casual attitude of the justices toward *stare decisis* in constitutional cases, this is a striking fact. It is even more striking in comparison to the specific willingness of the Court to repudiate the only federalism case having anything close to landmark status, *National League of Cities*.

No doubt there are many explanations for the Court's disinclination to reverse major decisions that create or extend rights. One reason, however, is central. Many, if not all, of the important rights decisions have been controversial. While it is possible to chip away at these decisions without appearing to have given in to political pressure, outright reversals would emphasize the extent to which the Court's decisions are responsive to resistance and disagreement at the local level.

The Court's deep hostility to conflict about its constitutional pronouncements is emphatically confirmed by its record on defining the scope of the federal judicial power to enforce orders against local officials. For decades the "law" on institutional injunctions has permitted federal courts to take over virtually any governmental function if necessary to effectuate a decree in the face of local resistance. As a consequence, in what are by now innumerable cases federal district courts have dictated to state officials how to organize their governments, how to run their schools and prisons, whom to appoint to important positions, and even how to vote on public issues. Here, if anywhere, a conservative Court might have been expected to fashion major changes. Instead, in *Missouri v. Jenkins* the Court squarely held that a federal judge may order state officials to raise property taxes even in excess of what is authorized under state law.[25] In response to the claim that this order invaded powers reserved to the states, the Court said simply: "The Tenth Amendment's reservation of non-delegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment. [That] amendment . . . was avowedly directed against the power of the States, and so permits a federal court to disestablish local governmental institutions that interfere with its commands [citations omitted]."[26] To say that district judges can "disestablish" local government is, of course, a fancy way to say that federalism ultimately places no limits on judicial efforts to enforce the Fourteenth Amendment. The enforcement of individual rights can displace the collective right to self-government.

Are these efforts at least restrained by traditional notions about the nature of the judicial function? In *Missouri* the Court brushed this question aside, asserting that institutionally defined constraints "would fail to take account of the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the Constitution imposes on them."[27] The opinion even holds open the possibility that, in the absence of alternatives, a district court might on its own impose and collect taxes. The inexorable and limitless logic of the decision certainly suggests that the federal judiciary has this power. As long as lower court decrees are thought to be identical with the sovereign voice of the people speaking through the Fourteenth

Amendment, no local institutional concern can overcome the supremacy of the federal obligation.

Is *Missouri v. Jenkins* itself an anomaly? (Four conservative members of the Court, including O'Connor, did, after all, dissent.) In the same year that it decided *Missouri*, the Court held that a city government can be ordered to pay a "bankrupting fine" until it enacts an ordinance desegregating its housing program sufficiently to suit a federal district judge.[28] If necessary, could the judge have fined individual legislators for failing to vote for the ordinance? The Court did not have to decide this issue but did say that the lower court should have proceeded against the city "first" and only "if that approach failed to produce compliance within a reasonable time" should fines against individuals have been considered.[29] The majority opinion was authored by Chief Justice Rehnquist and was joined by Justices White, O'Connor, Scalia, and Kennedy.

On the Court today the "states' rights" position regarding federal judicial power, then, is much like O'Connor's opinion in *New York*. The conservative justices indulge in protestations about the importance of local control, but their reasoning is vague and easily evaded. For example, the Court recently opined that ending judicial control over the desegregation of public schools recognizes "important values of local control of public school systems. . . ."[30] It asserted that decrees should be terminated "after the local authorities have operated in compliance . . . for a reasonable period of time. . . ." In the case at hand, however, the trial judge had been trying to terminate his supervision of the school district for years. The original finding of segregation had been made back in 1961 (thirty years before the case reached the Supreme Court). In 1977 the district judge found that the board of education had been in compliance with his desegregation decree for five years and that it "had manifested the desire and intent to follow the law." He "terminated" his jurisdiction over the case. In 1985 a Motion to Reopen was made; in response, the district court found that the board had achieved "unitariness" and again tried to end his jurisdiction. The Supreme Court noted that "in deciding whether to modify or dissolve a decree, a school board's compliance with previous court orders is obviously relevant."[31] But the Court did not order the injunction terminated. Instead, it remanded for further findings on whether there had been full compliance since 1972 and whether "the vestiges of past discrimination had been eliminated to the extent practicable." It instructed the lower court to examine "every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities."[32]

That same year the Court reviewed another desegregation case where the trial judge had been impressed by the efforts of the school board.[33] The board had taken steps to "combat the effects of demographics on the

racial mix of the schools." It had instituted a magnet school program and "on its own initiative" a minority-to-majority student transfer program. It had taken "active steps" to recruit and hire black teachers "in significant numbers." Its overall programs were "very innovative" and it targeted "[m]any remedial programs" at the predominantly black schools.[34] Again, however, the Supreme Court offered bromides. "The task is to correct, by a balancing of the individual and collective interest, the condition that offends the Constitution." The requirement of a unitary school system "must be implemented according to this prescription."[35] In a somewhat stiff bow to federalism, the Court did say that a lower court "may determine that it will not order further remedies in areas where the school district is in compliance. . . ." In coming to such a conclusion, however, the trial court should consider "whether retention of judicial control [over areas where compliance has been achieved] is necessary or practical to achieve compliance . . . in other facets of the school system and whether the school district has demonstrated to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree. . . ."[36] The case, now over twenty years old, was remanded for further consideration "in light of the principles set forth in this opinion."

The only clear message that emerges from the Court's recent desegregation decisions is that federal district judges should continue to supplant or "disestablish" local institutions of government until full, "good faith" compliance with every aspect of their decrees is achieved. This dogged commitment by a "conservative" Court to the educational theories and reform mechanisms of an earlier era is, like the Court's refusal to overrule any landmark case establishing rights against state governments, a central puzzle of our time. Whatever else it is, this commitment is a testament to the Court's overwhelming resolve to appear to be immovable in the face of political resistance and dissatisfaction. What is at stake, more clearly than the educational interests of millions of schoolchildren, is the authority of the federal judiciary.

IV

The Rehnquist Court consistently claims that its edicts take precedence over the integrity of local governmental institutions and are impervious to the expression of local political dissatisfaction. These claims reflect a profound failure to appreciate or even understand our federal structure. As we have already seen, the reservation of sovereign status for the states was intended as a mechanism to enforce constitutional limitations on the national govern-

ment and as an expression of the reservation of ultimate sovereignty in the people. This means that the two layers of government were meant to compete with one another.

This design does not imply that state courts and legislatures can legally interpose their will against national authority. But it does mean that the people in the states must make constitutional judgments. Even while subject to the supremacy of federal law, they are entitled to decide whether the federal courts have abused their authority. They are entitled to do so even (or especially) when the issues are controversial ones, like desegregation. Such judgments are not foreign to the constitutional system and they are not threats to limited government. They are the preconditions to both. When expressed through the mechanisms of state and local governments, such judgments are entitled to the consideration and respect of federal officials, including judges.

Should the Supreme Court—"conservative" or otherwise—be expected to enforce a structural principle that so profoundly implicates the legitimacy of disagreement over the meaning of our fundamental law? Of course not. The judiciary, more than any other institution of government, claims a monopoly on interpretive authority. The Court's own self-image makes it the main rival of "the people" as the locus of sovereignty. The federal judiciary is, to say the least, an unlikely place to expect appreciation for political conflict, dissent, and resistance.

Even aside from the natural rivalry over the power to enforce constitutional limits, the courts could not be expected to support a robust form of federalism. The essential task of judges, of course, is to resolve cases, and to do this they need to find some controlling authority. An authority, it goes without saying, will tend to seem controlling to the extent that it is definite, unambiguous, and permanent. This is why, as is commonly noted, judges are inclined to simplify complex historical evidence and to overstate the degree of certainty with which a legal rule or principle resolves a case.[37] For exactly the same reasons it is to be expected that judges will deny, distort, or undervalue constitutional principles that are characterized by open-endedness, ambiguity, and other forms of messiness—which is to say, it is to be expected that judges will be especially inclined not to appreciate or understand processes that depend upon various forms of political disagreement, conflict, and defiance.

A rich account of the functions of the states in our constitutional system would not only undermine the Supreme Court's cherished role as the ultimate expositor of the Constitution but also contradict deep instincts that are natural outgrowths of judges' essential task of authoritative dispute resolution.

It is, therefore, not surprising that many of the Court's federalism decisions are vague, limited, and intellectually unsatisfying. Recall Justice O'Connor's opinion in the *New York* case. Its central deficiency is the failure to explain convincingly what is jeopardized when the national government "commandeers" the legislative apparatus of state governments. The historical discussion itemizes various of the framers' statements that imply some degree of state immunity from federal regulatory authority, but there is no explanation of why that immunity might have been thought to be important. The argument that state sovereignty serves democratic accountability is never connected to the historical materials, nor is it related to the idea of federalism itself. Other than a few hoary generalities about preventing tyranny, the opinion simply does not identify what would be endangered by reducing states to the status of federal agencies. The omission is all the more glaring because the danger is obvious: Without control over their own legislation, states, like puppets, would be able to say only what they were permitted to say; state governments would lose the capacity to articulate policies that could compete with federal policies. The power to legislate is, in short, the power to disagree. But, of course, it is precisely state power to communicate official disagreement with decisions of the national government that is intolerable to the Court's own position as ultimate expositor of constitutional meaning.

Because the Court makes its federalism decisions without fully acknowledging the propriety of disagreement between the national and state governments, judicial protections for federalism tend to be inversely related to the scope of that disagreement. That is, enforcement of the principle of federalism is stronger in cases where the values behind federalism are implicated more weakly. Consider the circumstances of *New York v. United States*. This was, as I have said, the first occasion in sixteen years in which the Court saw fit to impose any limitation on the commerce power. In this case the area of disagreement between the national and state governments was almost nonexistent. The scheme for solving the radioactive waste problem had been proposed by the states themselves (including New York). They had asked Congress to approve the statutory arrangement that the Court eventually invalidated. In contrast, federal control over the wages and hours of state employees, which the Court approved in *Garcia*, had been widely and loudly opposed by state governments.

Seen from this perspective, it becomes clear why the modern Court has been more willing to protect state institutions from being "commandeered" than it has been to protect states from federal usurpations of substantive regulatory power, as discussed in chapter 2. In the "no commandeering" cases, the only relevant national policy determination has to do with state

governments themselves because the states' autonomy from federal control still does not extend to nondiscriminatory federal regulations that bind state governments along with citizens.[38] If judicial protections were extended to nondiscriminatory federal rules, state autonomy would represent a sharper conflict with national authority because states would be freed to defy an otherwise generally applicable federal policy. In short, although the Court protects the structural autonomy of the states due to an almost unavoidable recognition of the fact that under our constitutional system states must continue to exist, the justices do so only because and when it represents the minimum possible threat to the implicit judicial preference for a clear ordering of authority over public policy.

Along similar lines, it is possible more generally to construct a rough index of when national authority is likely to be vindicated by the judiciary: National authority is highest (and most likely to be protected from competitors) where states defy or disagree with Supreme Court interpretations of the Constitution, since both the Court and the Constitution are almost pure symbols of unified, definite national authority and since tolerating state and local government challenges would fragment authority among innumerable contestants.[39] Hence conservative justices like Kennedy and O'Connor participated in the hysterically nationalistic *Planned Parenthood v. Casey* (a subject to which I will return in chapter 7). Next highest is where the national legislature (which, inevitably, is contaminated with some degree of state influence and even state-based loyalty) defies or disagrees with federal judicial interpretations of the Constitution. Thus, Kennedy and others have demonstrated strong hostility to congressional efforts to enforce the Fourteenth Amendment in ways that reverse precedent (a subject that will be treated at length in chapter 6), and Chief Justice Rehnquist himself authored a dogmatic opinion striking down a congressional effort to reverse *Miranda v. Arizona.*[40]

Somewhat lower on the scale is where state decisions conflict, not with specific, existing judicial interpretations of the Constitution, but with general values arguably implicit in the Constitution. Here national authority is less defined and therefore less clear—but still very strong according to the judge's preference for singular authority, especially when challenged by multiple decision makers. Accordingly, the record of even a conservative Court includes many individual-rights cases that have limited state decisional autonomy on the basis of highly questionable interpretations of the Constitution.

Lower yet on the scale of national authority are situations where state decisions conflict with federal statutory policies. Such policies, of course, do represent national authority and are therefore often upheld, as is the case

with most commerce clause enactments, including those that regulate state governments directly.[41] But here national authority is seen as less powerful because congressional policies are constitutionally discretionary and because Congress (as I have said) is suspect due to the possibility of parochial influences. Therefore, the Court can, at least on rare occasions, invalidate a federal commerce clause statute like the Gun-Free School Zones Act discussed in the last chapter, and at least some of the justices can vote to protect local school districts from federal statutory claims of sexual harassment.[42] I might add that national authority in this category is even less implicated to the extent that states are unlikely to favor substantive policies that oppose the congressional policy. States, for example, are unlikely to favor either guns in schools or sexual harassment, and they are actually on record as supporting the federal Violence against Women Act, so to this extent whatever national authority is implicated by the congressional policies is less undermined by judicial protection of state decisional autonomy.

Next lower on the scale of national authority is when the national congressional policy at issue relates specifically to state institutions, and therefore the authoritativeness of national regulatory policy is not significantly diminished. As I have said already, the Court was willing to protect state sovereignty in cases like *New York* and *Printz*.

At the very low end of the spectrum of national authority are instances where the congressional policy would be enforced by lawsuits against the states themselves. In this area there is no necessary reason to expect substantive disagreement between the national and state governments, and in any event federal policies can be carried out through suits naming state officials rather than the state itself. Hence the Court has been willing to enforce the formal immunity of states from suit in federal and state courts and, in *College Savings Bank*, to protect such immunity even from legislation enacted as a part of Congress's power to enforce the Fourteenth Amendment. *College Savings Bank*, by the way, does allow suits against states in federal courts if state relief is demonstrably inadequate; thus reluctance or disagreement at the state level is the predicate for invoking federal jurisdiction. In short, the sovereignty of state governments is protected by *College Savings Bank* but only because there is no evidence of conflicting perspectives on appropriate policy.

Although it sometimes seems outdated and unfashionable, federalism can serve many values, both conservative and liberal. As a consequence, justices from William O. Douglas to Sandra Day O'Connor have said nice things about it on occasion. However, at its root, the federal system of government was designed to serve a populist value. It anchors law in consent, and it uses

the rough techniques of political pressure and open conflict to civilize government. The broad array of cases discussed in this chapter reveals that the Court is not inclined to enforce this robust version of federalism. The fundamental impulse behind the cases is to domesticate federalism. Of course, the justices do understand the elementary and undeniable principle that states have constitutional status, and a willingness to protect states from being commandeered as administrative units of the national government naturally flows from this understanding. But for the justices to appreciate fully *why* states exist would be in tension with important aspects of the judicial function and with natural inclinations of the judicial mind. These inherent limitations put judges at war with federalism to the extent that federalism exists so that disagreement can be registered and national authority questioned. That Americans rely (and as a practical matter must rely) on the Supreme Court to explain and protect the principle of federalism demonstrates, not that our political unity is at risk, but that an intellectual precondition for energy at the periphery is vanishing into the center.

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4

Radical Federalism
The "Antifederalist" Possibility

I

The Supreme Court, of course, is not the only source of our constitutional understandings. That it is likely to provide us with only a domesticated version of federalism would matter less if other components of our political culture were steeped in a more robust tradition. And, because of our rich history and strong political institutions at the local level, there are elements of such a tradition still available. But many of the most potent intellectual influences in our culture are increasingly committed to strong nationalism rather than a robust federalism.

One of those influences is the legal academy, which not only trains the lawyers and judges who argue and decide constitutional disputes but also has significant impact on education more generally. Law professors help to shape the writings of journalists, the debates that go on in legislatures and executive offices, and the ideas taught to students at all educational levels. As I have already indicated at the beginning of this book, many important legal scholars view the Supreme Court's recent record on federalism with excitement, whether fearful or hopeful. They look at the cases discussed in the last two chapters as "a dramatic antifederalist revival" and as having "revolutionary"

potential. Even very cautious scholars use words like "startling."[1] Opinions differ, naturally, but in general the terms of the debate in the legal academy are defined by the language of alarm. The issue as presented by legal scholars is whether, and to what degree, the Supreme Court is moving the nation toward some radical form of decentralized power.

That academic discussion should be framed in this way is, I think, partly a testament to a failure of imagination very similar to what I have tried to describe in Supreme Court opinions. If true, this is a surprising state of affairs because scholars have no responsibility to decide cases in the way that judges have. Indeed, intellectual breadth and daring are usually thought to be part of the academic enterprise. Nevertheless, despite the erudition and braininess displayed in much constitutional scholarship, an embarrassing and unpleasant possibility lurks in the background like a crazy relative in the attic. This possibility is that modern academic commentary on constitutional law is in large measure an exercise in willpower.

I do not, of course, mean to deny the existence of important and admirable instances of truly intellectual contributions in constitutional studies.[2] But in dreary moments of detachment, it is difficult not to see the general contours of constitutional scholarship. In such moments, we notice that sometimes positions temporarily shift but that they seldom change fundamentally; we see that critical insights are often acknowledged but are then quickly forgotten or ignored. In short, the same basic debates grind on and little progress is made. No sooner is one brilliant theory fatally undermined than another appears to take its place. One fervent historical claim after another is shown to be simplistic, but the enterprise of generating them goes on. An endless line of ingenious doctrinal arguments are shown to be unsatisfactory, but like an empty train, they keep clanking down the track.

What is the purpose of this confident flow of words, this relentless verbal energy? Its most obvious object is to prevail—that is, to drown out or obliterate or, at least, outlast. To prevail, the basic rule seems to be: begin with the boldest available position and then hold on. Seen in this light, adversarial huffing and puffing is not a minor deficiency in an otherwise intellectual enterprise; it is evidence that some of the main purposes of the enterprise were not intellectual to begin with. Those purposes, like the vigor of early settlers as they pushed into the West, express the typically American drive for self-assertion.

That the current debate on federalism could be structured as a debate about revolutionary potential is a testament to this adversarial audacity. After all, this nation's two-hundred-year history can fairly be described as a gradual but inexorable march of national power. Moreover, as I will try to demon-

strate, this triumph of centralization is so complete that today, even in the legal academy, where unusual ideas might be expected to germinate, there is no important radical or revolutionary antifederalist challenge to our present federal system. It is less surprising, but no less demonstrable, that there is no such challenge from the most nationalized and remote of institutions, the Supreme Court. There is, however, an influential movement in the academy and on the federal bench in favor of continuing the elimination of any remaining significant state authority. As presently structured, the debate is designed not to shed light on our constitutional system but to ensure that this radically nationalist position will prevail. The boldest available strategy is to turn the truth upside down by labeling as constitutionally radical even moderate or marginal reservations about the continuing trend toward centralization.

These claims require that I be able to identify what a constitutionally "radical" or "revolutionary" antifederalist program would look like. The meaning of these words is dependent on some baseline, and I propose as a point of comparison the program of the radical nationalists on the Court and within the academy. I first describe this program and then I compare it to current antifederalist proposals. Finally, I outline what a radical antifederalist program might look like if there were one.

II

The most extreme version of radical nationalism proposes the elimination of the states. This could involve replacing the states with rationally drawn regional districts, a bright idea that is nevertheless impractical because Article IV requires the consent of a state's legislature before its territorial integrity is sacrificed. A fallback proposal is to transform the existing states into administrative units of the national government. If this transformation were complete, it would run afoul of the requirement that the United States guarantee to each state a republican form of government. Perhaps because of the constitutional impediments, there is no substantial academic movement in favor of either method of eliminating the states. Still, the idea in one form or another has had advocates as far back as Alexander Hamilton,[3] and an adventuresome modern thinker occasionally mentions some variation.[4] Such proposals are important mainly in indicating how wide the range of permissible discourse is among nationalists.

A somewhat more restrained version of extreme nationalism (the version that Madison emphatically denied was contemplated in the proposed Constitution)[5] would allow states to exist but would completely subordinate them

to the national government. To use Madison's terms, this position would replace the "mixed government" inherent in the Constitution of 1787 with a "national" or "consolidated" government. Under a consolidated system, state authority would be subordinated in three ways. First, the legal authority of the Constitution (including, of course, any amendments) would arise from the consent of the people of the whole nation without any participation by the states. Second, the operating institutions of the national government would not be derived from or dependent on state institutions. Third, the national government would have undefined regulatory power over the people directly.

The first proposition—that the Constitution gained its legal authority as an act of the undifferentiated people of the whole nation—is simply at odds with the history of ratification and with the ongoing practice of formal amendment. The proposed Constitution was submitted for ratification to conventions organized within each of the states, and the formal amendments to that document have been submitted to state legislatures or (in one instance) to state conventions. Nevertheless, the claim that the authority of the Constitution arises from the consent of the undifferentiated people has a long pedigree going back at least to Justice Story. It is common in modern academic writings and was embraced by Justice Kennedy in *U.S. Term Limits, Inc. v. Thornton.*[6] Indeed, the Madisonian position that the Constitution would gain legal force through ratification by "[e]ach state . . . as a sovereign body"[7] is today decried by justices and commentators as dangerously radical.

While this accusation is surely a sign of the audacity of today's radical nationalists, of more practical importance is their disapproval of the role of the states in the amendment process. It might be supposed that since this role is specifically required by Article V,[8] there would be no outright opposition to it or at least that any outright opposition would itself be framed as a proposed amendment under the procedures of Article V. One of the most influential legal books of our time, however, argues that the Constitution can and has been amended without any participation by the states when in "constitutional moments" the people of the nation engage in heightened deliberations.[9] While this idea is taken very seriously, some scholars do reject the thesis as radical. Nevertheless, the underlying impulse to minimize the role of the states in the amendment process has broad support. This support is partially discernible in the common academic position against using the convention option of Article V. It is safer, eminent constitutional scholars frequently and earnestly tell the public, to wait for the national legislature to frame specific amendments than for two-thirds of the state legislatures to apply for a convention.[10]

More generally, opposition to state involvement in the amendment process is apparent in the enormous amounts of judicial and academic effort that in recent decades have been expended in trying to fashion justifications for innovative interpretations of various constitutional rights. Given that some of these rights have no specific textual bases, that some arguably reverse intended constitutional meaning, and that some nationalize issues (such as education and family law) that the Court itself depicts as quintessential examples of matters left to the states, it might be that their establishment should have been left to constitutional amendment. Even if judicial interpretation is viewed as a proper vehicle for instituting such basic changes, there can be no doubt that it would also have been legitimate to utilize the amendment process. Justices and scholars, however, have relied almost exclusively on judicial interpretation and in so doing have effectively created an enormously significant alternative to either of the Article V amendment methods.[11] The sustained and aggressive use of this alternative has meant that much of the fundamental law has been established without participation by the states.

The second element of radical nationalism requires exclusion of state institutions from control over or operation of national institutions. Much of this exclusion has been accomplished by constitutional amendment and by the relocation of what once were assumed to be political questions to the jurisdiction of federal courts. These massive changes, which include, for example, the exclusion of state legislatures from the selection of senators and the relocation of ultimate responsibility for electoral reapportionment decisions to the federal courts, are not enough for radical nationalists. Highly respected constitutional scholars also rail against the electoral college and, more important, want to eliminate the equal representation of each state in the Senate.[12]

Under Article V, the elimination of equal representation in the Senate cannot be accomplished without the consent of every state. This might seem to be an insurmountable obstacle, but the ceaseless urge toward consolidated government is not to be deterred. While the role of the states in choosing national representatives cannot be eliminated, nationalists can attempt to reduce it to a formality. A majority of the Supreme Court has repeatedly and authoritatively asserted that representatives to the national legislature "owe their allegiance to the people, and not to the States."[13] Senators "become, when elected, servants of the people of the United States."[14] Thus, although presumably the framers made equal representation in the Senate a virtually unamendable part of the Constitution for some serious reason, radical nationalism posits that senators are to serve only the national interest and assumes that this interest is definable without reference to state interests. As

legally improbable as this position may be, modern consolidationists not only assert it but, characteristically, describe those who disagree as dangerously radical. The Court's claim that national representatives should serve only the national interest cannot, of course, displace political realities, but it can reinforce more general psychological and cultural influences that encourage members of Congress to cut their state-based roots as they live and work in Washington.

The Court's impact on the political culture has undermined state influence over national institutions in another and even more fundamental way. The Court[15] has insisted that the federal judiciary is the authentic voice of "the people" who enacted and amended the Constitution.[16] In the last century, the national judiciary emerged in the public's understanding as the preeminent enforcer of limitations on the national government. In theory, if not in operation, judicial review has replaced political pressure from the states as the primary check on federal overreaching. In the process, state-based political activity expressing disagreement with the constitutional claims of national institutions has been burdened by an extra measure of perceived illegitimacy.[17]

The third element of a fully nationalized government, according to Madison, is the generalized authority to regulate the conduct of the people. This element was treated at length in chapter 2. That the central government's regulatory power is effectively unlimited was conventional academic wisdom until *United States v. Lopez,*[18] and calls for a return to this state of affairs are frequent and vociferous.[19]

Let me briefly recapitulate: Madison (and other proponents of the proposed Constitution) specifically and unequivocally denied that the new system would create either a confederated or a consolidated government. These arguments (not to mention the plainest possible constitutional text and enduring political practices) indicate that ours is a mixed form of government. Nevertheless, radical nationalists in the academy and on the Court insistently push for the central government to have, in effect if not in form, all the elements of an unmixed system. It would, of course, be one thing for these strong nationalists to acknowledge that our present government is and was meant to be mixed and then to argue that a consolidated system would be an improvement. But, instead, they usually insist that a consolidated national government is what our present Constitution creates.

What is more difficult to convey is the tenor of many of the arguments made on behalf of an unmixed national system. As a convenient illustration, consider an essay by the respected scholar Daniel Farber.[20] This article, "The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and

the Original Understanding," is by current standards serious and moderate. Farber's argument is that George Washington's letter to Congress on behalf of the Constitutional Convention demonstrates several important aspects of intended constitutional meaning.

Farber claims that Washington's letter demonstrates that the Constitution was to gain its authority from the whole people, not the people in the states. He infers this in part from Washington's references to "our country" and "our Union."[21] Since these words seem to assume the existence of a country before ratification, Farber concludes that Washington believed Americans were "in some sense already one people."[22] A second point is that Washington's letter "does not say a word about the importance of maintaining the states as a check on the federal government."[23] Although Farber uses the observation for a somewhat different purpose, his interpretation is consistent with the familiar consolidationist view that state institutions should not serve as a constituent part of—and therefore not as a check on—national institutions. The third argument made by Farber is that because the letter does refer to "fully and effectively vesting" important powers in the new government, the regulatory powers of Congress were meant to be so large as to be capable of becoming general in all practical effect.[24]

In Farber's essay, then, can be seen all three elements of the consolidationist position as defined by Madison. These elements are asserted to be the law of the land simply because of Washington's letter. Although the argument is made confidently, a moment's reflection shows it to be as light as smoke. To begin with, Washington's use of the phrase "our Union," while interesting, could not have meant that a legitimate political union already existed, inasmuch as the announced purpose of the new Constitution was to create such a union. Indeed, the purpose of the letter was to introduce and recommend the instrument that would accomplish this change. Moreover, supposing that a unified nation somehow could have predated its own founding, it would not necessarily follow that the people in that union were organized independently of the states in which they lived. In fact, whether that kind of unification was even created by the new Constitution is today a controverted question.[25] Perhaps sensing these kinds of difficulties, Farber shifts quickly (as if it were the same point) to the much more realistic possibility that Washington meant that Americans were "in some sense already one people."[26] It does seem quite likely that before ratification Americans could have had a sense of historical or cultural identity or of some form of incipient political identity. (Indeed, the government created by the Articles of Confederation was sometimes referred to as a "union.")[27] What Farber does not explain is his conclusion that Americans were already one people in the sense

that they had authority to ratify a new constitution independently of the sovereign will of the people within existing states. If they had believed themselves to be one people in that sense, presumably they would have attempted to ratify the Constitution by a national convention. They did not do so; moreover, even under the Constitution that "the people" were establishing and Washington was introducing, a national convention can be used to propose, but not to ratify, constitutional text.[28]

Farber's essay sails briskly along, ignoring these and other difficulties. The most general difficulty, however, is not ignored, but it is not taken seriously either. All three of Farber's arguments are obviously subject to the objection that Washington's brief letter is neither the text of the Constitution that was eventually ratified nor a faithful summation of the rich historical record that exists concerning the intentions of the framers and ratifiers. For instance, what justifies Farber's conclusion that the failure to mention the role of states as checks on the national government is significant—any more significant than, say, Washington's failure to mention that the Constitution did not contemplate a king? To know what to make of omissions or of vague terminology like "fully vesting," it is necessary to know something about the rest of the debate over ratification. Of course, Farber knows this full well,[29] and it is here that his essay descends to the level of parlor game. To the presumably conclusive objection that a single, brief letter is far too little to resolve fundamental questions about intended constitutional meaning, Farber asks us to "look at how conservative theorists define the proper role of intent."[30] His analysis purports to show that these conservative theorists should, if they are consistent, treat Washington's letter as the authoritative statement of intended meaning.

Farber may have checkmated Judge Easterbrook and the other "conservative theorists" (although I somehow doubt it), but he has not given any argument that would convince someone who does not accept these conservatives' (putative) theory of historical intent. And into the category of the unpersuaded would have to go a good many of the strong nationalists who are presumably eager to develop some real justification for their consolidationist positions. In short, Farber's essay not only contains much of the substance of the standard nationalist argument but also conveys the sense of audacity and brazenness that tends to characterize conventional constitutional scholarship. If the consolidationists are clever enough and daring enough, their ideas, even if wrong, will be the last ones standing.

I do not want to leave the impression that strongly nationalistic positions go so far as to favor formal consolidation. Most proposals for further centralization stop short of that extreme. They do go very far, however, in calling

for effective consolidation. For example, despite the general tendency in the academy to support the institution of judicial review (and despite the related but more specific tendency to criticize the political question doctrine), a prize-winning book argues that the federal judiciary should altogether drop any effort to protect the states from federal overreaching.[31] It is not at all uncommon to see arguments to the effect that federalism serves no important values or that it is entirely obsolescent.[32] Under the assumption that states should continue to exist, a standard academic position is that their operations should be subject to direct national regulation.[33] Even Mark Tushnet's extended and unusual argument for moving our constitutional discourse from the courts to the political arena makes no mention of organizing this discourse according to state-based institutions.[34] "The people," for all that appears from Tushnet's proposal, should be an undifferentiated, nationalized entity. This idea, like the other proposals just mentioned, are all radical in the sense that they assign little or no value to a structural principle that was undeniably central to the constitutional design and that continues to play an important part in the regular operation of American governance.

III

Although, of course, by some measure there may today be a radical antifederalist agenda, I think it is clear that there is no antifederalist program equivalent to the radical nationalist position that dominates the case law and the academy and is taken for granted. As a preliminary matter, recall that it is at least not entirely beyond the pale for nationalists on occasion to consider abolishing the states outright. An equivalent antifederalist discourse is imaginable. The corresponding antifederalist proposal would be to abolish the national government and return to the kind of confederation that preceded unification, an objective that occasional commentators like Linda Greenhouse actually impute to members of the Court. However, as far as I know, no one on the Court or in the academy even mentions, much less supports, any such idea.

A more realistic possibility is that, just as modern nationalists support all three elements of what Madison called consolidation, modern antifederalists might support what he termed confederation. Certainly, much of the outcry against the "new federalism" asserts precisely that it favors replacing the present system with a "league" or a "confederation of nations."[35] At least in Madisonian terms, this charge is false. In a confederation, the unanimous consent of the states would be required for constitutional amendment, each state would be required to have equal representation in the House of Rep-

resentatives as well as in the Senate, and the national government could have no direct regulatory authority at all. If any one of these proposals has been made by a reputable scholar or jurist, I have not seen it. In contrast to the fact that it is not uncommon to find writers like Farber who matter-of-factly recommend all three elements of an unmixed national government, I am confident that no serious modern writer has proposed all three elements of confederation.

Of course, there might well be antifederalist proposals that are radical even though they fall short of favoring formal confederation. It might be, for instance, that in the same way that many strong nationalists see virtually no value in residual state sovereignty, some modern antifederalists may see no value or almost no value in the national government. Merely stating this possibility outright suggests its outlandish implausibility. Needless to say, many antifederalists, including, for example, the moderately conservative law professor Charles Fried and the strongly conservative justice Antonin Scalia, have written specifically and sometimes movingly about the values of nationhood.[36] It is safe to say that every significant antifederalist on or off the Court understands the need for potent national powers like defense and taxation. While Justice Thomas and Richard Epstein (among others) have argued forcefully that national power must be specifically authorized,[37] the various arguments for a restrictive definition of "commerce" do not suggest that it was inappropriate or unwise to authorize national power over that set of activities conceded to constitute commerce among the states. Similarly, not a word in what is claimed to be the most revolutionary judicial opinion, the *Term Limits* dissent, which I will discuss fully in chapter 6, implies that states could impose any qualification for national representatives that is specifically prohibited by either the Constitution or a federal statute. In short, modern antifederalists are questioning how much power the Constitution grants the national government, not whether a national government serves vitally important purposes.

Despite their occasionally loose rhetoric, in sober moments strong nationalists might be inclined to admit all this and yet still insist that the modern antifederalists are dangerously radical. They could claim—indeed, some do claim[38]—that the antifederalist program is radical by a different measure altogether. That is the measure of proposed deviation from the status quo. Radical nationalism, by this argument, may be constitutionally radical, but it is largely an accomplished fact. The antifederalist agenda, conversely, may be legalistically moderate, but it proposes very significant changes from what has become the accepted norm.

In evaluating this claim, it is important to note that its apparent empiricism is illusory. Suppose that in the past fifty years the American government had gradually developed into a presidential dictatorship. Under that circumstance, calls for a return to republican arrangements would entail very large changes from the established norm. Presumably, however, such calls could not be dismissed as radical for that reason. Whether a large change in existing practices is "radical" or not must depend in some degree on how far existing practices depart from legal and moral norms. To the extent that the empirical claim assumes, as a benchmark, the existence of a consolidated government, that claim evades or begs the question whether consolidation is constitutionally radical.

But even on its own terms the empirical claim is doubtful because it depends on exaggerating the degree to which our political practices are nationalized. Although strong nationalists see states as anachronisms and favor a program of consolidation, state governments continue to exist and to exhibit important elements of sovereignty. They organize governance at the local level, they regulate the lives of their citizens, they participate in the amendment process, and so on. It is true that by and large people have come to expect the national government to regulate without conceptually based limitations, but they still assume that much of this national power will be employed against a background of normal and pervasive state regulation. Certainly it would be a major jolt to established expectations if the national government were to displace (rather than supplement) state institutions in the routine operation of public schools or criminal law enforcement. In some measure, then, the antifederalist program seeks only to preserve the status quo or to change it at the margin. Consider the three cases that are the most important constituents of that program:

1. Despite the furor over the dissent in *Term Limits*, the most that can be said with any certainty about its implications is that those who joined it would approve of other state-imposed qualifications. This power, however, would be limited by explicit constitutional limitations, such as the equal protection clause, and also, presumably, by the power of Congress under Article I, Section 4, to override state decisions.[39] Moreover, the significant role the states generally play in operating and regulating national elections is not foreign to our experience. In fact, as the dissent points out, before 1913, when the Seventeenth Amendment was enacted, state legislatures had "virtually unfettered" discretion to adopt rules narrowing their choice for U.S. senator.[40] Perhaps most fundamentally, even today, after the *Term Limits* decision, the voters in every state have, as a practical matter, the power to

decide what should be a disqualification for national office, even including insufficient commitment to that state's interests. If the voters in the states want a "patchwork" of parochial representatives, they can—and do—elect such people now. If they want representatives who look to "the national interest," nothing in the dissent could prevent them from realizing that either.

2. On the basis of both the *Term Limits* dissent and the majority opinion in *Lopez,*[41] it is obviously fair to conclude that some important antifederalists generally favor construing enumerated national powers restrictively. Given the number and range of existing statutes based on the commerce power, theoretically this position could eventually result in a significant change in the status quo. However, not only is such a change unlikely for the reasons given in chapter 2, but every first-year law student knows that Congress can get around the *Lopez* ruling by focusing its statutes on items that move in interstate commerce or by using conditional expenditures. True, Justice Thomas's concurring opinion proposes a more sweeping reappraisal of modern commerce clause decisions based on a historical and narrow understanding of the word "commerce."[42] However, Thomas denies that his attack on the "substantial effects" test would lead to a wholesale repudiation of the modern cases.[43]

Naturally, skeptics might wonder about this reassurance. But even the narrowest meaning of "commerce" extends to commercial sales and transportation undertaken in connection with those sales. Under this definition, perhaps Congress could not regulate "local" activities, like manufacturing, directly, but I can see no convincing reason why it could not regulate the same subjects indirectly by prohibiting interstate shipment of goods produced in violation of whatever standards Congress imposed. As Epstein notes, various doctrinal limits on this indirect form of national regulation are conceivable, but they require justifications that go well beyond a historical understanding of the commerce clause.[44] These supplementary doctrines, which include judicial investigation of congressional motives, have been firmly repudiated by the Court and are not even mentioned in Thomas's concurrence. In short, standing alone, the most that even Thomas's definition of commerce would accomplish would be to force increased reliance on what is already one of the major techniques for the exercise of the commerce power. More frequent resort to the device of regulating goods at the point of interstate shipment would hardly qualify as a radical change from present practices.

3. In *Seminole Tribe of Florida v. Florida,*[45] the Court said that the commerce power does not authorize Congress to subject nonconsenting states to suits by private parties. To assess the significance of this decision it is necessary to keep in mind that Congress can induce states to consent to suit by

conditioning federal expenditures on such consent and that even in the absence of consent Congress has power to authorize suits against muncipalities and other governmental subdivisions. Moreover, as several commentators have pointed out, *Seminole Tribe* does not affect the rule that federal laws can be enforced prospectively against states in federal court by the expedient of naming as defendants the appropriate state officers rather than the state itself.[46] As Henry Monaghan concluded, *Seminole Tribe* "will prevent a federal forum only in rare situations . . . in which Congress has provided a remedy against the state but not against the state officials."[47] It is true that in these rare situations Congress may no longer assign jurisdiction to state courts;[48] nevertheless, enforcement of federal policies is still possible through suits brought by federal agencies.

Even if none of the three major "antifederalist" opinions threatens any important operational changes in the status quo, it might be that an antifederalist movement exists that is energetically engaged in fomenting ideas that will eventually lead to such changes. I cannot entirely disprove this claim, but I can indicate why it is unlikely.

When antifederalists propose ideas that might have potential for radical decentralization, in significant instances they specifically argue against any real-world change. For example, in an article arguing flatly for the proposition that "the post–New Deal administrative state is unconstitutional,"[49] Gary Lawson asserts just as flatly that the administrative state "has been accepted by all institutions of government and by the electorate."[50] He devotes the concluding section of his essay to a brooding meditation on the possible responses to "the enormous gap between constitutional meaning and constitutional practice."[51] The option he seems to favor is to accept the modern state as a fact and to reconsider whether a constitutionalism of historically intended meaning should carry any normative weight.

In a similar vein, H. Jefferson Powell offers an extensive exploration and partial defense of the immunity for state decision-making processes created in *New York v. United States.*[52] As one aspect of his analysis, Powell hits upon the kind of insight that often causes constitutional scholars to embark on excited flights of doctrinal prescription. He notes that the *New York* opinion is inconsistent with *Martin v. Hunter's Lessee.*[53] That is, he finds a plausible modern argument for immunizing the decisions of state supreme courts from compelled entry of judgment by the U.S. Supreme Court. Now, there is an idea with the potential for radical alteration in the status quo. Moreover, Powell is respectful of the original arguments against *Hunter's Lessee*, and he is sympathetic to the *New York* Court's intuitions about federalism. He does not, however, propose using *New York* as a fulcrum to dislodge the accepted

practice of the Supreme Court's commandeering state courts to implement its judgments. On the contrary, he observes that Justice O'Connor, the author of *New York*, "assuredly does not question the holding of *Martin v. Hunter's Lessee*," so Marshall's opinion "must raise questions about the coherence of Justice O'Connor's federalism."[54] He goes on to try to rescue a modest version of O'Connor's federalism—a version that does not challenge "the substantive scope of federal power"[55] and does not succumb "to the impractical desire to repudiate the modern federal government."[56]

When modern antifederalist scholars draw back from or repudiate altogether the operational implications of their arguments, they may be exhibiting nothing more than a begrudging recognition of political reality. But they may also be exhibiting the virtually universal consensus that I referred to earlier; that is, they may be demonstrating their own recognition that a strong national government is morally and politically essential.

Participation in such a consensus would also explain why so many proposals for decentralization are designed, in both their content and their style, to preserve national power. Two leading defenses of the limited state immunity created by *New York*, for example, emphasize that process immunities can protect democratic values without diminishing the power of the national government to regulate any aspect of private behavior.[57] Moreover, several of the commentaries on the reemergence in *Lopez* of a distinctive legal concept of commerce emphasize didactic, rather than operational, objectives, as does Monaghan's effort to explain *Seminole Tribe*.[58] Even where *Lopez* is defended on instrumental, doctrinal grounds, the emphasis often is not on the development of rules that would have far-reaching consequences.[59] For instance, Deborah Merritt defends a "fuzzy" method of distinguishing "commerce" from other activities and praises the Court for leaving prior commerce clause decisions untouched.[60] Finally, Lynn Baker has recently mounted an extended argument for limiting Congress's spending power in light of *Lopez*, but her rather conventionally doctrinal proposal is carefully hedged with important presumptions added for the specific purpose of "preserving for Congress a power to spend that is greater than its power to regulate the states directly."[61]

All of these examples of prescriptive modesty might, I suppose, be dismissed as crafty but insincere reassurances. But if modern antifederalists covertly favored dramatic alterations in present political practices, presumably they would not rely on reform through the very national institutions that can be expected to protect the national government from radical disempowerment. Most antifederalist proposals, however, do rely on national decision makers. Robert Bork, for instance, advances a broad-gauged attack on federal judicial power, but his radical solution is to amend the Constitution to allow

the *national* legislature to override Supreme Court decisions.[62] This is a prescription for change, but not for change that radically redistributes power to the states. (Indeed, Bork's proposal would authorize Congress to reverse decisions of state supreme courts.) Similarly, the various commentators who recommend restrictive definitions of "commerce among the states" would trust the national courts to see that these definitions are not evaded or subverted. John Yoo's argument that institutional injunctions lie outside the meaning of "judicial power" in Article III relies for implementation partly on the Court's sense of self-restraint and partly on Congress.[63] Stephen Gardbaum's interesting idea that federalism has principled application even in the area of concurrent powers is to be implemented by the Supreme Court's "policing Congress's deliberative processes."[64]

Intellectual fixation on nationally imposed solutions to problems of federal overreaching is not, of course, surprising or necessarily inappropriate. But it does emphasize the extent to which even proposals for significant change assume the legitimacy and importance of national institutions.

Modern antifederalists do not want to abolish the national government. They do not argue for confederation. By and large, they do not even argue for significant changes in current political practices. The most that can be said is that they do not accept the view that states are of no value in our political system. Therefore, these modern antifederalists want to preserve and strengthen elements of our existing mixed system. In short, modern antifederalism is radical only on the assumption that the positions taken by modern consolidationists are noncontroversial both descriptively and normatively. That this is the prevailing assumption throughout so much of the world of elite constitutional commentary demonstrates, again, how depleted are our reserves of the kind of imagination and energy necessary to resist the gravitational forces of our political center.

IV

The modest and equivocal nature of antifederalists' objectives raises the question of what a radical antifederalist agenda, if one existed, would look like. It is possible—but fanciful—to imagine a strong antifederalist movement mirroring the tactics of the modern consolidationist movement. Radical antifederalists might exploit all available historical and philosophical materials to urge that state sovereignty is not simply useful or even important but that it is absolutely foundational to all other constitutional values.[65] Building on Epstein's arguments about the reach of the commerce clause, they could offer one imaginative doctrinal formulation after another in a short-run effort to

prevent all evasions of conceptualistic limitations on the enumerated powers. They could argue audaciously and relentlessly for reading the necessary and proper clause as a mere truism that adds nothing to Congress's authority. They could insist that the inner logic of *New York* requires that it be extended to protect the integrity of state judicial proceedings from the U.S. Supreme Court. Arguing against empty formalism and from the assumption that the meaning of the Eleventh Amendment must adapt in response to unforeseen modern conditions, they could seek to reverse *Ex parte Young* so that state immunity could not be easily evaded. They could not only propound but also seek to implement a definition of "the judicial power" under Article III that is as restrictive as the current judicial role is expansive. Antifederalists could, in short, ape strong nationalists by exploiting all the wide opportunities afforded by the conventions of constitutional interpretation.

As unlikely (or unattractive) as this version of modern antifederalism might be, it would in some respects not really be radical. It would depend almost entirely on the exercise of national judicial power.[66] A more truly radical program would aim at making national power dependent on state institutions rather than the reverse. This version of antifederalism might, for instance, support repeal of the Seventeenth Amendment so that the Senate would again be directly responsive to state legislatures. It could also favor repealing those parts of Article V that give Congress a role in the amendment process, and it would propose replacing them with populist or state-based procedures.[67] It could support an amendment allowing state legislatures to overturn certain classes of Supreme Court decisions. These kinds of ideas are certainly radical in one sense, but in another they are not. Unlike, for instance, the nationalists' use of expansive judicial review to supplement or replace the provisions of Article V, these proposals all docilely accept the amendment process, a process that is itself controlled by national institutions.

This suggests that, like strong nationalists, antifederalists could rely on a strategy of directing inventive and insistent constitutional arguments at institutions that have a stake in accepting those arguments. Radical antifederalism might, therefore, turn to some form of nullification or interposition.

Insofar as nullification entails outright defiance of national authority, it would certainly be radical but it would not be modern antifederalism. In the extremely unlikely event that states prevailed against national authority, the "people in the states" would have become sovereign over the Constitution that they ratified. Just as judicial review effectively replaces the sovereignty of the people with judicial discretion, defiant nullification replaces the foundational document with local political judgment. In seeking to mimic the

tactics of the consolidationists, antifederalists would have transformed themselves into confederationists.

Interposition, however, does not necessarily require outright defiance. Variations of this doctrine can be and have been used simply as devices for registering official disagreement with constitutional claims made by the national government.[68] At least in combination with other forms of pressure, this tactic seems to me to hold some radical potential and also to be consistent with the principles of modern antifederalism.

Using interposition for communicative and organizational purposes does not presume ultimate sovereignty for the states, but can it be expected to induce any significant change in the status quo? After all, even the Virginia and Kentucky Resolves opened debate on the Alien and Sedition Acts only to produce support for the nationalist position.[69] Moreover, as the history of abortion regulation over the past thirty years demonstrates, states already "talk back" to the national government through various official actions that effectively challenge national policy. Even when they are partially effective, however, such recalcitrant actions are typically framed and understood as policy disagreements. Since the Court has preempted the high ground of constitutional interpretation, dissent based on moral or pragmatic considerations is widely viewed as improper.[70] A certain kind of radical potential, therefore, could arise from the possibility that responsible and sustained use of the communicative versions of interposition might help to persuade the public that the "people in the states" do have a legitimate role in enforcing constitutional limits.

This kind of change in public understanding and attitude could have far-reaching practical ramifications. While it is common to complain that the habitual, inexorable resort to national solutions reduces the moral status of state and local governments, it is also true that nationalization is a result of this loss of moral status. States still exist and function in significant ways, but they do so without any strong underpinnings of political morality. Consolidationists are right in claiming that, as a people, we have largely lost any sense of why limited state sovereignty might be, not just a familiar, but a desirable state of affairs. Hence, the existence of independent power centers within the states can provide only a weak drag on regulatory centralization.

If states were self-consciously to take on the role of helping to enforce the Constitution, they might earn some of the stature presently monopolized by the judiciary. They might, that is, provide the public with some affirmative reason—beyond occasional self-interest—for loyalty to and interest in state institutions. This is not a matter of conjecture. As John Dinan has impres-

sively demonstrated, throughout much of our history, a history now largely forgotten, state institutions assumed major responsibility for the definition and enforcement of constitutional rights.[71] The ensuing debates at the local level were often enfused with gravity and insight.

At least in contrast to the kinds of specific and limited changes that might be expected from, say, a few judicial decisions extending *Lopez*, an increase in the moral status of state institutions would amount to a cultural change to which the word "radical" might actually apply. The federal system of government that we have today is defined and maintained by thousands of decisions that result every day from the understandings and relationships existing within legislatures, government bureaucracies, and political parties.[72] To influence the attitudes that underlie these deliberations and decisions could have pervasive and significant effects.

If the states were established as limited but legitimate contributors to the process of determining constitutional meaning, renewed realism and maturity could be injected into American political thought. Institutionalized competition to protect constitutional values could promote the recognition that here sovereignty resides in a complex, indeterminate process, not in a king or a court. It could vividly hold out the paradoxical idea that the national interest cannot be determined wholly apart from local interests. It could instill a deeper understanding that there are degrees of political unity and limits on loyalty. All of which is to say that in practice a vibrant form of federalism requires and might promote a capacity for independence, for ambivalence, for incompleteness, and for qualification.[73] Thus, a radical effort to reinvigorate the moral status of the states would have as one of its ambitious purposes the promotion of certain attractive but precarious intellectual qualities.

The intellectual climate that exists in any polity is, of course, the product of history, and it can be doubted that this climate would be altered much even by such a significant change as the reintroduction of a responsible version of interposition. Moreover, it can be doubted that the doctrine of interposition could be reintroduced in any responsible form under current conditions.

Nevertheless, what ought not to be unrealistic is that those who study the constitutional system be willing to consider the idea of using interposition to reinvigorate the federal system—that they not dismiss this idea merely because it is in some sense "radical," that they not muster their formidable rhetorical forces to shut down thought, that they not roll out consolidationist doctrine to mark the limit of permissible discussion. While it may well be

too much to hope that the political culture as a whole possesses the intellectualism demanded by a federal system, it ought not to be too much to ask it of the constitutional law establishment. That it almost certainly is too much to ask is a dismaying indication of how far the preconditions for centrifugal energy have atrophied.

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5

Radical Nationalism

I

One of the principal claims of the preceding chapters—that far from contemplating a radical antifederalist revival, the Supreme Court is actually hostile to the basic impulses underlying a robust form of federalism—may strike many as implausible if not upside down. After all, virtually everyone agrees that federalism is a basic element of our constitutional system, and it seems rash to attribute to five members of the Court a position that is profoundly hostile to that principle. And, indeed, as I described in the first chapter, there are many understandable bases for the belief that some members of the Court may actually be excessively enamored with that principle. If there is one judicial opinion that appears to support these doubts and objections, that opinion is Justice Clarence Thomas's dissent in *U.S. Term Limits, Inc. v. Thornton,*[1] a decision that so far I have only touched on. Even Charles Fried's sober "Foreword" in the *Harvard Law Review*, which is generally skeptical about the significance of "revolutionary gesture" in other recent federalism cases, concedes that the four votes in support of Thomas's "manifesto" come "closest to revolutionary."[2] No other opinion has aroused as much alarm.

One reason for this extraordinary reaction is that *Term Limits* is one of those rare cases where the justices try to signal that an issue is genuinely worthy of the adjective "constitutional."[3] Both the majority opinion and the dissent are substantial and detailed. Justice Thomas's dissent, especially, is a methodical, relentless legal argument.[4] It establishes him as an intellectually formidable presence on the Court. All the opinions (including Justice Kennedy's concurrence) succeed in linking the specific dispute about term limits to grander themes about allocation of authority. The justices appeal in serious ways not only to text, history, and structure but also to first principles. They insist that the constitutionality of state term limits legislation cannot be determined without understanding what kind of a nation we are.

At that altitude it is easy to lose your balance, and it is possible to question whether the justices were fully in control of their material. In particular, it is curious that all the opinions dwell on the question whether the ultimate source of the authority of the Constitution resides in the people in the states or the undifferentiated people of the whole nation. This highly abstract issue does not seem tightly connected to the question presented by the case.[5] The sovereign people "of the states" could, after all, have agreed to limit their power to define the qualifications for federal office. Conversely, even assuming that the people of the nation consented to the Constitution, they could still have reserved to the states the power to set federal term limits. Be this as it may, the justices' emphasis on this question of first principle links all the opinions to one of the oldest and deepest questions about our nationhood. Whether the ultimate source of constitutional authority included the states was a question passionately debated at the time of the framing, during the period of resistance to the Alien and Sedition Acts, and as the nation lurched toward the Civil War.

The continuing American fixation on this question of the derivation of constitutional authority is, I think, relevant to the *Term Limits* case not in some logical or legalistic sense but in what it reveals about the fears that underlie our society's commitment to strong nationalism. Correspondingly, the case can tell us something about why robust forms of federalism are so threatening. My purpose in developing this theme is not to defend Justice Thomas's thinking against charges of radicalism. Indeed, my interest is in trying to understand his radicalism and to depict it more accurately. Nevertheless, in a certain sense I will be defending his opinion. My view is that the dissent is deeply radical and threatening only in that it challenges a radical potential in the majority opinion. That potential is not generally acknowledged to be radical (nor decried as dangerous) because it is consistent with nationalistic political aspirations that are widely shared, especially among

sophisticated commentators. These aspirations are, I think, the nerve that Justice Thomas struck. After describing the strong nationalism inherent in *Term Limits*, I will try to show how the dissent threatens the belief that this form of nationalism is either realistic or attractive. I will try to show, that is, that the commitment to radical nationalism is based on a deep and intractable anxiety.

II

The Thomas dissent in *Term Limits* is a fine illustration of the ambiguity in the data upon which current fears about disunification are based. Given the powerful arguments and the heavy rhetoric in his opinion, especially when enunciated within the historical and social context described in chapter 1, the ensuing scholarly and journalistic storm seems understandable. But if we blink, the furor seems to be based on airy nothings. After all, there is no realistic chance that Justice Thomas will lead a successful campaign from the Court to turn this country into a confederation or to convince any appreciable number of Americans that their "sole political identity" is with their state governments. On the doubtful assumption that Justice Thomas intended to pursue such objectives, there are (as I indicated in the last chapter) strong reasons to believe that all the other justices, including his fellow dissenters, are ambivalent or dubious about "states' rights" even when the issues are limited or ordinary.[6] Far more important, the political culture in the United States is too nationalized to permit any court on its own to alter significantly our identity as a unified nation.[7] What, then, can account for the existence of apparently serious concerns about the revolutionary potential in Justice Thomas's position?

One kind of explanation that immediately presents itself is psychological. The critics, it might be hypothesized, have been under stress. They have in recent years suffered a series of shocks and defeats, including the partial restoration of the doctrine of state immunity from congressional regulatory power and the first judicial finding in almost six decades that an activity is outside the commerce power.[8] Also to be taken into account are new statutes, such as the Unfunded Mandates Act and the Welfare Reform Act.[9] Fears of confederation, it might be said, are understandable overreactions by strong nationalists to these outrages. Like all psychological explanations, this one is somewhat insulting. It assumes that a few political setbacks can cause intelligent, capable people to lose their grip on reality.

We might, therefore, prefer the conventional doctrinal explanation. This approach would involve a careful analysis of the logic employed in the Tho-

mas dissent, along with a demonstration that—if extended—that logic would have various far-reaching consequences. The doctrine of interposition, for instance, might well, as I myself suggested, be shown to follow potentially from the dissenters' view that sovereignty resides in the people in the states. The difficulty with this as an explanation, of course, is that all of Justice Thomas's critics (especially the justices) know that seldom, if ever, are all the doctrinal implications of an opinion realized. Indeed, as the cases from *National League of Cities v. Usery* to *Garcia v. San Antonio Metropolitan Transit Authority* show, sometimes those implications are not realized at all.[10] Limitations can be imposed because judges have second thoughts or because of practical realities, but they can also be imposed because jurists honestly do not agree that their decisions ever did entail the dire implications that others attribute to them. It is clear, for instance, that—right or wrong—Justice Thomas does not believe that his view of the Tenth Amendment must be pushed so far as to threaten (as charged by some critics) the practice of holding congressional elections.[11]

I certainly do not mean to deny, by the way, that there is considerable potential for expansion in the Thomas position nor that he might intend to try to realize some of it in future cases. There is virtually no doubt, for instance, that he would vote to approve other kinds of state-imposed qualifications. More generally, we know from his opinion in *United States v. Lopez* that Justice Thomas takes seriously enough the idea that the national government may exercise only authorized powers that he would invalidate a range of modern commerce clause enactments.[12] These two possibilities, like others that I can imagine, might be thought to be unwise and even radical. But the identification of such realistic fears only intensifies puzzlement as to why Justice Thomas's critics so often invoke unrealistic visions of confederation.

A third kind of explanation would begin by insisting that the logical implications of a judicial opinion are relevant to the terms of public debate quite independently of their likely operational consequences. That is, aside from Justice Thomas's beliefs or intentions and aside from predictions about the other justices' probable voting patterns in subsequent cases, the *Term Limits* dissent might be "revolutionary" as a set of ideas. Under this view, the critics of the Thomas dissent are not really trying to stave off confederation; they are simply trying to win an argument, to defeat a particularly bad idea.

We all know that it is possible to get excited about ideas for their own sake, so this explanation is a promising one. To the extent that some of the

criticisms are expressed in words that portray the issue as operational, like "reinstalling the Articles of Confederation," this might be understood to be "a slight exaggeration" (which you might recall is the phrase Linda Greenhouse actually did use). And the ideas or aspirations that underlie the Thomas dissent may well be fundamentally bad ones. But just as it is true that Justice Thomas does not actually propose to establish a confederation, it is also true that at least on its face his opinion does not argue on behalf of the idea of confederation. So, although it is helpful to suppose that the critics are agitated by Justice Thomas's ideas *as ideas* (because it helps account for their fervor), it is still not clear why they frame the debate in the terms that they do.

One possibility is that Justice Thomas is arguing for the idea of a confederation whether he says so or not. To me this seems doubtful or even unfair. If I were to write in favor of one important but limited aspect of Marxism (say, the idea of alienated labor), it would seem wrong, at least absent a good deal of explanation, for a critic to reply that I am arguing on behalf of the inevitability of class struggle, the dictatorship of the proletariat, and all the rest. Analogously, even if Justice Thomas likes one important component of the idea of confederation (for example, the notion that ultimate sovereignty resides in the people in the states), he is not necessarily committed to other possible components (such as the lodging of citizens' primary allegiance in state governments).

A variation on this way of explaining the extreme terminology chosen by the critics of the dissent is to focus not on the ideas that Justice Thomas was arguing *for* but on the ideas that his opinion *undermines*. To the extent that, as I suggested earlier, the dissent is a sustained and impressive refutation, then its significance for the critics could correspond to the significance of the ideas that they see in the majority's position. The critics' terminology, that is, might be explicable as a reflection of their own commitments. To test this explanation, it is necessary to shift attention to the majority opinion. What aspirations does it stand for?

III

The majority opinion holds that at least insofar as states seek to regulate the national electoral process, they must be authorized to do so by the Constitution. It denies that the Tenth Amendment's reservation of unenumerated powers to the states is a sufficient authorization, because that reservation refers only to powers in existence before the Constitution was enacted. Since the national government's electoral system was created by the Constitution,

authority to regulate it could not have existed prior to ratification. Even if the power could have been reserved, the Court insists that it was not because the text of the Constitution establishes an exclusive set of qualifications.

At least in my judgment, the Thomas dissent mounts an effective challenge to these positions.[13] But if all that it challenges is the conclusion that state-imposed qualifications for national political office are unconstitutional, the ardor of Justice Thomas's critics would be hard to understand. Such qualifications have been imposed in the past without threatening the Union,[14] and even the majority acknowledges that term limits are arguably beneficial.[15] Moreover, other qualifications that could be imagined (such as mental competency) seem sensible enough. It might be thought, therefore, that the majority's position must entail much more. For example, there presumably are many national functions besides elections that came into being only with the Constitution of 1787. The concurring opinion, accordingly, implies that states have no reserved power to regulate any exercise of federal power.[16] From this it might be extrapolated that states have no power under the Tenth Amendment to regulate substantive areas that are enumerated in the Constitution as being national powers.[17] The argument would be that national powers like that over commerce came into being with the Constitution of 1787 in the same way that the national electoral process did; therefore, the states could not have exercised this precise power prior to ratification. The conclusion would follow that there is no concurrent state authority over matters subject to congressional power, such as the power to regulate commerce.

Some people might consider the logic of these extensions to be very powerful. In fact, the logic is almost a perfect reflection of the objections that Justice Brennan, as well as various eminent law professors, made to *National League of Cities* years ago.[18] Like each state's putatively sovereign apparatus, the sovereign national political process can be thought to be significant ultimately because of the substantive regulatory decisions that it yields. Therefore (so goes the argument), it follows from *Term Limits* that states can exercise no power over the regulation of commerce.

Of course, for the general reasons that I mentioned in connection with possible extensions of Justice Thomas's own position, these kinds of extrapolations of the majority position are hardly inevitable even if the logic were inexorable. For one thing, the consequences would be impractical. The exercise of federal authority is as pervasive as the delivery of mail and could hardly be immunized from all state regulation. Moreover, now that "commerce" is thought to include almost all activities that go on within the states, abolishing or limiting the states' concurrent powers would require increasing Washington's regulatory power at a time of widespread disenchantment with

centralized planning. Although versions of these doctrinal implications have been toyed with at various times, beginning in 1824 with Chief Justice Marshall's famous interpretation of the commerce power in *Gibbons v. Ogden*, it seems fanciful to attribute to the *Term Limits* majority any serious intentions of these kinds. Even the more limited extrapolation—that is, to the establishment of an immunity for the exercise of certain "sovereign" national functions—would run up against the Court's frustrating experience in trying to define the sovereign functions of state governments. Having not so long ago acknowledged the morass created by these efforts,[19] it would be strange for the Court to embark on the same inquiry at the national level.

The probability that the *Term Limits* majority is not intending to initiate any broad regime of federal immunity does not mean that it does not find the idea conceptually attractive. After all, those justices do quote approvingly from Chief Justice Marshall's opinion in *McCulloch v. Maryland*—an opinion that contains language expansive enough that it would, if taken literally, prevent states from requiring U.S. mail trucks to stop at red lights.[20] Moreover, members of the *Term Limits* majority have joined in decisions of the Court invalidating state laws that, even in the absence of a federal statute, are said to burden interstate commerce unduly.[21] These "dormant commerce clause" cases demonstrate the continuing appeal of the idea that an authorization to Congress is inconsistent with concurrent state regulatory power.

Historically, and for some today, this appeal might rest in part on an analogy to physical objects. That is, national regulatory authorization might be thought to occupy space in the same way that a cinder block does and, thus, to exclude any other government's powers. However, the modern dormant commerce cases tend to be highly functional rather than conceptualistic—they emphasize interest balancing and motive analysis rather than abstractions about the allocation of power. In fact, one of the ideas that they seem to reflect is almost the opposite of the cinder block analogy. In some of these cases what state officials seem to have done wrong is to have *not* regulated interstate commerce (or at least to have not been sufficiently attentive to the needs of that commerce).[22] Rather than being ready to shoulder an appropriate share of the costs of national commerce, they have tried to protect their own citizens' interests by sloughing off burdens onto other states.

It is possible, then, that the federal immunity created in *Term Limits* arises out of a commitment to the much larger idea that local ties and loyalties that exist within the states are dangerous because they produce policies that frustrate national policies. As I argued in chapter 3, this domesticated form of federalism turns the Constitution's logic on its head. A principal

reason for a federal system, obviously, is to allow for the vindication of local interests and values.[23] Another is to divide citizen loyalty so that political competition between the nation and the states can help enforce constitutional limitations on the central government.[24] That is, the system is built on the idea that, at least within limits, the national will should be frustrated by state-based politics. If the *Term Limits* majority is committed to the idea that local interests and divided loyalties are undesirable just because they can reflect different values and interests than those that prevail at the national level, its opinion is powerful confirmation that the justices are instinctively opposed to federalism.

Hostility to the kind of conflict inherent in robust federalism would explain the terminology utilized by the five prevailing justices. Remember, the majority suggests they are doing battle with the position that this nation is "a collection of states" and that Congress is a "confederation of nations"; recall also that the concurrence attacks the view that "the sole political identity of an American is with the State of his or her residence." These formulations cast the issue as being between unified nationhood and confederation, between loyalty to the whole country and loyalty to a state. They leave out the possibility that multiple sovereignties and divided loyalties can be consistent with nationhood. They leave out, that is, the possibility of federalism.

Still, each of the specific sentences I have quoted could in context be read as having a meaning that stops well short of general hostility to the basic elements of federalism. Other aspects of the *Term Limits* opinion, however, support the conclusion that a radically nationalistic aspiration animates the majority.

Consider how far the majority takes the argument that the power to define qualifications for national office is a new, nonreserved power created by the whole people when the Constitution was ratified. It is one thing to accept (as the Court does) Justice Story's claim that national officers "owe their existence and functions to the united voice of the whole . . . of the people."[25] If historically true, this claim would tend to support the rather formalistic conclusion that the power to determine qualifications could not have predated ratification. The majority, however, takes another step altogether and endorses the view that national representatives "owe primary allegiance . . . to the people of the Nation."[26] This assertion is unnecessary to the Court's Tenth Amendment argument because that argument turns on the metaphysics of "reserving" powers. Even if it were entirely clear that the power to set qualifications came into being with the new Constitution, the framers might have thought it desirable or inevitable that primary loyalty would remain with the states. They did, after all, set up a system that as a practical

matter leaves the people in each state free to vote for representatives whose predominant allegiance is to their state.[27] Nevertheless, the majority pushes the point further, insisting that the "salary provisions reflect the view that representatives owe their allegiance to the people, and not to the States."[28] Here the majority does not modify "allegiance" with the word "primary" and thus appears to have extended its disapproval of divided loyalties so far as to insist on a single allegiance.

There can be doubt, of course, about whether the majority means to go this far. This stance is inconsistent with the position taken by the Court less than two decades ago that the national political process can and should be trusted to guard the role of the states in our federal system.[29] More fundamentally, it is inconsistent with the great insight of the founders that it is possible—and desirable—to have multiple sovereigns, that loyalty to the national government can coexist with and even be partially defined by loyalty to state governments.

The concluding paragraph of the opinion, however, tends to dispel any doubts.[30] To permit state-imposed term limits, the majority says, "would effect a fundamental change in the constitutional framework." The framers intended the qualifications for national representatives to be "fixed" and "uniform." That intention, says the Supreme Court, reflects the understanding that "Members of Congress . . . become, when elected, servants of the people of the United States." Thus, the theory at work in *Term Limits* is that the whole people of the United States have a legal interest in each state's representatives because the duty of those officers is to pursue the political interests of the nation. Their allegiance must be to the national interest. Again, what is left out of this version of our "constitutional framework" is the possibility that state interests may legitimately help to define the national interest. What is left out is the framers' paradoxical idea that in a federal system officials cannot properly serve one master unless they also serve another.

In claiming that the *Term Limits* majority rejects the impulses that underlie federalism itself, I might be accused of exaggerating in the same way that the critics of the dissent exaggerated when they attributed to that opinion a commitment to confederation. Perhaps this is true, although I have tried to stay close to the language and arguments actually used by the majority. Moreover, although it is unrealistic to believe that in operation the national interest is or could be defined independently of state interests, the idea of unalloyed nationalism is not unrealistic at all.

In fact, as I briefly indicated in the last chapter, the concept is endemic in the legal academy today. It can be seen, for example, in Bruce Ackerman's

"constitutional moments," which occur when the American people, unconstrained by those inconvenient, state-based procedures in Article V, amend the Constitution by bringing the conclusions of their heightened deliberations directly to bear on national decision makers.[31] Unalloyed nationalism can also be seen in Robin West's claim that the Fourteenth Amendment embodies "an absolute, incontrovertible right not to be subject to any sovereignty other than the state."[32] Under West's "sole sovereignty" principle, state and local governments are reduced to much the same status as private organizations; "the state" is the national government, and for her it is bondage to be subject to more than this one sovereign.

Tamer manifestations of strong nationalism can be seen in the hostility of Daniel Farber, Mark Tushnet, William Eskridge, and Suzanna Sherry to the malapportionment of the U.S. Senate, and in the criticisms that Jack Balkin and Akhil Amar direct at the electoral college.[33] If these examples seem partial and oblique, think of Jesse Choper's full-scale assault on the values of federalism.[34] Or read Edward Rubin and Malcolm Feeley's colorful argument that there is "no normative principle involved [in federalism] that is worthy of protection."[35]

To say the least, the five justices in the *Term Limits* majority would not be entirely out of step with much prominent academic thinking if they were hostile to basic elements of federalism. Although their commitment to nationalism is not unconventional, it is, I think, radical in the sense that it represents a basic rejection of the constitutional design. At any rate, to the extent that *Term Limits* does represent a commitment to radical nationalism, the argumentative stakes are very high. It would be natural for those who support the majority position to perceive the dissent's persistent rebuttal as outrageously extreme; in fact, from the perspective of Justice Thomas's critics the dissent is radical because it reasserts a constitutional commitment that contemporary nationalists have rather completely abandoned.

IV

My effort so far to explain the extreme terminology spawned by the Thomas dissent is subject to this objection: The most I have shown is that the dissent threatens an idea that is *legalistically* radical. Given the loud cheers that sophisticated commentators have often raised when the modern Court has done "justice" by departing from the intended meaning of the Constitution, it would be naive in the extreme to assume that journalists or even most justices think it crucial to adhere closely to the text or original understanding. It

might, therefore, seem more likely that Justice Thomas's critics simply believe that there is no good political or organizational reason to dilute national political allegiance and national political will. As I have said, a substantial literature exists arguing in that direction. Unless Justice Thomas's position undermines the conviction that unalloyed nationalism is a desirable system, it remains difficult to see how his dissent could seriously threaten his critics.

One extralegal reason for the kind of nationalism represented by the majority opinion is the belief that federalism is out-of-date. For instance, Rubin and Feeley argue that federalism can no longer secure state-based values and identifications because today "our real community is a national one."[36] No doubt there is much to support this claim empirically, and the claim itself is powerful in its implications. For one thing, if the kind of unalloyed nationalism embraced by the *Term Limits* majority is already a completely established fact, then the dissenters' ideas are radically at odds with our circumstances.

The term limits movement, however, presents a discomforting fact for empiricists like Rubin and Feeley. This movement, based in the states and springing in part from local experience with the imposition of qualifications for state legislative offices, is evidence that our political community is not yet completely nationalized. Indeed, it demonstrates that people within some states are ready to challenge national political elites both intellectually and politically. The dissent emphasizes this when it depicts that initiative as "an effort at the state level to offset the electoral advantages that congressional incumbents have conferred upon themselves at the federal level."[37] Justice Thomas's constitutional defense thus carries with it a much larger point about the continuing role of state-based politics in shaping the national culture.

The intellectual tradition of which *Term Limits* is a part does not always insist that our only real political community is national. Indeed, an alternative—and probably more widespread—basis for modern hostility to federalism is the belief that state-based political communities do exist but are morally benighted. This belief is understandable in light of the unsavory historical associations of "states' rights." It has never, however, been entirely accurate, as is demonstrated by the commonly invoked examples of state resistance to the Alien and Sedition Acts and later to fugitive slave laws.[38] More to the point, in acknowledging that term limits can be defended as a method of compensating for the advantages of incumbency, the dissent undermines the moral complacency of liberal nationalists. The entrenched congressional leadership is, after all, an odd object of solicitude for progressives. Whatever the immediate partisan implications might be, the general stance

of the term limits movement (it proposes institutional reform, favors political flux and accountability, and challenges the powerful) raises a significant question about where the progressive instinct is lodged today.[39]

Even if state-based political cultures do exist and can promote morally attractive policies, strong nationalists object to federalism because it frustrates the will of the national majority. Thus, state-imposed term limits would, the Court says, "be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States."[40] Although chosen by separate constituents, after their election national representatives should be "servants of the people of the United States."[41] Majoritarianism at the state level, in short, must not be allowed to interfere with the more important majoritarianism that occurs in our national institutions.

The moral basis for national majoritarianism might at first appear to be clear enough. If political legitimacy comes from electoral numbers, surely more is better than less, bigger more legitimate than smaller. Why should a majority in Arkansas frustrate the larger majority called "the people of the United States"? However, as Felix Morley long ago pointed out,[42] this logic can be applied to national majorities too, for the world has more people than the United States. If nationalism is not to dissolve into internationalism, it must be that the appropriate size of the governing majority depends on many factors, including the quality of the deliberation achievable at a particular scale, the moral entitlement of a certain segment of the population to control issues of special importance to them, and so on. As Justice Thomas's dissent makes clear, once the reflexive preference for majoritarianism in larger units is set aside, the values of democracy might well support the results of the Arkansas initiative process. The term limits provision had "won nearly 60% of the votes cast in a direct election and . . . [had] carried every congressional district in the state." The majority of Arkansas voters had thereby decided "to restrict the field of candidates whom they [were] willing to send to Washington. . . ."[43]

There are, of course, various ways for nationalists to supplement the first, crude argument for national majoritarianism. Rubin and Feeley's claim that "the United States has one political community, and that political community is the United States" is one such effort.[44] Although their assertion would no doubt come as a surprise to the many Americans for whom participation in state political processes is important and distinctive, suppose that it were true. Even if Rubin and Feeley's claim (or others serving the same purpose) were believable, it could not be used to support the *Term Limits* decision. The reason is that no national majority had prohibited states from

enacting term limits legislation. Even given the obvious incentives to do so, Congress had passed no statute on the matter.

National democracy is an unlikely explanation for the kind of nationalism represented by *Term Limits* anyway. Many nationalistic legal scholars, including some of Justice Thomas's critics, regard the legislative process with skepticism and Congress with something close to contempt. Moreover, on significant occasions, all the justices are quite willing to countermand the products of congressional decision making. Indeed, in *Term Limits* itself the majority takes the unusual step of rearguing and reaffirming one such decision, *Powell v. McCormack.*[45] This suggests that, despite the Court's rhetoric about national representatives being "servants" of the whole people, the likely explanation for *Term Limits* is actually distrust of national democracy. And, in fact, under the majority opinion, Congress is foreclosed from either approving or disapproving state term limits legislation. It is the dissenting opinion that would allow for an expression of political will at the national level; it proposes to validate the Arkansas term limits law as a regulation of federal elections under Article I, Section 4, thus presumably exposing such state laws to congressional override.[46]

While it is, I think, accurate to conclude that *Term Limits* is not animated by democratic impulses, it would be too much to say that the nationalism of *Term Limits* is thoroughly antimajoritarian. According to its own terms, the decision blocks both the state and national political processes only where a clear and certain constitutional limitation is at stake. So if there is an attractive value behind the nationalism of *Term Limits*, it is the value of constitutionalism.

But how attractive is the aspiration for constitutionalism found in *Term Limits*? As I noted earlier, the main constitutional arguments made by the Court and so doggedly challenged by the four dissenting justices are that the power to define qualifications was not an "original power" of the states and therefore could not have been reserved; and that even if the power had been original, the framers "divested" the states by listing exclusive qualifications. The effect of the majority's arguments on both issues is that the Constitution authoritatively covers the issue of state-imposed term limits. It is authoritative with respect to the first issue because the "reserved powers" are a closed set, determined by what existed at the time of ratification. It is authoritative with respect to the second issue because the qualifications listed in the Constitution were meant to be exhaustive and not susceptible to state augmentation.

Correspondingly, the specific meaning of the dissent is that both the reserved powers and the possible qualifications for Congress are open sets.

The resonance of this argument goes far beyond the issue of term limits. Its larger significance is the idea that the Constitution leaves important gaps and, thus, that there are dangerous possibilities it cannot protect against. The dissenters' position, that is, insists that there are limits to constitutional control over politics—that beyond the lighted arena of constitutional interpretation lies an unbounded world of political will.

This prospect *is* radical. It cuts against the overarching promise of modern constitutionalism, which is that a minimal level of political virtue can be ensured by legal prescription. The power of this promise can be seen in the ever-expanding list of subjects that in this century have been exposed to judicial oversight.[47] The promise does not require that constitutional protections be defined at any definite level. It requires that the Constitution cover as much as possible so that as little as possible will be excluded from legal constraint (and its operational correlative, judicial supervision). For many, this idea of exhaustive constitutionalism makes possible a profound sense of security and assurance.

The dissent's willingness to challenge this promise, I think, is what makes explicable the cries of outrage. Seen in this light, the critics' references to reconstruction and confederation are allusions to the degree of political chaos that unsupervised political will can generate. It also explains the otherwise perplexing theme that I mentioned at the outset. As I said, both majority and dissent treat as central to the case the issue of consent—whether the people of the states or the undifferentiated people of the nation consented to the Constitution. The dissent's claim that sovereignty lies in the people of the states is troubling, not because it bears very much on the scope of the Tenth Amendment, but because it is emblematic of forces not subject to constitutional control. On the other hand, the majority's repeated invocation of the "people of the whole nation" comfortingly projects the idea of a nationhood back into the preconstitutional past. At the same time, it extends the metaphor of legal control by suggesting that the only cognizable political force that predated the nation was the "whole people," who constrained themselves forevermore when they consented to the Constitution. Under this view, ultimately there is no legitimate political force outside the Constitution. For the *Term Limits* majority, then, the trouble with federalism turns out to be the same thing that is the trouble with democracy. Both mean that the Constitution leaves much unresolved. Both destroy the background assurance that things will come out all right.

An aspiration for control by legal prescription is what drives modern constitutionalism and its derivative, radical nationalism. This aspiration is a profound part of our political culture (and especially the culture of the legal

elite) but it is shaky because in sober moments everyone knows that uncertainty and risk are elementary facts of political life that cannot be expunged by a written code or judicial review. The *Term Limits* dissent thus struck an exposed nerve with its unblinking insistence that the possibility of unprescribed outcomes is also perfectly legitimate.

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6

Judicial Supremacy and Stable Meaning

I

If it is true that the strong nationalism presently prevailing in our political culture is partly a function of a yearning for the security of comprehensive legal prescription, then the modern rejection of robust federalism is being driven by some of the same underlying impulses as our contemporary fixation on constitutional law and judicial review. The promise of comprehensive, uniform, authoritative prescription is attractive partly (as I said in the last chapter) because it is consistent with the optimistic American insistence that outcomes will be positive. Now I will suggest that it is attractive also because it is consistent with a desire for stability in legal norms. According to the founding myth behind robust federalism, the moral authority of nationhood arose from the people organized in state governments that preexisted the Union and still exist. Accordingly, there are operating institutions entitled to speak on—and, to this extent, unsettle—constitutional meaning. According to the founding myth of strong nationalism, an abstract, undifferentiated "people" enacted the Constitution; to the extent that the Supreme Court has been successful in claiming to speak for this "people," there is no competing

authority to challenge and unsettle the state of affairs said by the Court to be mandated by the Constitution.

The desire to have stable, comprehensive constitutional requirements is understandable. The difficulty is that there are reasons to think that the institutional embodiment of this desire, judicial supremacy, actually destabilizes constitutional norms. To the extent that this is so and judicial supremacy nevertheless remains entrenched, people will increasingly seek relief from instability in the very institution that is an important source of that instability. Authority, that is, will be further centralized as a consequence of the failures of centralization.

This implosive cycle is both counterintuitive and difficult to demonstrate. Because even moderate forms of interposition are essentially off modern jurisprudential and political maps, the potentially stabilizing effects of legitimate state-generated constitutional challenges cannot be easily traced. However, these effects can be indirectly illustrated by examining a form of challenge to judicial authority that has not been entirely discredited. Congress's authority to enforce the provisions of the Fourteenth Amendment is explicit in the Constitution and is frequently exercised.

A recent and vivid example is the Religious Freedom Restoration Act of 1993 (RFRA), which the Court invalidated in an important case called *City of Boerne v. P. F. Flores.*[1] In this statute, Congress prohibited any government from substantially burdening a person's exercise of religion through the enforcement of a generally applicable rule unless the government could justify the burden by showing a "compelling governmental interest."[2] This standard of legal protection was based on constitutional doctrines that had been articulated by the Court in prior cases but subsequently repudiated in a case called *Employment Division v. Smith.*[3] RFRA was prompted in part by the belief that in *Smith* the Supreme Court had "virtually eliminated the requirement that government justify burdens on religious exercise imposed by laws neutral toward religion. . . ."[4] Thus RFRA represented a legislative challenge to the most recent judicial interpretation of the free exercise clause.

In *City of Boerne v. P. F. Flores* the Court repeats the familiar proposition that it is the province and duty of the judiciary "to say what the law is."[5] But the Court also says that Congress has "the duty to make its own informed judgment" on the meaning of the Constitution.[6] Thus RFRA exceeded Congress's power, not because constitutional interpretation is outside the legislative function, but because the act was based on an interpretation of the religion clauses that contradicted an existing judicial precedent. Congress, in short, was under a duty to defer to the Court's existing interpretations. The judiciary's power to interpret the Constitution is not exclusive but it is, ac-

cording to *Flores*, supreme with respect to the judgment of a coordinate branch of government. It is supreme not only in the sense that the Court will give legal effect to its own precedent but also in the sense that Congress breached a duty when it enacted a law based on its own contrary opinion about the meaning of the Constitution.

Important aspects of this doctrine of judicial supremacy have been appearing in the case law with increasing frequency and clarity. Components of the doctrine can be seen in cases constricting the political question doctrine as well as in cases countermanding Congress's judgments about the meaning of the commerce clause, separation of powers, and the Tenth Amendment.[7] Moreover, the sense of self-confidence and self-importance that underlies judicial supremacy can be seen in cases that strongly disapprove of independent judgments on constitutional issues by state and local officials.[8] After *Flores,* the culmination of this series of assertions of power by the federal judiciary, the Court has referred to the primacy of its own power almost as a matter of routine.[9]

As the justices have been gradually making this potent conception of their role a fact of institutional life, some thoughtful legal scholars have begun to develop justifications for it. In particular, in 1997 the *Harvard Law Review* featured a tightly reasoned article, authored by Larry Alexander and Frederick Schauer, that defends judicial supremacy "without qualification."[10] Both the Court's opinion in *Flores* and the *Harvard* article attempt to justify judicial supremacy on the ground that it promotes stability in constitutional meaning.

In the remainder of this chapter, I will examine both the *Flores* opinion and the Alexander and Schauer article. Interestingly, although both the opinion and the article conclude there is a congressional duty of deference to the Court, Alexander and Schauer's analysis demonstrates why many of the reasons given by the *Flores* Court are inadequate. Moreover, putting *Flores* in context helps to show why Alexander and Schauer are wrong to think that judicial supremacy will necessarily promote stability in constitutional meaning.

II

Why, according to *Flores*, is Congress under a duty to defer to existing judicial interpretations of the religion clauses? The answer is developed at length in the opinion but can be quickly stated: Congress has only enumerated powers, and its power under section 5 of the Fourteenth Amendment is to "enforce" existing constitutional meaning, not to alter that meaning. The Court finds evidence for this distinction in the amendment's text, in its his-

tory, and in the case law that interprets the amendment. The source of Congress's duty, then, is the Constitution itself.

From one perspective, it is odd for the Court to labor so hard to show that the Fourteenth Amendment does not authorize Congress to alter the terms of the Fourteenth Amendment. Neither Congress nor the executive nor the Court is authorized to "change" anything in the Constitution, since the procedure for changing the Constitution is laid out in Article V and does not include unilateral action by any branch of government. So by "change" or "alter" the Court must mean something short of amendment; it might be thought, for instance, that the Court means the sort of change that can occur by the process called "interpretation." Put directly, then, the reasoning might seem to be that section 5 authorizes Congress to enforce but not to interpret the provisions of the Fourteenth Amendment. If this is what the Court meant, presumably RFRA would have been constitutional if section 5 had said, "Congress shall have power to enforce *and interpret* the provisions of this amendment."

This, however, cannot be right because (as I indicated earlier) *Flores* plainly states that Congress "has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution." Congress thus is authorized to interpret the whole Constitution, including the Fourteenth Amendment. The Court's position, therefore, must be that the terms and history of section 5 require that *when interpreting* the terms of the Fourteenth Amendment Congress defer to existing judicial precedents.

One of the many virtues of the Alexander and Schauer article is that it demonstrates why this explanation for legislative deference begs the question at issue. They write: "Even a written constitution explicitly specifying its authoritative interpreter would rest on a preconstitutional understanding about who should be the authoritative interpreter of *that* provision."[11] Thus, the force of the justification offered in *Flores* ultimately depends not on the meaning of "enforce" in section 5 but on the Court's assumption that the judiciary is the authoritative interpreter of that word. For members of Congress who do not accept this assumption, the main argument in *Flores* offers no reason to defer to the Court's judgment that "enforce" means "interpret consistently with existing legal precedent." Certainly members could agree with the Court's constitutional analysis, but they could also in good faith reject that analysis. Indeed, they could reject that analysis even if it were based on much stronger reasons than those actually offered by the Court. Suppose that section 5 had said, "Congress shall enforce the provisions of this amendment in accordance with applicable judicial precedent." If it were Congress's judgment that *it* should interpret section 5, Congress could con-

clude that "in accordance with" and "applicable" meant that it was free to ignore precedents that in its judgment were inappropriate, outdated, or irrelevant. Given that the *Flores* Court's analysis is based on the single, rather cryptic word "enforce," Congress could surely interpret section 5 so that it does not require legislative deference on the meaning of the rest of the Fourteenth Amendment.

To turn the matter around, consider again the hypothetical possibility that section 5 specifically authorized Congress "to enforce *and interpret*" the provisions of the amendment. Would the outcome of *Flores* have had to be different? Not on the Court's assumption that it is authorized to interpret the words "enforce and interpret." The Court could have insisted that in context "to interpret" referred to circumstances where no applicable judicial precedents existed and thus did not include the power to interpret in a way that conflicted with judicial precedent. If this seems far-fetched, recall that under the Court's working assumptions in *Flores*, Congress does have the power both to enforce and to interpret the Fourteenth Amendment. The addition of the word "interpret" only confirms these assumptions and need not change the conclusion that Congress's interpretive power must be exercised in accordance with existing precedents.

In fact, of course, neither section 5 nor anything in the rest of the Constitution specifies an authoritative interpreter. As Alexander and Schauer say, under this circumstance "it is even clearer" that the document cannot settle whose interpretation is authoritative.[12] In short, the Court's interpretation of section 5 as requiring Congress to defer to judicial precedents does not determine Congress's constitutional duties unless it can be demonstrated that Congress must defer to the Court's interpretation of section 5.

In *Flores* the Court makes no such demonstration. The closest it comes to arguing for what Alexander and Schauer call a "preconstitutional understanding" is a brief paragraph at the end of the opinion. Immediately after acknowledging that congressional power includes constitutional interpretation, the majority says: "Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is."[13]

In this passage the Court does suggest a reason for its assumption that the judiciary is the authoritative interpreter of section 5. It states that "[o]ur national experience"—not constitutional meaning—supports the view that this division of responsibility will best preserve the Constitution. The passage,

however, is unsatisfactory in a number of ways. First, the Court offers no explanation for what it means by the word "best," so the historical claim is impossible to evaluate. Second, because the substance of the claim is only that preservation has worked best when "*each part* of the government" respects the Constitution and the determinations "of *the other* branches," the passage, unless it simply assumes the matter at issue, is consistent with judicial deference to legislative interpretations. It does not help to add that the judicial duty is to say what the law is because the Court has just finished conceding that interpretation is also—and always has been—a part of the legislative function.

Even if these problems are ignored, Alexander and Schauer develop a third and decisive objection to justifications based on historical experience. They write: "[A] principle of historical reference would owe its political validity and its status as law to current acceptance. . . . The present, and not the past, decides whether the past is relevant."[14]

The Court meets this point only by implication—indeed, only in its use of the single word "preserved." Focusing on this word, it is possible to read the passage as suggesting that we today should be convinced (because of our historical experience) that an extraconstitutional rule of legislative deference is desirable because this rule best stabilizes constitutional meaning. Thus, at the end of its opinion the Court might be seen as refashioning the earlier argument that the Fourteenth Amendment denies Congress the power to "alter" the content of the Fourteenth Amendment. Now making a prudential and institutional argument, the Court can be seen as claiming that its precedents must control when they are in conflict with a legislative interpretation because otherwise the meaning of the Constitution would change more than is desirable.

If persuasive, this is a reason for members of Congress to defer to judicial precedents even if they do not accept the Court's assumption that it is the authoritative interpreter of section 5. The argument would be stronger, of course, if it contained some indication of what kinds of changes or what rate of change is undesirable. Fortunately, the Alexander and Schauer article is an extended explanation of why change in announced constitutional meaning should be avoided. Not so fortunately, thinking about *Flores* makes clear that this explanation does not justify a rule of legislative deference.

III

Alexander and Schauer argue that stability in the announced meaning of a law (including constitutional law) is desirable because the nature or purpose

of law is "to settle authoritatively what is to be done."[15] No matter what the content of the law, the fact that a set of issues is settled allows people to coordinate their behavior and induces various kinds of cooperative behavior. This "settlement function" cannot be served, they argue, unless a preconstitutional norm establishes which of the various competing interpreters is authoritative. They observe that one such possible norm is judicial supremacy, but they quickly add that "[t]his is not the only possible preconstitutional norm."[16] The chief alternative to judicial supremacy, according to Alexander and Schauer, is that "each official decide for herself what the Constitution requires."[17] The bulk of their remaining analysis shows that deference to judicial precedent is preferable to this "interpretive anarchy."[18]

Readers of *Flores* will immediately recognize that Alexander and Schauer's assertion that interpretive anarchy is the "chief alternative" to judicial supremacy is questionable. RFRA is only the latest in a long history of congressional statutes that seek to substitute legislative judgments about the meaning of the Constitution for judicial interpretations.[19] Moreover, these congressional efforts have often been successful as either a practical or a formal matter. Indeed, some studies indicate that the Court has very rarely strayed for long from strong expressions of national political will about the meaning of the Constitution.[20]

Even so, of course, it may be right that interpretive anarchy is in some sense a more important alternative to judicial supremacy than is legislative supremacy. Nevertheless, as Alexander and Schauer briefly acknowledge,[21] an argument that judicial supremacy is preferable to interpretive anarchy is not an argument that judicial supremacy is preferable to legislative supremacy. At most, the Alexander and Schauer argument establishes that *some* authoritative interpretation of the Constitution is desirable; thus, despite their evident intention to discourage legislative challenges to judicial precedents, their argument is quite consistent with the conclusion that judges should defer to legislators at least some of the time. If in *Flores* the Court had accepted Congress's interpretation of the free exercise clause, the meaning of that clause would have been settled, or at least so it would appear on the face of things.

If the Court had deferred to Congress, however, Congress would have been free to legislate again, and the effective meaning of the free exercise clause could be unsettled. "Short-term majoritarian control," as Alexander and Schauer put it,[22] may be incompatible with the settlement function. Here again, however, *Flores* complicates the picture. After all, in RFRA Congress adopted the "compelling interest" test that the Court itself had announced in earlier cases. RFRA was enacted only because the Court had abandoned

its own interpretation in favor of the *Smith* doctrine of minimal justification. Indeed, in the interim period between *Smith* and *Flores* the Court significantly modified this second doctrine by employing a rather stringent test that inquired into the motivations behind a restriction of religious freedom.[23] If Congress now defers to the judiciary on the meaning of the free exercise clause, the Court could change its interpretation yet again. Alexander and Schauer do acknowledge, of course, that the Court can alter its interpretations, but they assume that such variations will be relatively rare and benign—opportunities to correct occasional mistakes rather than threats to the settlement function of law.[24] Thus, their analysis elides the relevant question, namely: Which institution, if assigned the role of authoritative interpreter, would be less likely to change its interpretations?

Like the *Flores* majority, Alexander and Schauer may think this question unimportant because as a matter of overwhelming historical evidence the Court has been more likely than Congress to "preserve" constitutional meaning. If so, they, like the Court, provide no documentation. It is baffling how anyone who has lived through a significant part of the modern period of tumultuous judicial creativity could treat the relative stability of judicial interpretations as self-evident.

The historical record demonstrates that the modern Supreme Court has repeatedly and dramatically changed the effective meaning of the Constitution.[25] Recall, for example, how in a short span of time the Court first held that the federal control of the wages and hours of state employees did not violate state sovereignty, then that it did, then that Congress (not the Court) should enforce the principle of state sovereignty, and then that the Court should protect state sovereignty through the "no commandeering" rule.[26] Or recall how in the *United States v. Lopez* decision the Court suddenly abandoned settled understandings about the scope of Congress's power to regulate commerce.[27] Or consider the Court's lengthy record of discovering rights, like the right to abortion and the right to burn the American flag, that had never before been recognized as a part of our Constitution and in many instances had been specifically denied in prior decisions of the Court. Despite this history of constant innovation and revision, scholars like Alexander and Schauer assume the relative stability of judicial interpretations or infer it from idealizations of judicial conduct.

The problem, however, is not merely that proponents of judicial supremacy ignore what is in fact a colorful judicial record of interpretive instability. The larger problem is that there are reasons to suspect that a "preconstitutional rule" of legislative deference is a major cause of the chaotic doctrinal record of the modern Court. Those reasons emerge from a closer examination of *Flores*.

IV

Why in RFRA did Congress enact (an abandoned) judicial doctrine into statutory language? Possibly, Congress agreed with the justices who had once adopted the compelling interest test that this doctrine accurately reflected the values of the free exercise clause; nevertheless, it is odd that the language was not adjusted more than it was. Even the addition of a "less drastic means" requirement, which the Court describes as new, was cribbed from other cases. Perhaps, the compelling interest test is a model not only of interpretive accuracy but also of statutory precision. But this is unlikely, given the history of variation and uncertainty in the judiciary's use of that doctrine up until its abandonment.[28] A more likely possibility is that Congress utilized judicial language because members of Congress share the widespread public belief that responsibility for interpreting the Constitution is primarily judicial. They were, after all, expressing an opinion about *which* Court was right in interpreting the First Amendment, not claiming a fully independent legislative prerogative of interpretation. In this sense RFRA represented partial legislative deference to judicial precedent.

Thus, even a partial commitment to the doctrine of judicial supremacy has consequences for the attitudes and behaviors of members of Congress. One is that in carrying out their duties under section 5, they will be inclined to use language taken from the case law. If Congress had been more fully deferential, it would have accepted the most current precedent as authoritative and thus presumably would have incorporated into its statute some combination of the rationality and motive tests. If members of Congress had not been deferential at all, they would have felt free to draft language wholly different from any version of the Court's doctrinal formulations.

Therefore, *Flores* raises the question whether a preconstitutional rule of legislative supremacy might produce statutes that served the settlement function more effectively than does judicialized language. In the abstract, it is possible that Congress, if left entirely to its own devices, might use either very vague language that allows for little predictability or very specific language that allows for a high degree of predictability. What we do know, however, is that the Court's constitutional doctrines, especially in the area of the religion clauses, are confusing, indeterminate, and manipulable.[29] Consequently, it is not inconceivable that an unconstrained Congress would do better.

In fact, the circumstances of *Flores* suggest some commonsense reasons for believing that under a doctrine of legislative supremacy statutes would serve the settlement function better than doctrinal language does. To begin with the most obvious point, RFRA was proposed because *Smith* was enor-

mously unpopular with large segments of the public. Moreover, a directly accountable body such as Congress presumably will, on average, be likely to reflect popular sentiments more faithfully than the relatively isolated Court. If an announced constitutional norm is popular, then it is probably safe to assume less pressure will be generated to change it.

Indeed, one reason for the doctrinal gyrations that have typified the modern Court's record is that many of its decisions have been politically unpopular.[30] Despite widespread assumptions about judicial supremacy, these controversial decisions have generated acute political pressures that have been brought to bear on the Court both formally (for example, through the confirmation process) and informally (for example, by street demonstrations). Relative judicial isolation sometimes does enable judges to resist such pressures, but by separating constitutional meaning from public understanding and aspiration it also creates an inherently unstable situation. It is perplexing that sophisticated legal scholars like Alexander and Schauer seem to see legislative accountability ("short-term majoritarian control") only as an impediment to interpretive stability. Political insulation can produce circumstances likely to lead to interpretive revisions.

It is true that the doctrine of judicial supremacy could be extended to prevent not just congressional recalcitrance but all popular (nonprofessional) disagreement with the Court's constitutional interpretations. Language in some Supreme Court decisions flirts with this view, and the Alexander and Schauer article also hints at this more radical position.[31] If this expanded version of judicial supremacy were accepted, it might be thought that the Court's interpretations could depart from popular understandings and sentiments and still remain stable because virtually all political pressure to change those interpretations would be precluded. By almost any standard, however, this degree of judicial supremacy is deeply controversial. It is also unrealistic. As widely accepted as the doctrine of judicial review may be, it has never succeeded in preventing significant political resistance to the Court's pronouncements. No matter what articles in the *Harvard Law Review* urge, it is inconceivable that reverential attitudes toward the Court could grow so strong as to inhibit all significant political disagreement with its decisions.

Still, it is possible that the justices themselves might be convinced that all (or most) political disagreement with their decisions is inappropriate. Presumably, Alexander and Schauer think that it would be desirable for members of the Court to be persuaded of this view. Perhaps they think that, fortified by a proper understanding of the settlement function of constitutional law, the justices will reject or ignore the political pressures that cannot

be eliminated. Once again, however, *Flores* complicates the picture. The case demonstrates that even justices who adopt the doctrine of judicial supremacy will be affected by political pressure in ways that undermine the settlement function.

In *Flores* the Court did not ignore the political pressure manifested in RFRA. Convinced that this sort of disagreement is illegitimate, the justices reacted to perceived defiance of their authority by significantly unsettling the case law interpreting section 5. Indeed, Congress's intention to disagree with the Court—a matter not even discussed in earlier section 5 cases[32]—arguably is now the crucial consideration in defining the power "to enforce" in section 5.[33]

In the process of reacting to congressional defiance, the justices also withdrew even further from their earlier interpretations of the free exercise clause. RFRA is not, declares the Court, "responsive to . . . unconstitutional behavior. . . ."[34] The Court viewed Congress's intentions as improper and therefore concluded that a constitutional standard, which it had previously decreed to be constitutionally required in most respects, was not even responsive to unconstitutionally behavior.

I might be wrong to read *Flores* as establishing a new measure of congressional authority under section 5 or as suggesting an even more restrictive level of protection for the free exercise of religion. It may turn out otherwise, but that is the point: Meanwhile, constitutional meaning has been unsettled. I do think that an examination of a wide range of cases—in criminal procedure, school desegregation, abortion, free speech, and so on—shows that members of the Court often react to perceived disagreement by altering constitutional meaning.[35] This response is exactly what everyday experience would predict. Acceptance of a preconstitutional rule of judicial supremacy does not ensure that judges will concentrate on legal issues and ignore political pressures. On the contrary, such a rule produces a mind-set that is highly likely to react (angrily) to political disagreement.

To the extent that the Court uses constitutional interpretation as a club to punish what it sees as political recalcitrance, its interpretations are likely to become (at least for a while) even more unacceptable to the public at large. This, I think, is the history in a number of areas, including school busing and abortion.[36] In the end, of course, political pressures may die away as the public sees the costs of disagreement mount inexorably. But what the record shows is that in important instances the Court eventually yields to the pressures generated by its escalating interpretations.

When the Court yields, it does so in ways that maintain at least the appearance of consistency. This, of course, is exactly what should be expected

of judges who accept as fundamental the rule of judicial supremacy. But in denying or obscuring the nature of their own behavior, they tend to announce doctrines that are especially unlikely to serve the settlement function. For instance, in *Planned Parenthood v. Casey*, a decision discussed at length in the next chapter, the Court emphatically denied that political pressure should affect its decisions on abortion and loudly reaffirmed the "basic" holding of *Roe v. Wade*. It then jettisoned the notorious but clear trimester system and substituted an "excessive burden" test, the operational meaning of which can only be determined on a case-by-case basis.

The seeds of this same sequence can already be located in the changing case law on section 5. Suppose Congress reacts to *Flores* by enacting new civil rights laws that test the Court's will. Suppose further that the Court ratchets up the incipient doctrines in *Flores*, perhaps by requiring a closer and closer fit between the effects of the laws and the Court's precedents. This escalation would eventually invalidate laws that are now overwhelmingly viewed as important and useful. At that point the Court would be likely to deflate *Flores* while insisting that nothing was changing. Motive inquiry, for example, is similar to the "undue burden" test in that it is ad hoc and would provide convenient cover for judicial retreat. As the school desegregation cases, discussed in chapter 3, show vividly, "illegitimate motive" is a standard that permits superficial stability in announced meaning but also allows extremely wide variations in operational meaning.

The rule of judicial supremacy, in short, cannot be evaluated simply as a jurisprudential concept. If the rule is being recommended for use in the political system we actually have, its likely psychological and institutional consequences must be considered. Those consequences may or may not be healthy on other grounds, but they seem rather clearly at odds with stable legal meaning.

V

Alexander and Schauer demonstrate that the rule of judicial supremacy cannot be inferred from the Constitution, as the Court in *Flores* attempts to do. But their effort to deduce that rule from the settlement function of law is in turn undermined by *Flores*, which poses a question that Alexander and Schauer largely pass over. That question is: Why is judicial supremacy more likely than legislative supremacy to serve the settlement function? *Flores*, despite its own argument, suggests that a persuasive answer to this question is unlikely because it reminds us of the many ways that judicial supremacy operates in our political system to undermine stability and predictability.

Nevertheless, judicial supremacy may be superior to interpretive anarchy. Nothing that I have said so far has dealt directly with that possibility. Moreover, it should be noted that jurists like those in the *Flores* majority and scholars like Alexander and Schauer may at some level all believe that in the real world there can be no practical difference between legislative supremacy and interpretive anarchy. They may think that if judicial authority can be challenged by Congress, there is no stopping place; when other political officials see that the national legislature can rightfully resist judicial precedent, all politicians will make the same claim. And just as no preconstitutional argument in favor of judicial supremacy can be realistically expected in our political system to prevent political challenges to the Court's interpretations, no argument in favor of congressional supremacy would prevent widespread challenges to legislative interpretations.

This argument (as well as common sense) suggests that a degree of interpretive anarchy is inevitable. As long as there is not complete unanimity among all branches and layers of government about the locus of the ultimate authority to interpret the Constitution, interpretive anarchy will exist on at least some issues some of the time. To the extent that there is widespread agreement about this institutional locus, official challenges may be few or they may be muffled or they may be unpopular. But challenges will continue to occur.

If interpretive anarchy is inevitable, it must have always characterized American political history to some degree. And, of course, that is the case. Such "anarchy," then, must not be as incompatible with stability and predictability as judges and scholars often assume.[37] There are many reasons why this might be so. As anyone who has successfully navigated a busy city sidewalk knows, social coordination is a matter not only of rules but also of unspoken assumptions and inarticulate experience. In very significant respects the American constitutional system has been stable because history and culture have made many issues too clear to need words and too certain to permit disputes. It is no doubt true that adjudication, along with preconstitutional beliefs about the authoritativeness of judicial interpretations, tends in some ways to reinforce this massive bedrock of common instinct and expectation. It is also true, however, that in other ways constitutional litigation shatters this heritage.

The relationship between legal rules and deeper cultural understandings is no doubt extremely variable and complicated, but one factor seems clear enough. Legal standards that are a consequence of full, frank, and respectful interchange among a wide array of political communities will be relatively likely to reflect deep commonalities of belief and experience. Thus, a process

that includes many discordant voices and allows for revision and adaptation may well, despite short-run instabilities, eventually result in a more solid constitutionalism. In contrast, the exclusion or delegitimization of important segments of the political culture from authoritative constitutional discourse can be expected to produce a rigid and brittle appearance of consistency. This veneer of stability is so thin that, as we shall see next, it induces anxiety about nationhood itself.

7

Judicial Supremacy and Nationhood

I

It is no accident that proponents of judicial supremacy use a word like "anarchy" in describing the alternatives. The deeper fear raised by the possibility of unsettled constitutional meaning is of open conflict and legal chaos. However, because judicial supremacy distances interpretations from the rich variety of experiences and understandings that make up the American political culture, reliance on centralized judicial authority does not produce stability. Indeed, it produces unrooted interpretive innovations and frequent fluctuations that themselves add to anxiety about anarchy. The paradoxical consequence is to induce ever more extravagant claims for judicial power. This can be demonstrated, I think, by a close examination of one of the most dramatic and extraordinary opinions of the twentieth century, *Planned Parenthood v. Casey*.

Even critics of *Casey* must admit that the opinion of the Court has an earnest, almost yearning quality.[1] The justices manifestly *want* the American people to understand weighty and difficult matters. They discuss at length not only the immediate legal basis of their reaffirmation that the Constitution protects the right to abortion but also the deeper institutional and political

bases of the rule of law and, indeed, of "the country's understanding of itself. . . ." Accordingly, beginning with the first sentence ("Liberty finds no refuge in a jurisprudence of doubt"), the language of the opinion is both portentous and elusive. The justices take us into their confidence; they risk much. They reveal what to some is stupefying arrogance and to others selfless heroism.

They do not, however, reveal the full range of considerations that drive their thinking. I do not mean that in this respect the opinion is hypocritical or devious. I mean only that it is incomplete. The highly intellectualized picture so elaborately drawn must rest on a more primitive vision or fear.

Think about that first, cryptic sentence. Translated into concrete terms, the justices appear to be denying that the right to abortion (presumably the "liberty" referred to) will find protection ("refuge") in the position taken by those who challenge that right (the "jurisprudence of doubt"). But, who, it must be asked, has to be made to understand that a liberty is unlikely to be protected by its critics? As if this question presented no problem for their solemn tone, the justices plunge on in the same baffling direction. The very next sentence complains that "19 years after our holding . . . [in] *Roe v. Wade*, . . . that definition of liberty is still questioned." And then the majority notes that the United States, as *amicus curiae*, is again asking that the Court overrule *Roe*. So at least as a literal matter, it is clear that this most weighty of judicial opinions opens by developing the thought that the right to abortion will find no protection among those who are asking the Court to abolish the right to abortion.

It is possible, however, to read the first paragraph, not as painfully self-evident, but as evocative. This would be more respectful, and it is also consistent with some specific phrasing. The use of the general word "liberty" implies that much more is at stake than any particular right. Similarly, the threat is said to come not from a specific criticism but from a whole "jurisprudence of doubt." A "refuge" is needed, then, because it is a storm that is raging. This is enough, it might be thought, for an opening paragraph. The nature of the struggle and of the potential calamity can be identified in due course.

These broad considerations are not, however, identified in the next section of the opinion, which explains the Court's determination that the right to abortion is protected by the due process clause. True, this part of the opinion does contain lofty, not to say pretentious, language about the relationship between the right to abortion and the need to define "one's own concept of existence" and even "[t]he destiny of woman." In themselves these famous passages add only the thought that the liberty threatened by the storm swirling around *Roe* is a highly significant right. Oddly, this claim, which is

so strenuously asserted, is undercut by the justices themselves when in the same section they concede not only that "[s]ome of us as individuals find abortion offensive to our most basic principles of morality . . ." but also that there is "weight" to the arguments for overruling *Roe*. But putting all quibbles aside and assuming that the sentiments expressed about the importance of the right to abortion are coherent and heartfelt, these passages do not address the possibility, suggested by that brooding opening paragraph, that much is at risk *beyond* this particular right. The first sentence of the opinion, that is to say, cannot be rescued from vacuousness by being restated to say, "A profoundly significant constitutional right finds no protection among those who deny that it is either morally valuable or constitutionally protected." Indeed, the earlier suggestion that more is under attack than a constitutional right is raised again as the second section concludes: "[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have [just] given *combined with* the force of *stare decisis*."[2] The "liberty" that needs a refuge, it appears, is in significant part whatever liberty is implicated by respect for precedent, that is, by stability in judicial interpretation.

There follow many pages (fully twice as many as are spent justifying the constitutional status of the right to abortion) that explain what is at stake in respecting the precedent represented by a case such as *Roe v. Wade*. In this third section the Court invokes institutional considerations of the highest order. Indeed, at first glance this long discussion seems to redeem fully the portentousness and incompleteness of the opening paragraph of the opinion. The phrase "jurisprudence of doubt," it turns out, does, indeed, refer to far more than criticisms of *Roe* or even of the Court's privacy decisions in general. It refers to a dangerous misunderstanding of the subtleties of the doctrine of *stare decisis* in constitutional cases. Ultimately, it refers to the kind of doubts that are created when the Court overturns decisions under circumstances that create the appearance of "surrender to political pressure." And this jurisprudence of doubt would threaten "liberty" in the broadest sense of that word. By undermining the Court's legitimacy, disregard for the precedent established by certain momentous constitutional decisions, such as *Roe*, would exact a truly "terrible price": "Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be

in its very ability to see itself through its constitutional ideals."[3] In short, the liberty that is under attack—"under fire"—is nothing short of the liberty to be a part of a political culture that is committed to the rule of law and understands itself through the prism of constitutional values. If in certain crucial circumstances the Supreme Court is seen as surrendering to political pressures, the resulting jurisprudence of doubt will corrode American constitutionalism.

This claim is obviously subject to being criticized as self-important or even grandiose, but it may not seem vulnerable to the charge of incompleteness. I believe, however, that a moment's reflection confirms that even in these stunningly expansive passages, the justices do not fully or precisely describe the vision that drives their decision to reaffirm the essentials of *Roe v. Wade*. Step back for a moment and consider the suspiciously rarified nature of the Court's anguished argument: What is at issue, after all, is the place of *stare decisis* in a certain class of constitutional cases. Now, there certainly are many practical reasons for settling the meaning of law. Stable meaning allows for predictability and social coordination. But is it even remotely plausible that such grand values as judicial legitimacy and American commitment to the rule of law depend in any fundamental way on an arcane judicial doctrine about following precedent? Can it be seriously contended that our devotion to constitutional ideals rides on a juristic norm that most citizens understand only dimly and that even some sophisticated judges and lawyers believe should have no applicability in any constitutional case?

Intellectualizations about fidelity to precedent can be, I know, beautiful to the lawyerly eye.[4] But, as the dissenters indicate,[5] the Court's position depends on answers to some rather mundane empirical and historical questions. For example: To what extent do Americans now believe (and to what extent have they believed in the past) that the Court's constitutional decisions are based on precedent rather than politics? To what extent do they believe these decisions should be based on precedent? Do Americans in fact understand prominent Supreme Court reversals in the way the *Casey* majority does, as responses to new factual understandings rather than new judgments of principle? If not, has cynicism about the Court's fidelity to *stare decisis* undermined respect for the rule of law? Would Americans see reversing *Roe* as more political than upholding *Roe*? Would they see judicial abandonment of *Roe*'s trimester scheme (which, of course, the plurality in *Casey* supported) as significantly less political than they would abandonment of the right to abortion itself? And even if the Court is right about the immediate effects of reversing *Roe*, what evidence can be found that the harm done to the legitimacy of the Court would be difficult to repair?

Assume for a moment that *stare decisis* is essential for judicial legitimacy in the way indicated by the majority and assume further that this legitimacy is tied up with American commitment to the rule of law. Even so, the argument remains empirically ungrounded. Why should anyone believe that these perceptions about the Court are essential for America's constitutional idealism? There are many sources, other than the Supreme Court, of constitutional ideals. In the nineteenth century, opponents of slavery did not derive their understanding of the Constitution from the judiciary. Freedom of speech remained a potent political principle despite judicial nonenforcement throughout that century. And today neither opponents of the death penalty nor advocates of the right to bear arms abandon their constitutional convictions merely because their principles have been rejected repeatedly by the Court. Americans get their constitutional ideals from all sorts of places—from the *Federalist Papers*, from sixth-grade civics, from newspaper editorials, from the Gettysburg Address, from neighbors, from religious institutions, and so on.[6] A legitimate judiciary no doubt contributes to our constitutional self-understanding, but it does not follow that Americans would abandon constitutional ideals if the Court's legitimacy were reduced.

It is, of course, impossible to know just how American constitutionalism would change in response to some increment in public cynicism about the Supreme Court. The *Casey* opinion elides this problem by suggesting vaguely that the elements in the asserted chain of causation—*stare decisis*, judicial legitimacy, rule of law, constitutional idealism—are indistinguishable or at least "not readily separable."[7] But these concepts are all quite different. Certainly, "legitimacy" in the usual sense of that word does not necessarily involve the capacity to inculcate constitutional ideals. Citizens can accept the prerogative of judges to decide constitutional cases while still believing that Supreme Court justices are capable of serious errors and, therefore, are a fallible source of constitutional ideals. In fact, both beliefs are held by many loyal Americans who honor the judiciary as an institution. (Who, one wonders, *doesn't*, at least at some level, hold these beliefs?) In short, the Court's capacity to secure compliance and its moral standing as a governmental institution—its legitimacy—can exist quite apart from the grand educative function that is the object of the Court's articulated anxiety.

Moreover, "the rule of law," as venerable a term as that is, does not capture what the members of the majority are concerned about either. It is possible, for instance, to believe that the Court has followed "the law" by following a precedent and still believe that the Court is a highly fallible guide to constitutional ideals. (Indeed, it seems possible that this is a set of views held by those justices in the plurality who had grave doubts about the original

holding in *Roe*.) It is also possible to believe that a judicial decision is lawful according to formalistic interpretive criteria but nevertheless is not an enunciation of constitutional ideals according to moral or political standards. And, needless to say, it is possible to believe that a decision is lawful according to realistic criteria but not a faithful reflection of constitutional ideals according to historical or textual sources.

Of course, I do not mean that the plurality's claims make no sense at all. Nor do I mean that the three justices could or should have awaited definitive studies bearing on the causal questions before releasing their torrent of urgent words. I mean only that from a down-to-earth perspective their argument is unlikely. As a matter of idle speculation, yes, it is all possible; but as a ground for an important decision, the claims are at once so tenuous and strident as to approach the hysterical.

Why, then, do thoughtful people, including not only Supreme Court justices but also prominent scholars such as James B. White and John Hart Ely, accept the argument or at least take it seriously?[8] It could be (once again) because constitutional decisions, as well as the commentary about them, tend to produce a certain habituation to improbable factual assertions and loose rhetoric. But I believe it is also because the opinion resonates with an unspoken fear, with a vision of catastrophe that is deeply rooted both in our history and in contemporary debate.

The full scope of this vision can be glimpsed by dwelling for a moment on the end point of the Court's argument, the capacity of the nation "to see itself through its constitutional ideals." The capacity for this kind of collective self-perception is nothing less than the capacity for a national identity. What is at issue, then, is not just the operational integrity of our constitutional system but the existence of the political culture upon which that system rests. What would it mean if the citizens of the United States could not see themselves through their constitutional ideals? A variety of serious observers, including those referred to at the outset of this book, have said that for Americans to see themselves without constitutional ideals would be for Americans to see themselves without a country.[9] To the extent this is true, losing the capacity for constitutional idealism would convert Americans into a collection of people united by little except geographic proximity. Even the common experience of a shared history could lose its coherence and significance without the sustaining narrative of constitutionalism. Thus, when the justices say that their concern for the Court's legitimacy "is not for the sake of the Court but for the sake of the Nation . . . ," it might be that we should take them seriously. It might just be that, as in so many of the federalism cases and in

so much contemporary commentary, their underlying fear here is the political disintegration of the United States.

I am not claiming that anyone, including the members of the *Casey* majority, believes that *stare decisis* is necessary for national unity. But the various qualifications in the Court's argument suggest that the authoritativeness and supremacy of the judiciary's interpretive function, not respect for precedent, are the operative concerns. Recall that the argument is not that the country's capacity to see itself through constitutional ideals is at risk whenever an important precedent is overruled. The case must involve principled, rather than factual, judgments, and even then it must be one of those rare cases where "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." To abandon precedent under these circumstances would threaten the people's belief that "the Court [is] invested with the authority to . . . speak before all others for their constitutional ideals." All this suggests that just behind the linkages that make up the plurality's explicit argument—that *stare decisis* sometimes underlies judicial legitimacy, and that judicial legitimacy underlies the rule of law, and that the rule of law underlies constitutional idealism—lies a shadow argument that, if articulated, would go as follows: *Stare decisis* is sometimes necessary for judicial supremacy, and judicial supremacy is necessary for constitutionalism, and constitutionalism is necessary for nationhood.

II

Even if the argument of the *Casey* majority is incomplete and even if aspects of that argument point toward a belief that our national political identity is fragile and significantly dependent on judicial supremacy, concern for nationhood might at first seem an unlikely explanation for the extreme sense of urgency in the opinion. Why not stop with the simpler and more familiar explanation that judges, like everyone else, can become devoted to their own power and consequently enraged at those who resist that power? To insist that *Casey* rests on a deep fear of national disintegration would seem to be, at the least, intellectually uneconomical.

But consider: Almost all of the political "fire" directed at *Roe v. Wade*—the long line of state statutes seeking to roll back that decision as well as the nomination of conservatives to the Court—challenged the substance of a decision but not, strictly speaking, the Court's authority. Indeed, this political

activity was aimed at inducing *the Court* to change *its* position.[10] The justices would have been exercising power if they had decided to reverse an earlier Court, and satisfyingly so (one would imagine) for those members of the majority who find abortion morally repugnant and constitutionally questionable. Was Justice Scalia's bitter opinion, which, of course, did call for the overruling of *Roe*, an act of personal or institutional abasement? The urge to power is a reliable law of politics, but without some supplementation or qualification, it will not explain *Casey*.

A fuller understanding of the driving forces behind *Casey* can be found in an essay by Robert Burt published in the *Yale Law Journal*. In an argument eerily similar to the Court's opinion (but published years earlier), Burt argued exactly that constitutional cases involve clashes among convictions so fundamental as to transcend any "underlying sense of community."[11] Burt thought that in such cases the Court's function is to dramatize "how easily political conflict becomes transformed into diametric opposition . . . and how such opposition can lead . . . to the brink of civil war. . . ."[12] Its function, he insisted, is to show "the fragility of communal bonds in democratic theory and practice." That is, by insisting on its own authority and exposing its own weakness, the Court helps to reestablish a new sense of community based on "the listeners' [heightened] sense of their own vulnerability."[13]

Burt's idea is that behind constitutional law in a deeply divided society is fear—fear of breakdown and bloodshed. The radical and arresting corollary to this idea is that constitutional decisions are necessary where law is impossible. "The very purpose of judicial intervention," wrote Burt, ". . . is visibly to call into question the legitimacy of all constituted authority, including the Court's own authority. . . ." Brushing in this way up against the possibility of chaos, Americans accept the Court's invalidation of a law because they accept that the underlying moral dispute "cannot be legitimately resolved and that accordingly . . . the legislative enactment that one party has imposed on the other is invalid."[14]

Like the Court in *Casey*, the two paradigmatic issues that Burt points to as threatening the social fabric are abortion and school desegregation. For Burt, the Court's decision in *Cooper v. Aaron*, insisting on immediate desegregation in the Little Rock schools despite opposition by state officials and the resulting mob violence, illustrates the restorative judicial function. And in this Burt was echoing the Court's own assessment of the scope and gravity of what was at stake. The *Cooper* opinion begins by explicitly asserting that the case "raises questions of the highest importance to the maintenance of our federal system of government."[15]

The nine justices, according to Burt, dramatized the fragility of their authority by individually signing *Cooper*. Be this as it may, *Cooper* illustrates a more authoritarian aspect to Burt's version of the Court's function. After all, to disagree morally or legally with the Court when the basis of its decision is that common norms do not exist is to risk the very communal disintegration that it is the Court's function to help us escape. And *Cooper* does tend to confirm that at least in the kind of constitutional cases Burt has identified, the justices will view challenges to their authority as anarchic. Thus, the justices felt it necessary in *Cooper* to go beyond what was required to resolve the case and to assert as "indispensable" the principle that "the federal judiciary is supreme in the exposition of the law of the Constitution" and, consequently, that "[e]very state legislator and executive and judicial officer is solemnly committed by oath" to support its interpretations.[16] This identification of the judiciary's interpretations with the Constitution itself and the apparent extension of the duty of "support" to state officials who are not parties to any case would, if fully implemented, preclude all official actions predicated on disagreement with the federal courts. That is, the judicial function envisioned by Burt and apparently adopted by the Court in *Cooper v. Aaron* not only requires suspension of the democratic prerogative of morally coersive legislation but also suppression of official dissensus on constitutional interpretation.

That, I think, is the source of what years later in *Casey* the Court called "the rare precedential force" of cases like *Roe*. Because the justices perceived unfettered abortion regulation as threatening the nation's social fabric, they represented the Court's role, beginning in *Roe*, as having been to call "the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." To reverse *Roe* would have been to acknowledge the legitimacy of continuing political debate on that mandate. Reversal, therefore, would have risked political disintegration, the very danger that the justices believe gave rise to the Court's authority in the first instance. Here, then, is the *Casey* majority's shadow argument brought out into the light: *Stare decisis* is necessary for judicial supremacy when that supremacy extends so far as to require suppression of official disagreement with the Court's interpretation; judicial supremacy (taken this far) is necessary for constitutionalism when the Court's interpretation rests on the belief that no common moral norms exist on which to base moral or legal debate; constitutionalism is necessary for nationhood when the issue about which society lacks common moral norms is so central that continuing debate will cause political disintegration.

III

Just as a thought experiment, let us assume for a moment that the shadow argument in *Casey* is overwrought as applied to the issue of abortion. That is, assume that abortion prohibitions could be reintroduced without causing political disintegration. It is, after all, possible that if *Roe* had been reversed, the pro-choice movement would have reacted with no more resistance or violence than the pro-life movement has in fact manifested in reaction to the Court's decision in *Casey*. Some zealots might have carried out shootings and bombings, some intellectual journals might have proposed that the time had come to discuss the possibility of civil disobedience, but the great mass of the pro-choice movement—agonized as it undoubtedly would be—might simply labor on trying to influence state and federal laws, change the composition of the federal courts, and amend the Constitution. Meanwhile, even with its moral fabric strained, the country might continue to go about its business.

While thinking the unthinkable, let us assume that the violent circumstances leading to *Cooper v. Aaron* did not actually threaten the nation. Consider the possibility that, although those events involved ugly threats to the welfare and education of Little Rock schoolchildren, they might not have involved any material threat to nationhood. It is true, of course, that when Governor Faubus ordered the Arkansas National Guard to Central High School, he powerfully evoked associations with the Civil War. But by the time the Supreme Court acted a year later, the president of the United States had ordered units of the 101st Airborne Division to Central High. It bears remembering that this president, the man who had once planned and supervised the Normandy invasion, instructed his attorney general to see that "the force we send [to Little Rock] is strong enough that it will not be challenged."[17] And it was not challenged; the morning after deployment, school integration resumed. Thereafter, Eisenhower federalized the National Guardsmen, who, as everyone knows, protected the brave black students for the remainder of the school year under cruel and chaotic conditions. In short, the overwhelming military power of the national government had been successfully deployed by the time *Cooper* was announced.

Having gone this far, it should be relatively easy to assume that *National League of Cities v. Usery*, had it not been overruled, would not have led to the dismantling of the New Deal and that state-imposed term limits would not have reestablished the Articles of Confederation. While we are at it, we might as well imagine the possibility that multiculturalism, no matter how radical its intellectual underpinnings, is not as a practical matter a threat to

the Bill of Rights or to our national identity—no more so than, say, the Communist Party turned out to be.

From this optimistic but not entirely unrealistic perspective, the question that emerges is this: What is the source of the widespread and acute fear of disintegration? The answer that emerges from *Casey* is that centralization itself is creating anxiety about nationhood. At the level of regulatory policy, this dynamic is obvious; as Justice Scalia and others have argued, the Supreme Court's decision in *Roe* to centralize abortion policy dramatically raised the moral and political stakes all around, thereby fomenting the very political stridency that eventually produced fears of a culture war. What may not be quite so obvious is that these fears might naturally induce further centralization and, therefore, greater anxiety about disintegration. This implosive cycle would account for the otherwise-odd coexistence in the modern case law, as well as in political debate, of the widespread sense that nationhood is precarious alongside the brute facts of successful nationalization.

The dynamic of implosion may be operating not only at the level of policy but also at the level of process. More specifically, our devotion to judicial supremacy, which is the symbolic apex of American nationhood, is making nationhood seem more precarious than it is and thus inducing evermore nervous reliance on national judicial power. This possibility, I think, can be seen in the shadow argument made by the *Casey* majority.

According to the shadow argument, the function of the Supreme Court in crucial situations does not depend on the justices' assessment of the moral or legal value of the asserted right. Indeed, the justification for the Court's action is that continued discourse about such an assessment would threaten the national political community. The purpose of *stare decisis* in these situations, as the *Casey* majority makes clear, is to substitute the authority of the Court for further debate, not only for further public debate but also for continuing internal deliberation by those justices who themselves doubt the substantive justifications for the right. One difficulty with this strategy is that it is only natural for debate to be provoked, not precluded, by a judicial opinion that proclaims its own substantive weaknesses. Indeed, much of the reaction to *Casey* demonstrates that the plurality's stubborn adherence to an admittedly questionable constitutional position has infuriated the opposition and, in fact, has begun to produce a radical jurisprudence of doubt.[18]

The lawlessness underlying *Cooper* was less explicit than that underlying *Casey* but no less provocative. Although the justices did not announce any reservations about *Brown v. Board of Education*, they asserted the Court's authority in palpable disregard of the moral and legal underpinning of *Brown*. That underpinning was the determination that segregation laws harmed the

hearts and minds of black children. Not one of the nine justices who did think to sign their names to *Cooper* thought to explain how attending Central High School under armed guard would protect the hearts and minds, let alone improve the education, of those brave, beleaguered students. Thus, even more starkly (if less explicitly) than in *Casey*, the Court in *Cooper* severed its authority from any constitutional base. True, local resistance subsided and the Little Rock schools were desegregated, but the Court's separation of authority from justification set in motion decades of bitter confrontations throughout the nation. The so-called root and branch remedy—that peculiarly unembarrassed and antiseptic allusion to the vast destruction to be caused by the wrath of God—imposed elaborate plans for student relocation and dispatched fleets of buses and transferred teachers. In these ways it manifested the supreme authority of the federal courts. But the operational assertion of that authority, which evolved without being connected in any believable way to educational equality, did not convince or silence vast segments of the public. Indeed, it infuriated many, thus creating a specter of unruly resistance to judicial authority that no doubt still motivates the drive for ever-greater central authority.[19]

The American republic has been resilient enough to withstand the severe cleavages created by the Court's rulings on abortion and racial balance. But the shadow argument of *Casey* not only predictably elicits severe disagreement but also predictably shapes perceptions of that disagreement. According to the shadow argument, the Court's interpretation must be accepted, not because it is right, but because dissensus on an issue deemed crucial and unresolvable will tear the country apart. Under these circumstances, disagreement with the Court must be perceived as anarchic. Therefore, although the nation has not in fact been destroyed by the political opponents of the Supreme Court, those opponents are viewed by many in the political class, including jurists and scholars, as dangerous subversives rather than as angry citizens. It *appears* that the country cannot withstand the dissenters' anger and their moralism because they dispute judicial interpretations that are premised on the conviction that disagreement is dangerous to the nation. Against the backdrop vision of political breakdown, ordinary dissenters look dangerously lawless.[20]

It will not do ultimately, of course, merely to assume that the justices were simply wrong in the circumstances of *Casey* or *Cooper* to fear national disintegration. This fear is self-induced, a product of the brittle psychology of excessive centralization, only if it is true that the nation can withstand more than the justices and their allies believe it can. If, on the other hand, it is true that debate on issues like abortion will destroy the nation, those

who insist on challenging the Court's decisions *are* threatening the nation. No one can be sure about the future, but there is a certain calming effect in seeing that this whole matter turns on a question rather than an axiom, that it depends on a difficult prediction, not a self-evident fact. And there should be a cautionary effect in recognizing that fear of chaos triggers as an instinctive reaction the further centralization of authority, which can itself induce the illusion of chaos. Surely within limits Justice Brandeis was right to believe that strength should create self-confidence and that a self-confident people can afford to tolerate dissent even on fundamentals. Within those limits it might be said that nationhood finds no refuge in a jurisprudence of fear.

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8

Communities on Defense

I

If it is true, as the decision in *Planned Parenthood v. Casey* indicates, that the demand for unquestionable centralized authority is fueled by an underlying anxiety about irresolvable moral divisions and the possibility of violent breakdown, it is predictable that the institutions of centralized authority would resist comprehending their own capacity for destabilization and disruption. And, in fact, the Supreme Court does imagine that it provides stable interpretations of our foundational law and that it settles, rather than ignites, great moral struggles. Among the many consequences of this defective self-perception is an inability to understand or tolerate the various segments that make up American society. Not only does the jurisprudence of fear distort some justices' perception of dissent, but at times they are unable even to hear the moral component of argumentation that is taking place around them. Conflicts, therefore, seem inexplicable, gratuitous, and dangerous.

A dramatic illustration of this implosive dynamic can be found in *Romer v. Evans*, the famous case in which the Court invalidated an amendment to the Colorado Constitution that prohibited state policies allowing homosexuals to make any claim of "protected status or . . . discrimination."[1] The ma-

jority's constitutional analysis begins in a tone of bewilderment. Speaking for the Court, Justice Kennedy complains that the provision (which was called "Amendment 2") "defies . . . conventional [judicial] inquiry."[2] He goes on to say that because the amendment imposes a broad disability on a single named group, it is "exceptional," "peculiar" and "inexplicable."[3] Indeed, after reciting for comparative purposes some familiar and ordinary equal protection cases, the opinion asserts that Amendment 2 is "unprecedented in our jurisprudence."[4]

In law as in life it is only a short distance from the recognition of strangeness to condemnation. Accordingly, the first sentence of the next paragraph states, "It is not within our constitutional tradition to enact laws of this sort." Condemnation yields many satisfactions, and one is the cessation of bewilderment. The opinion now moves swiftly and confidently to describe the purposes of the amendment: It was enacted to express "animosity" toward homosexuals and "to make them unequal to everyone else."[5] Thus, bewilderment is replaced by certainty. In fact, Amendment 2 turns out not to be so strange after all; at least, it does not defy traditional forms of judicial inquiry. The amendment offends what the Court describes as the "conventional and venerable" principle that all laws must bear a rational relationship to a legitimate purpose.[6]

The Court's exposition, then, is a fairly exact rhetorical expression of the psychological impulse of intolerance. The opinion conceives what is unusual to be foreign; it understands what is foreign to be evil; it sees what is evil to be threatening; it suppresses what is threatening. This, I hasten to add, is not in itself a criticism of *Romer*. Intolerance, as Lee Bollinger explained some years ago, can be "a sign of admirable moral strength. . . ."[7] If tolerance is restraint in the face of provocation,[8] its advantages are limited and essentially intellectual. Tolerance allows for time and reflection, but it does not obviate the eventual necessity for moral decision and, sometimes, for condemnation.

From this perspective what might be thought regrettable is the fact that the members of the majority found it sufficient to provide only one brief paragraph assessing the public purposes asserted for Amendment 2 by the state.[9] Moreover, if the purposes marshaled in the state's brief (at least one of which the opinion does not mention)[10] seemed, as the opinion claims, wholly improbable, then one might have expected that ordinary curiosity would have prompted the justices to speculate rather fully about what the citizens of Colorado could have been up to. After all, by the Court's own account the amendment is both astonishingly broad and entirely unique. Surely when the people of a state enact such a law in an area of undoubted moral importance, some sustained thought about their objectives would be natural.

Of course, fuller reflection about the state's purposes might have only led back to the Court's harsh and spare conclusion. But even assuming there was no escaping the word "animosity," the justices could have developed with specificity and care a depiction of the nature of the ill will that was capable of resulting in the unprecedented action under review. What prejudices, what fears, what hatreds combined in 1992—for the first time in our history—to impel the people of a state to attempt to make homosexuals "unequal to everyone else"? On this, *Romer* has virtually nothing to say.

Perhaps the majority was sketchy about the state's objectives out of a sort of decorous sensitivity—a desire to inflict no more insult than necessary. If polite restraint is what accounts for the Court's terseness, it is even more puzzling why the Court did not consider at greater length whether anything besides ill will could have accounted for Amendment 2. *Especially* if the majority were inclined to avoid or minimize moral condemnation, it would have been natural to canvas all ostensibly benign possibilities before concluding that an enactment endorsed by more than half a million diverse citizens was motivated by animosity. Some possibilities were available in Justice Scalia's dissent (which the majority largely ignored) and in the Court's own earlier opinion upholding the moral authority of states to criminalize homosexual sodomy[11] (an opinion to which the majority did not even refer). If these sources were too confining, Richard John Neuhaus, for one, has argued that "five millennia of moral teaching about the right ordering of human sexuality" would have provided the justices with some material.[12] While Neuhaus's particular choice of words may be exasperating to some, it nevertheless remains true that *Romer* says almost nothing about history, religion, morality, psychology, politics, or culture. How, it must be asked, could the Court claim to discover the purpose behind Amendment 2, an enactment that it described as deeply puzzling and widely significant, without reference to the rich social context from which it emerged?

Providing rich social context is often thought to be a job for, well, the legal academy. Salmon, driven as they are to spawn, struggle each year against the rushing waters; and law professors, driven as they are to improve the world, write relentlessly in an effort to articulate what judges neglected to mention while busy doing justice.[13] Predictably for a case like *Romer*, which is both cryptic and morally "progressive," an exotic array of constitutional doctrines has been produced. Jane Schacter, for instance, proposes that because Amendment 2 "coerced gay invisibility . . . ," it offends a principle against "social disenfranchisement and caste-like practices. . . ."[14] William Eskridge argues that *Romer* rests on the notion that the judiciary should guard "against Kulturkamp."[15] Daniel Farber and Suzanna Sherry think the decision

involves a "pariah principle."[16] Somewhat similarly, Cass Sunstein discloses that "close to the heart of the matter" is a judgment that discriminations against homosexuals are "likely to reflect sharp 'we-they' distinctions and irrational hatred . . . a judgment that certain citizens should be treated as social outcasts."[17] (*Romer*, along with some other recent cases, is such a challenge to Sunstein that he partially reconsiders his often-stated commitment to reason-giving; he urges that sometimes it is useful for courts not to give reasons because, you see, this can encourage legislatures to come up with them.) Akhil Amar dusts off the bill of attainder clause.[18]

The commentary contains wide variations, but it is probably fair to say in general that, although academics are neither so spare nor so acontextual as the justices, their efforts tend to resemble *Romer* in emphasizing that Amendment 2 would have imposed an extraordinarily pervasive set of social disabilities on homosexuals and in concluding that there was no adequate justification for this imposition.

No, I am not about to argue that there is an adequate justification for Amendment 2. While I do not think the reasons behind the amendment are hard to find or irrational, I freely acknowledge that the moral issues inherent in the adjective "adequate" are too deep for me. Rather, the point I want to develop in the remainder of this chapter is that it is odd in the extreme that either justices or professors should write as if a sympathetic account of the people's purposes is either unimaginable or flimsy.[19] The oddness arises from the fact that no one should know better than these constitutional lawyers what the voters in Colorado were doing. The voters were, as I shall elaborate below, playing defense. This was—or should have been—obvious to the legal establishment from the beginning because no one plays offense more aggressively than legal commentators and jurists.

Intolerance can be an appropriate consequence of moral clarity, but it can also be, as advocates of all sides of the gay rights question recognize some of the time, a protection against self-knowledge. What the *Romer* decision and much of the subsequent academic commentary demonstrate is not so much that the legal establishment has been blind to the concerns of a large segment of their fellow citizens as that it has resolutely closed its eyes.

II

At an early stage of the litigation, the plaintiffs' brief characterized the proponents of Amendment 2 as a loose conspiracy of national organizations, a web of right-wingers and religious fanatics with a far-reaching agenda. Some characterizations went so far as to compare their "pro-family" program with

"Hitler's appeals to traditional German family values."[20] According to the brief, this dangerous and shadowy group used an ostensibly local organization called Colorado for Family Values (CFV) as a kind of front. The plaintiffs' depiction of sinister political forces served vaguely as a basis for their claim that the popular vote for Amendment 2 was an expression of "antipathy" and "prejudice." By the time that the case reached the Supreme Court, the sociological evidence adduced for this conclusion had been pared down considerably. It consisted of the observation that CFV, in common with anti–gay rights campaigns "across the country," had asserted that homosexuality is associated with pedophilia and had relied for this proposition on Paul Cameron, a psychologist who allegedly had been sanctioned for misuse of data by various professional organizations.[21]

Perhaps because of the rather yawning gap between Paul Cameron's professional problems and the motivations of over 500,000 Colorado voters, the Supreme Court did not refer to this piece of evidence when it declared Amendment 2 had been born of animosity. Relying on its own analysis of the text of the amendment rather than on sociological description, the majority denied that there could be any legitimate purpose for permitting the exclusion of homosexuals "from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[22]

Given their legal training, it is not surprising that the justices converted an empirical issue into a question of logic. But, mustering our capacity for restraint in the face of provocation, it might be instructive to examine briefly the efforts of CFV to persuade Colorado voters to enact Amendment 2. Of course, this examination has its limitations. It cannot tell us about the covert purposes of either CFV or any national organizations that might have been using CFV. And it cannot tell us anything certain about the reasons a majority of the voters enacted the amendment. There is no question, however, that CFV is responsible for the language of the amendment and for the major part of the campaign in its behalf.[23] Its public arguments, surely, are one important source for understanding the purposes of law.

The most influential single publication from CFV was an eight-page "tabloid." Some 750,000 of these were distributed by CFV volunteers to registered voters across the state. The tabloid is described by an observer sympathetic to CFV as "the single greatest contribution to the 92 campaign."[24] The tabloid is white with some blue and some black printing. As might be expected of campaign material, it makes liberal use of exclamation points. The main headline on page 1 says, "STOP special class status for homosexuality." The other headlines on the front page include "Equal Rights—Not Special Rights!" "Vote Yes! on AMENDMENT 2," "Colorado civil-rights lead-

ers say 'YES!' on Amendment 2," and "Are homosexuals a 'disadvantaged minority'? You decide!" A block inset says, "TURN INSIDE FOR THE SHOCKING TRUTH!" and lists the following as a table of contents:

Also on the front page is a block inset that states:

> If you do one thing to prepare yourself for this November 3rd election—please . . . arm yourself with the facts about Amendment 2. Militant homosexuals have flooded Colorado's media with claims that they're only after "equal protection." Truth is, they already share that with all Americans. What they really want will shock and alarm you. Please—read this tabloid carefully, cover to cover. We've packed it with astonishing, fully-documented reports on the actual goals of homosexual extremists. . . .

This front page is worth describing in some detail partly because it is likely to have been the most influential section and partly because it is, I think, a reasonably accurate indicator of what is in the rest of the tabloid. As can be seen, one major theme that appears on this page (and is also developed throughout the publication) is that homosexuality is harmful, avoidable behavior. The tabloid claims it is linked to pedophilia, disease, and promiscuity. Another theme is that Amendment 2 is not animated by hatred and will only prohibit "special rights." (In this regard, it is interesting to note that in several places the tabloid argues that the amendment will not prevent homosexuals from "asking for or receiving protection from . . . basic discrimination" and that a part of this argument is the repeated characterization of

homosexuals as "American citizens.")[25] The material related to the first theme is blunt and inflammatory, and it is safe to say that many people would characterize some of it as exaggerated or false. The second theme is far less combative, but its reassurances can, of course, be regarded as disingenuous.

In any event, the dominant theme in the tabloid is different from either of these two. The main theme is that "homosexual extremists" are powerful and have an agenda. This set of claims not only accounts for most of the print space but is developed from many angles, in considerable detail, and with a sense of great urgency. Thus, the tabloid contains charges to the effect that homosexuals want to legalize pedophilia, promote homosexuality in public schools, legalize public sexual behavior, induce Congress to enact a "national 'gay-rights' law," abolish the traditional family, suppress "non-'politically correct' " speech, alter the hiring practices of churches, limit the freedoms of business owners, and, of course, establish "special class status." The immediacy of these supposed threats is emphasized by claims about the financial and political resources of homosexuals and by numerous specific anecdotes—about local ordinances already enacted, national laws already proposed, educational literature already distributed, sensitivity training already ordered, preferences already demanded, and so on. Moreover, the tabloid insists that this complex, broad-scale agenda ("the shocking truth") had been hidden because "militant homosexuals" had been issuing misleading claims through "their friends in the press."

Having insisted on a review of CFV's tabloid, perhaps it seems that now is the time for me to begin a condemnation. And it certainly is possible that a detailed and careful assessment of the contents of the tabloid would end by characterizing many of its claims as inaccurate, harsh, conspiratorial, and alarmist. Even assuming this, I think the tabloid should not be immediately dismissed simply as evidence of animosity or prejudice. To see why, consider the position of the various jurists who read the characterizations of CFV in the plaintiffs' briefs. As I already indicated, some of this material might, if studied, also be characterized as inaccurate, harsh, conspiratorial, and alarmist. Presumably the judges who invalidated Amendment 2 (as well as others interested in an understanding of the purposes of the gay rights movement) did not shut off thought when first encountering the plaintiffs' claims. Rather, assuming they did not uncritically accept these claims as true, they must have looked past any particular inaccuracies in an effort to see whether some basic, defensible position might be found somewhere in those writings despite their tone. This would have been a sensible reaction, since everyone knows that important underlying truths can sometimes be found in the midst of exaggeration and simplification. Similarly, the tabloid might have a logic that

resonated with more moderate and qualified beliefs found among the general voting population.[26]

Putting aside for a moment, then, the specific claims made in the CFV tabloid, what is the underlying structure of its argument? And could that structure have appealed to any moderate voters who might have helped enact Amendment 2?

The argument of the tabloid can be broken down into the following elements: (1) A movement exists to further a set of goals called "gay rights." (2) This set of goals represents a danger to the values or way of life of a sizable community. (3) This sizable community does not yet appreciate the extent or nature of the threat to its way of life because (*a*) although the immediate, discrete goals are linked together so as to implicate much broader cultural changes, this linkage is nonobvious, and (*b*) the proponents of the discrete changes behave strategically to deny the linkages. (4) Many of the discrete changes are under way, and it is realistic to believe that the more radical cultural change could be achieved imminently. (5) The community that is at risk from these changes cannot effectively defend itself through ordinary mechanisms of self-government. (6) A state constitutional amendment is a potentially effective way to forestall both the specific goals and the larger cultural changes. In sum, the tabloid might have resonated with those who believed that it is desirable to erect a legalistic defense against something called "the gay rights movement."

Now, it goes without saying that a person who is moved to oppose "the agenda" of the gay rights movement could well hold animosity toward homosexuals. But it seems just as plain that opposition need not be based on animosity. As Neuhaus and others have pointed out, traditional religious disapproval of homosexual conduct is not the same as hatred of individual homosexuals. Even passing this undeniable point, consider another relatively noncontroversial example.[27] Imagine a person who concedes that the gay rights agenda *may be* morally right. The most that can be said is that this person is uncertain about the morality of the goals of the gay rights movement. Uncertainty, it should go without saying, is not the same as animosity or hatred. Yet such a person could be persuaded by the tabloid's underlying argument. Suppose (as is surely realistic in our culture) our imagined individual is convinced that there are important moral virtues inherent in traditional heterosexual families and in the aspects of society associated with them. The gay rights agenda depicted in the tabloid would be disturbing to this person because that agenda, which the person regards as having possible virtues, is presented as threatening an existing way of life that he or she views as definitely having virtues. In short, support for Amendment 2 could have

been based on uncertainty about the morality and the possible consequences of the gay rights movement.

It might be objected that an unwillingness to take any risk on behalf of another person or group of persons can be the equivalent of animosity. Hard-heartedness can be close enough to hatred for practical purposes, but this objection would be strongest at the extreme—that is, in the circumstance where an individual will not take even a very small risk to reduce another's very great burden. However, given the long history of legal protections for heterosexual family life in an array of different cultures and given the enormous significance this life has had for sensitive and pivotal relationships, it surely is implausible to assume Colorado voters must have perceived the risk presented by the gay rights movement as slight. And when the stakes are great enough, a person without animosity can decide it is important to avoid risk.

It is nevertheless true, as both courts and commentators are inclined to say, that the specific method of defense proposed in the tabloid might indicate animosity. There are many ways to avoid risk; the question is whether a nonhostile voter could be persuaded to support the method represented by Amendment 2. Why authorize discrimination virtually everywhere—in housing, employment, insurance, welfare services, education, in (as the Court put it) "an almost limitless number of transactions and endeavors that constitute ordinary civic life . . ."? Could the voters have had any moral reason to go so far as to authorize social banishment?

Recall now the argument of the tabloid: A valued way of life is said to be threatened by an "agenda" consisting of discrete moves that are largely hidden and beyond ordinary political control. What could the connection be between this diagnosis and the proposed remedy? The amendment created the possibility that a large range of discrimination claims would be barred by a legal rule having constitutional status. If enough people were to respond to this rule by discriminating against homosexuals, the result *could have been* to isolate homosexuals psychologically and culturally and, eventually, politically. This possibility does not make Amendment 2 unprecedented; on the contrary, it tends to assimilate the amendment into a miserable history of extreme and hateful defensive measures. Everyone knows that, acting under the belief that their ways of life were being threatened, dominant coalitions have long used violence, imprisonment, segregation, and expulsion against a wide array of minority groups. Moreover, on occasion these methods have been legitimized by the highest legal authorities.[28] In comparison to such measures, what is unique about Amendment 2 is its oddly abstract, legalistic quality. Techniques like expulsion and segregation isolate physically. In contrast, all that can be said with certainty about Amendment 2 is that it would

have established a *legal* disability against claims of discrimination based on homosexual orientation.

Although both the Court and many commentators have claimed that the motive for creating this legal disability was to establish actual isolation roughly equivalent to banishment, nothing in Amendment 2 *required* people to engage in pervasive discrimination. Therefore, it is at least possible that voters did not anticipate or intend to create an outcast status for homosexuals. Even the plaintiffs in the *Romer* litigation at one stage observed that, according to public opinion polls, Coloradans tended to disapprove of the very kinds of discrimination that the amendment authorized.[29]

Nevertheless, many judges and commentators seem to have reasoned that supporters of the measure must have intended to induce pervasive acts of discrimination because that was the method by which the amendment would achieve its objective. This point is persuasive only on the assumption that there was no other way in which voters could have anticipated Amendment 2 achieving its defensive purposes. Thus, the question becomes: If voters did not intend to establish a regime of pervasive discrimination against homosexuals, could they nevertheless have thought that the amendment would protect the way of life that they valued?

It is here that the tabloid is most instructive. Its theme that homosexual "extremists" are powerful and have an agenda is developed, as I have said, with considerable specificity. And the specific agenda described depends in virtually all respects upon the alteration of legal rules: On the one hand, "militants" are said to want to legalize pedophilia and public sexual behavior and homosexual marriage and, on the other, to restrict contractual freedoms and religious practices and non–politically correct speech directed at homosexuality. Moreover, the tabloid argues that these discrete legal objectives have as their linchpin another change in the law, the establishment of "special class status." In short, the tabloid claims that a broad threat to heterosexual society arises from a discrete series of legal "reforms" and that all of these legal changes will tend to follow from one central alteration in the law of discrimination.

To the extent that they accepted this argument, voters could certainly have seen Amendment 2 as an effective defense even if they did not intend for it to result in an operational regime of pervasive discrimination against homosexuals. Under the logic of the tabloid, the establishment of a key legal disability *by itself* would tend to protect the way of life thought to be in danger. Even if hardly anyone actually took advantage of the right to discriminate against homosexuals, the preclusion of the linchpin of the gay rights strategy could have been thought likely to preclude other related

changes in the law and therefore likely to prevent the feared revolution in social norms and practices. That is, if voters held the thoroughly American assumption that radical social change can be induced by law reform, they could have been persuaded that radical change could also be defended against by nothing more than a preemptive change in the law. Thus, given the perceived nature of the strategy, of the "militants," Amendment 2 could have been seen as an effective defense even if no one anticipated that it would turn homosexuals into outcasts.

In fact, Amendment 2 could not work as an effective defense unless homosexuals were *included* as part of the political community in at least one important respect. As explained in the tabloid, the law reform strategy of gay rights activists was powerful in that it was hidden and largely beyond ordinary political control. The precise fear that the tabloid played on, then, was not fear of change per se but fear of surreptitious change. And that fear would have been potent for anyone who, like our imagined voter, saw the gay rights agenda as presenting risks for profoundly important social institutions. Without adequate opportunity for notice, debate, and consent, risk is magnified. Or, to put it the other way, there is reassurance in the knowledge that change will not be undertaken until sizable numbers of people have been convinced that the risk is tolerable. Under Amendment 2, the gay rights movement could still pursue the linchpin of its strategy—but only by way of further amendment of the state constitution. Thus, the CFV proposal would allow for social revolution but only with some assurance of high visibility and direct majoritarian control. Amendment 2 could achieve its objectives by forcing "militant" gay rights advocates to operate openly as a part of an accountable political system. What is manifest, then, in one of the bluntest and most effective pieces of propaganda on behalf of Amendment 2 is that supporters could have been acting, not from animosity, but from a desire to establish popular control over the risk-filled decision whether to go down a road of social revolution.

At this point it might be objected that, while such a motivation was possible, the truth is that voters simply hated homosexuals. This may be; I do not know for sure what Colorado voters intended and neither does anyone else. My own assumption is that almost all complex decisions have mixed motivations that include components that are morally flawed. The Court, however, purported to base its knowledge about the purpose behind Amendment 2 on the ground that no alternative, nonmalignant explanation for enacting it was imaginable. I do think I have demonstrated that this is a measure of the thinness of the justices' imaginations (or the level of their intolerance), not of the motives of the people who voted for the amendment.

It might also be objected that even on the assumption that popular motives were mixed and included the kinds of considerations suggested by the underlying logic of the tabloid, those considerations were almost insanely conspiratorial. To the extent that voters conceived of a scheme for social revolution that would be initiated by a single change in the law of discrimination—and to the extent that they attributed that scheme to a crafty cabal of gay rights militants—it might be thought that voters were possessed by something close to paranoia. The improbability of the tabloid's argument then could itself be said to be evidence of prejudice and hatred. This objection brings me back to my central theme, for it seems apparent that the charge of paranoia can be made by the constitutional law establishment only if its members first manage a truly strange mental feat. To conclude that the underlying logic in the tabloid was unhinged, legal academics and judges must first pretend that, if they just shut their eyes tight, they can remove themselves from the scene. This is necessary because, as I shall now try to explain, the nationalist establishment's influence on our current political culture is one of the important factors making the argument in the tabloid believable.

III

Viewed from one angle, it does seem unrealistic, if not crazy, to believe that a single alteration in a legal rule can ultimately produce a social revolution.[30] Even admitting that one change can induce a whole row of legal dominoes to fall, the gap between written prescription and political reality just seems too great. How will the rules bind the enforcers? How will the enforcers, even if motivated, get the resources? How will the resources be deployed to alter the behavior, let alone the beliefs, of millions of people? From this angle, the content of legal rules is likely to be epiphenomenal, apparently powerful only because the rules are carried along on some vast tide of economic change or cultural transformation.[31]

This commonsense view is not, however, fully accepted, and nowhere is it resisted more vigorously than among the constitutional law establishment. Many sophisticated law professors and judges have long believed that *Brown v. Board of Education* precipitated school desegregation directly and that this ended Jim Crow indirectly. Indeed, the notion that popular resistance and political pressure were mainly responsible for triumphs in these areas is often treated as something close to a sacrilege.

Race discrimination is not a special case. It is common for constitutional lawyers to talk breathlessly about the profound social significance of "land-

mark" cases. Consider the terms used by the justices themselves in some of our most revered cases. *Miranda v. Arizona* was aimed at dispelling throughout the country "the compelling atmosphere of the [in-custody] interrogation," and this in turn would help maintain "the respect a government . . . must accord to the dignity and integrity of its citizens."[32] *New York Times v. Sullivan* was intended as a central part of a campaign to make debate on public issues "uninhibited, robust, and wide-open. . . ."[33] And recall that the essential holding in *Roe v. Wade* was expected to "call the contending sides of [the abortion] controversy to end their national division. . . ."[34] This sort of talk is not restricted to justices trying to justify their decisions in a few extraordinary cases. Scholarly commentators have argued that an obscure case dealing with an aspect of Idaho's probate system initiated a revolution in sex roles[35] and that, as I have discussed at length, isolated and timid decisions on state autonomy will usher in (that word again) a revolution in federal/state relations.

I do not mean that the romance of social reform through constitutional adjudication is entirely modern. Nor that it is entirely unconvincing. The idea of a landmark case goes back at least to the beginnings of the nation; indeed, its roots are entwined with the American faith in written constitutionalism itself. Even those, like me, who see much superstition and exaggeration in it, cannot doubt the continuing power of this tradition.

To acknowledge this power is to acknowledge American fascination with the formulation of legal rules. And the legal profession is where that fascination is worked out most intensely. In the culture of that profession, worlds turn on the specific wording of phrases, aphorisms, standards, and doctrines. There the relationship between a single holding and future lines of cases has intellectual presence and reality. There a decision is a precedent, a doctrine is a web of possibilities, a reason is a principle. The professionals who think this way for a living should not be astonished at CFV's claim that the establishment of "special class status" for homosexuals would have wide legal and social implications. Indeed, CFV's argument for Amendment 2 as a defense against an "attack" by "militants" could have resonated with voters partly because an elite class of lawyers had helped to convince the public that even clear, stable understandings and practices can be undermined through the tactics of modern law reform.

Romer itself—with all of its limitations and vagueness—is thought by many members of the constitutional law establishment to hold potential as the beginning of a judicially led movement on behalf of gay rights.[36] Cass Sunstein, for example, has argued that courts may build from *Romer* on a case-by-case basis to strike down a variety of "irrational" discriminations

against gays and that this process could lead to recognition of same-sex marriage.[37] Others have written more generally about how *Romer* might help produce "meaningful democratic equality for gay men and lesbians" and change "social norms and cultural meanings."[38]

If the idea of a law reform agenda which begins with a single pivotal move is familiar and even powerful to members of the legal profession, it is difficult to see why CFV could not reasonably have subscribed to the same idea. Even so, however, the notion that "special class status" could be a linchpin is not necessarily plausible. Being a piece of political propaganda, the tabloid does not fully explain all the causal connections on which its argument depends. But lawyers should have no trouble filling in the gaps.

Special class status in the area of employment discrimination would presumably entitle homosexuals to protection against a "hostile work environment." The moral predicate for this kind of protection could encourage sensitivity programs not only in employment settings but also in educational institutions. The social stature thereby gained (not to mention the specific doctrinal implications) could eventually make it difficult to justify a range of discriminations and restrictions, including the kinds of restrictions on public displays of homosexual affection, whether in military or civilian life, that the tabloid highlighted. It would also undermine the exclusion of homosexuals from state marriage laws. Once the exclusivity of marriage is broken down, other possibilities, such as legalizing pedophilia, become at least arguable.

Some of these possibilities now seem fanciful, but readers of the tabloid were presumably entitled to remember that legal rights, once established, can profoundly alter our sense of what is beyond the pale. They could recall, for instance, that the rights to sexual privacy and abortion, striking enough in themselves, were quickly extended to minors. Perhaps more importantly, they were entitled to recognize that even in the absence of such extensions the logic behind a right rapidly opens up new political arguments and legitimates new political objectives. The Equal Rights Amendment may have been defeated in part because of the (then) startling specter of females in combat, but the assimilation of women into the military moves inexorably on, carried along on a tide of cases that have helped to sweep away the idea of sexual differentiation. Even without establishing special class status for homosexuals, *Romer v. Evans* will be one more factor making the concept of same-sex marriage, which in many quarters was unthinkable not long ago, a serious topic of public debate. In any event, while the tabloid may well have been wrong in some of its predictions about the eventual implications of special

class status for homosexuals, its underlying claim that this change would be legally pivotal certainly cannot be dismissed as a sign of hysteria.

Nevertheless, it must be acknowledged that the tabloid may have vastly overstated the scope of the "threat" posed by gay rights law reform strategies. It could happen—indeed, it would be distinctively American if it did happen—that even radical reforms ensuing from the establishment of special class status would assimilate homosexuals into the mainstream culture rather than destroy or transform existing social institutions. This is one plausible prediction, but it is surely not necessarily a sign of delusional hatred to anticipate a different outcome. In fact, many gay rights advocates within the legal profession intend a different, more revolutionary outcome. Patricia Cain forthrightly urges that litigation be aimed at "a deconstruction of the categories homosexual and heterosexual, as those categories have been constructed by dominant forces in society."[39] William Eskridge acknowledges that to some extent "gaylaw sees itself as a movement to destabilize traditional legal and cultural norms. . . ."[40] While he describes this aspiration as romantic, his own argument for legalization of same-sex marriages notes that "what has been socially constructed can be socially reconstructed."[41] The ambitiousness of Eskridge's vision for "reconstruction" can be glimpsed in his argument that American reformers should borrow from institutions and practices found in (among other places) ancient Egypt, pre-Christian Rome, China during the Zhou dynasty, and Latin America in the 1500s.

So if the argument in CFV's tabloid is evidence of prejudice and hatred, the hysterical aspect of that argument must consist of something other than the basic fear of strategically linked legal changes leading to sweeping social change. The prime alternative possibility is the conspiratorial cast of the argument made by CFV. The tabloid does overestimate the cohesiveness of the "militants' agenda." It is too simple, of course, to say that special class status is the linchpin of the gay rights strategy. Some activists do emphasize changes in the law of discrimination, but important equal protection proposals center—to take just one example—on same-sex marriage more than special class status.[42] Moreover, other advocates see sodomy laws as the "bedrock" of discrimination against homosexuals.[43] There is lively disagreement within the literature about such questions as the centrality of gay participation in the military and even whether the civil rights model is appropriate or useful.[44]

Granting that the gay rights movement is far less intellectually monolithic than CFV claimed, the tabloid is hardly delusional in this respect. There are ample indications that important gay rights advocates, like Eskridge, believe that homosexuals should enlist the government "to fight social oppression

. . . through antidiscrimination statutes, hate crime laws, and sex education programs."[45] Nor is there any doubt that efforts to implement the "affirmative policies"[46] of this egalitarian strategy have been under way for some years. It is arguable that CFV, in reacting to this strategy, misidentified the most significant legal threat to its way of life. Perhaps they should have focused on the law of privacy or some other potentially expansive legal theory. But this seems more a matter of complex political and legal calculation than blind hatred.

A second rather conspiratorial aspect to the tabloid's argument is its insistence that both gay rights activists and their supporters in the press were systematically and effectively denying their ultimate objectives. Advocates within the constitutional law establishment might cheerfully admit that social revolution can come from key legal pronouncements but deny that there is anything masked about this process. The Supreme Court, after all, publishes its opinions, the Congress openly debates changes in civil rights laws, and the curriculum designed by the local school board must become public in order to be utilized. Even academic strategizing is done in law reviews that, while arcane, are available.

All of this is true, yet it misses something real and important about the level of suspicion in modern political life. To appreciate what is missing, turn the issue around and consider the suspicions of the opponents of Amendment 2. That law was also a public event, as was the strenuous argumentation made by CFV on its behalf. Part of CFV's argument was, as the tabloid makes clear, that the amendment was not motivated by animosity and that it was not intended to bar homosexuals, as American citizens, from making "basic" claims of discrimination. These assurances, which were in varying degrees buttressed by the Colorado attorney general and by the state supreme court,[47] were widely disbelieved. They were disbelieved not only by gay rights advocates but by most of the constitutional law establishment, including a majority of the Supreme Court. These critics of Amendment 2 are not commonly depicted as paranoid and hate filled for attributing secretive, duplicitous objectives to the supporters of the amendment. Indeed, especially when society is torn by fundamental disputes and moral vocabularies seem inadequate, it can be a measure of political realism to view public assurances as diversions and covers.[48]

Covert agendas have always, of course, been a part of politics. But the law reform tradition within the constitutional law establishment has, I think, added new force and sophistication to the tactics of secrecy and denial. Although it is true that at one level law reformers openly discuss grand objectives, the very process of adjudication tends to deny these objectives at an-

other. All that is formally at stake in a lawsuit is the issue at hand. School desegregation was argued in *Brown*, not Jim Crow.[49] The issue in the Idaho probate case was the rationality of sex discrimination in the selection of executors, not whether traditional sex roles should be abolished one after another.[50] *Romer* itself emphasizes the extraordinary nature of Amendment 2 and intimates nothing about whether homosexuality should be a suspect classification or whether heterosexual marriage may be unconstitutional. There can be little question, nevertheless, that many advocates intend for the limited arguments accepted in *Romer* to be an opening wedge in a campaign for the rights of homosexuals.[51] A kind of indirection or deniability resides in the very nature of modern law reform adjudication.

It must be said that law reform litigation promotes suspiciousness in another way as well. Something about the urgency and intense moralism of constitutional argumentation in the adversary system produces a heedlessness that is close to lawlessness. Litigation unleashes the same kinds of unrestrained energy and commitment as warfare. That is why sophisticated gay rights advocates can urge "ongoing guerrilla warfare against bigoted precedents, laws, and policies."[52] And it is also why CFV's tabloid characterized their opponents' law reform agenda as a series of "attacks" by "militants."

In the campaigns conducted by litigators (it goes without saying) the opinions of the majority are deprecated and their political efforts are set aside. In the process, history can be distorted, precedent can be forgotten, facts can be selected, and costs can be ignored—all for a higher good. To some degree this heedlessness not only frustrates but infects the political process.[53] Perversely, our legal institutions teach ordinary people the scary lesson that anything can be done with words. Consequently, the repetition and overreaching in the phrasing of Amendment 2 can be understood as a consequence of realistic distrust, not of paranoia. The inclusion of a prohibition against "any claim of discrimination," which caused the Court such consternation, could have reflected the suspicion that, no matter how clear the words and the legislative intent without this phrase, judges would convert claims of discrimination into demands for preference, as they had in interpreting the Civil Rights Act of 1964.[54] More generally, the fears behind the amendment as a whole—the fear of indirection, of false assurances, of an agenda pushed heedlessly—are not necessarily unrealistic in politics and certainly not in a political system shaped in part by the methods of legal argument.

I have been urging that the main elements of the tabloid's argument—the depiction of a threat from a quasi-covert, legalistic strategy for social revolution—could have resonated with realistic, unprejudiced voters. Even if

this is true, it might be that the tabloid displayed hysteria in its assessment of the immediacy of the changes proposed by gay rights "militants." And it does seem that the dangers posed by those who are hated are likely to be misperceived.

The tabloid claimed that a number of specific legal reforms in the gay rights "agenda" were either already partially accomplished or imminent. Moreover, the overall tone of the argument clearly implied that the larger social revolution to be precipitated by these changes was also a realistic possibility. Let us assume that the tabloid exaggerated the significance of the legal changes that had already been accomplished. Antidiscrimination protections in Aspen and Boulder, for instance, might well have signified little about statewide trends; zealous enforcement of an open-housing ordinance in Wisconsin might have been an aberration; and so on. Even on this assumption, the tabloid's basic claims cannot be considered unrealistic. Clearly, important gay rights advocates *intend* for far-reaching changes, such as the establishment of same-sex marriage, to be accomplished in the near future.[55] And it cannot be considered a sign of hysteria for voters to believe that in recent years issues surrounding homosexuality have become visible politically and that the homosexual movement has made significant alliances and gains. This is an era when enormous changes (involving, for instance, race relations, marriage, education, standards of public decency, the use of tobacco, and so on) have swept swiftly and sometimes unexpectedly across the nation. Some of these changes, such as those induced in workplaces across the country by innovations in the law of sexual harassment, began as improbable academic theorizing. In such an era it would be profoundly unrealistic *not* to take seriously the possibility of radical change in the social status of homosexuals.

The tabloid also claimed that the agenda of gay rights "militants" could not be effectively defended against in the normal political process. This claim is certainly questionable in light of the fact that many of the specific gains itemized by the tabloid were the responsibility of politically accountable officeholders. However, if a feeling of powerlessness is a sign of prejudice, then a vast number of Americans (including many gay rights advocates and also more generally many "progressive" law professors) must be prejudiced. Indeed, why Colorado voters apparently feel so cut off not only from the president and the Congress but also from their governor, their legislature, and their school boards is one of the truly intriguing and important inquiries passed up by the Supreme Court in its rush to condemn the motives behind Amendment 2.

A number of explanations that have nothing to do with hatred can be suggested. For example, high mobility rates and pervasive communication systems make it difficult for communities to remain stable and intact. As a result, virtually any way of life may seem vulnerable to change, and anxiety produced by this precariousness may translate into a general sense of powerlessness. Moreover, the rise of the professional class has in fact diluted popular influence over ostensibly accountable institutions.[56] The vastly expanded jurisdiction of the national government has removed an array of issues from local control, and this may have created a confused but understandable sense that all public issues are now worked out in some remote place accessible only through money or television. Furthermore, the feeling of powerlessness may grow with increases in political appetite; the more needs we expect government at any level to fulfill, the more we may fear—and notice—our inability to affect government.[57]

These explanations are all partial and debatable, but they raise an important possibility. That possibility is that the national judiciary may be one of the significant causes of the kind of anxiety that prompted Amendment 2. From the penetration of local communities by, for example, an unregulated Internet[58] to the enhanced influence of the knowledge class, from the expanded jurisdiction of the national government to dramatic increments in the public appetite for utopian political solutions whetted by the "rights explosion"—these are all matters for which the courts and the legal elite have some specific responsibility. Indeed, that many people feel cut off from government could not be given fuller, more direct instantiation than the *Romer* decision itself: Here is a decision that sets aside a democratic initiative with hardly a thought about the nature of the fears that drove it or about the role of lawyers and judges in creating those fears.

Perhaps it is a sign of prejudice for anxious people, buffeted by rapid change and stripped of a sense of control, to play defense against reformist aspirations. Perhaps it is wrong and unenlightened to try to protect a way of life. However, I do not think that those, including Supreme Court justices, who frequently—and with full-throated predictions of calamity—use interpretations of the national Constitution to block social experimentation are in much of a position to say so. And in any event it is difficult to see on what basis anyone could say so. Change is inevitable but progress is not; there is nothing necessarily unenlightened about trying to protect what has been of value in the past.

However that may be, what the justices in *Romer* did not want to think about is worth thinking about. It seems quite possible that in the years ahead

the pace of social transformation will only accelerate and that many Americans, caught up in large and uncontrollable forces, will feel increasingly frightened, isolated, and unable to control their lives. Moreover, because the national legal establishment will continue to be blind to its own role in producing this destabilization and alienation, it is likely to see the resulting disputes as inexplicable and dangerously irrational. This will be thought to justify, even to require, further resort to central authority.

9

The Nationalization of Intimacy

I

The nationalization of authority over issues like abortion and homosexuality has much wider implications than my discussion so far has considered. After all, the right to privacy occupies a central place in modern American culture. This general commitment to privacy was what kept Robert Bork, despite his qualifications, off the Supreme Court, and more recently it was what kept William Clinton, despite his behavior, in the White House. Bork's nomination was a threat to the constitutional right to use contraceptives and to choose abortion, while the impeachment charges against Clinton were a threat to the moral distinction between public political life and private sexual behavior. The power that the idea of privacy holds in contemporary society is, as everyone knows, evident in many other events and trends as well. It fuels dramatic changes in the rights of parents and the structure of family life. It underlies challenges to ingrained assumptions about appropriate conduct within the military. And, of course, it sustains the right-to-die movement.

Just as obvious but more odd is that fact that our society's high valuation of privacy coexists with an almost equally widespread passion for celebrity

status and other forms of public exposure. Indeed, these two apparently opposite commitments often are expressed simultaneously. Clinton, for instance, has always used his prodigious energy and skill to personalize the presidency. Thus, it was Clinton, the same man who successfully claimed that his sexual encounters in the Oval Office were part of his private life, who years earlier in a televised "town meeting" blithely answered one young woman's teasing question about the kind of underwear he wore. The public that revels in the personal quality of its relationship with President Clinton also insists that his private life is off limits. Conversely, some of those who condemned Bork as a threat to the right to privacy rummaged through his video records to find indications about his personal life.

This simultaneous demand for privacy and publicness is not some peculiarity specific to the American people's admiration for Clinton or hostility to Bork. Consider the fact that those who favor the right of access to abortion in professionalized medical settings often believe that states should be precluded from requiring minor females to discuss the abortion decision with parents in the seclusion of the home. Or think about how gay rights advocates occasionally combine a belief in private sexual liberty with support for the involuntary "outing" of closet homosexuals and, indeed, often demand that schoolchildren be exposed to highly public programs about homosexuality.

The very ambivalence of the public's attitude toward privacy contains a certain explanatory potential. Thus, it is often thought that the current popularity of the right to privacy is a reaction against the constant demand for exposure that characterizes modern life. At least since the famous article by Warren and Brandeis in the 1890 *Harvard Law Review*, observers have urged that important moral considerations underlie the individual's need to control the extent to which "thoughts, sentiments, and emotions shall be communicated to others."[1] "Privacy" in this sense is commonly believed to be at special risk under modern conditions chiefly because technological advances provide unprecedented opportunities for gathering and disseminating information. The administrative state compounds these risks because of its prodigious capacity to collect and store information about the lives that it regulates and services so pervasively.

Paradoxically, however, this kind of privacy, as greatly as it seems threatened today, has not found much favor with the public or the courts. Indeed, it is public exposure, the *opposite* of privacy in this conventional sense, that is hungrily sought throughout the culture and that is energetically protected by the courts as an aspect of freedom of speech.[2] What the constitutional right to privacy actually protects and what the public apparently wants is not privacy in the conventional sense of insulation or concealment but a set of

personal liberties that are thought to be especially important.[3] These include, of course, the right to sexual freedom (because, some say, sexuality is crucial to individual identity), the right to reproductive freedom (because that freedom, say others, is crucial for preventing the government from asserting totalitarian control over people's lives), the right to refuse medical treatment (because of the importance of bodily autonomy), and so on.

Once the right to privacy is understood to refer to certain favored liberties, the paradox of the populace's simultaneous commitments to privacy and publicness dissolves into a single strong commitment to personal liberty. Americans expect to know about President Clinton's underwear because we have a robust tradition of free speech, and Americans think Clinton's sex life should be private because we also have a robust tradition of sexual freedom. The issue, conceived in this way, is the familiar one of reconciling two competing strands of a single, overriding commitment to liberty. And in the instance of Clinton's impeachment, that reconciliation is easy: Clinton is not to be sanctioned for his sexual conduct, and citizens are free to read everything they can about that conduct. Admittedly, the reconciliation is not always so easy. Two liberties, obviously, can be in direct competition, as when the right to picket competes with the right to abortion. But even in these more difficult circumstances it is thought that what is exposed is multiple aspects of a commitment to individual liberty, not two deeply contradictory impulses that may be feeding on one another.

Under this view of privacy-as-liberty, the development rather late in that century of a constitutional right to privacy tends to be explained on the basis of the new and dangerous opportunities for oppression that were opened up by the regulatory state. For example, Bruce Ackerman explains the right to use contraceptives by posing this question: "Given New Deal activism, what remained of the Founding values of individual self-determination formerly expressed in the language of property and contract?"[4] His answer is that in *Griswold v. Connecticut*, Justice Douglas "mark[ed] out marriage as an appropriate context for re-presenting the continuing constitutional value of liberty inherited from the Founding."[5] In a similar but even more dramatic vein, Jed Rubenfeld traces the rise of the right to privacy to the fact that "now governmental power has so expanded that it affirmatively shapes our lives with the potential for total control."[6] Interestingly, jurists and free-speech theorists have made similar claims about why the right to publish should be given wide protections under the First Amendment. Thus, the images of systematic repression that drove the civil libertarian proposals of thinkers like Thomas Emerson were based on the excesses of mobilized wartime governments here or totalitarian governments abroad.[7]

The notion that the personal liberties called "privacy" and "speech" need special protection because of the broad regulatory powers of modern government is apparently self-evident, possibly because of background influences like George Orwell's *Nineteen Eighty-Four*. We are now, however, far enough past that ominous date to at least consider the possibility—which one would have expected to be congenial all along to supporters of the New Deal and the subsequent expansion of governmental power—that personal liberties may have been enhanced by government activism. Some glaring facts, at least, must be taken into account.[8] For example: During significant periods in our history, laws against adultery and homosexuality were widespread and at times severely enforced; today, they are rare or largely unenforced. For most of our history, relationships within marriage were rigidly defined; today, not only is marriage more easily begun and ended, but a wider range of roles is viewed as compatible with being a spouse or parent. Much the same can be said of the right to publish. Obscenity prosecutions, commonplace only a few decades ago, are now rare. Profanity, fighting words, group vilification, and other forms of speech that were once suppressed are now as routine as bumper stickers. In short, on a historically comparative basis, we are a country awash in the liberties called "privacy" and "speech." The judiciary's efforts to protect individuals from the administrative state have no doubt played some part in causing this flowering (or decay, as you like). But those efforts are also a reflection of the mores of the times. And the high valuation of personal freedoms that is so central a part of those mores might be, at least in part, a political and cultural consequence of the material wealth and economic security generated during the era of the administrative state.

It is understandable, perhaps, that the public, including jurists and legal scholars, might believe that privacy and speech are precarious under modern conditions even if the expansion of these rights is in fact being spawned by those same conditions. The abundance and popularity of these liberties mean that people are aware of them, and awareness itself is a precondition to fearing loss. Moreover, not only is it true that the modern state is powerful but it is also true that within memory some of these currently favored liberties were relatively scarce. Still, the easy and largely unexamined belief that the administrative state presents a severe threat to privacy and speech tends to deflect attention from the fact that to a considerable degree those liberties have been successfully established and have become widely popular during the era of affirmative government.

In sum, while a misnamed but naturally flourishing version of privacy-as-liberty is honored everywhere as an essential right, "privacy" in its conventional sense is subordinated to an overwhelming demand for unrestrained

publication. As the simultaneous insistence on privacy and publicness that is so dramatically embodied in President Clinton illustrates, modern American society energetically protects what may be secure and wantonly tosses away what is probably at risk. From this perspective, it seems possible that the legal prominence of "personal rights" is a consequence of the conditions of modern life as much as it is a protection against those conditions.

As we shall see, one aspect of modern life that gives rise to the simultaneous demand for personal liberty and public intimacy is centralization, both political and cultural. Moreover, I think that the expansion of the personal liberty called "privacy" generates a need for more public intimacy and that (in turn) the growth of public intimacy generates a need for more personal liberty. This interaction between personal liberty and public intimacy produces ever greater centralization.

II

I have stated my thesis abstractly, as if the broad cultural and political implosion claimed here were an obscure and rarified matter. In fact, however, it is a matter of everyday life. Elements of it can be seen, for instance, as you walk down hallways in the buildings of the University of Colorado, where I work. Sooner or later you will pass an office with a small sign visible through a glass partition. The sign announces that the office is a "Hate-Free Zone." One might expect that this somewhat self-satisfied declaration would create a stir. On the one hand, it is a proud statement about a very serious matter; on the other, it implies that the rest of the building, no matter how quiet and apparently benign at the moment, is hate-filled. Most people, however, seem to ignore the sign; at least, I have never observed anyone showing a reaction one way or another. This kind of sign, along with others announcing smoke-free zones, drug-free zones, and gun-free zones, are such common occurrences around the country that they seem a natural and unremarkable part of the cultural landscape. They are worth a moment's reflection.

Now, obviously, the "hate-free" office at the University of Colorado is not itself a manifestation of centralization; on the contrary, part of what makes it so odd, almost forlorn, is its extreme localization. This little, glassed-in space—surrounded by so many other offices, and then by other buildings, and then by an unruly town, and then by a vast state and a looming nation—is hate-free. If the jurisdiction is tiny, however, the claim is large. Implicit in the word "free," repeated elsewhere for so many different causes, is a claim of perfection. Hate is not discouraged, not penalized, not minimized, not even regretted. Hate, if only in this little domain, is absent. And herein lies

another source of the oddness of these everyday signs, for in fact there are drugs and guns in many schools, including those announcing otherwise, and even the good people who work in those hate-free offices cannot all be completely innocent of hatred. As specific as their pronouncements of perfection may be, the signs are not descriptive but utopian.

The perfectionist impulse, narrowed and localized as it is in a small "hate-free" office, is nevertheless traceable in part to national decision making. In fact, it is traceable in part to the Supreme Court's invalidation in *Romer v. Evans* of Colorado's "Amendment 2." Because of this decision and a complex array of other factors, including the successful nationalization of antidiscrimination policies on race, gender, and disability, discrimination against homosexuals has become a prominent item on the agendas of both Congress and the president. A national law, signed by President Clinton, now protects the authority of states to restrict marriage to heterosexual relationships, and a range of laws prohibiting various forms of discrimination against homosexuals have been proposed but so far have not been enacted.[9] Thus, with the three branches of the national government partially fueling and partially frustrating the political program of the gay rights movement, it was only natural that reformist energy should be redirected at different and smaller jurisdictions. That this energy should eventually be localized in a forlornly small hate-free office is itself partly a reflection of the fact that intermediate state institutions have been rendered morally suspect by the nation's highest court.

As the size of the jurisdiction diminished, however, the scale of reformist aspiration could grow. Large, diverse populations, after all, inevitably contain prejudices and hatreds. It would simply never occur to anyone to label the United States as a whole "hate-free" with respect to homosexuals or virtually any other group. Even at the less utopian level of antidiscrimination policy, the national government has resisted the moral claims of gay rights advocates. But gay rights advocates could realistically pursue a more morally ambitious program (including, for instance, the provision of a social center, sensitivity training, etc.) within the much smaller and more homogeneous community of the university. And at the level of a single office, even the banishment of hatred can be imagined and proclaimed. Thus, to the extent that the reformist impulse behind the "hate-free zone" sign is perfectionist, extreme localism is a natural consequence.

If, as I have suggested, the hate-free office at the University of Colorado can be seen as a strikingly small jurisdiction aspiring to limited perfection, it has much in common with the constitutional right to personal liberty that has come to be called the "right to privacy." These rights, too, represent the

radical localization (in a couple, a family, a school, an individual, or a doctor's office) of a limited set of important matters (sexuality, marriage, child-raising, education, contraception, abortion).[10] Moreover, this localization is at least in part a function of perfectionism, which is evident, for example, in the argument that the right to engage in sexual intimacies is "central to . . . the development of human personality"[11] and in the even more exalted argument that the right to abortion enables individuals to define their "own concept of existence, of meaning, of the universe, and of the mystery of human life."[12] The theme in the privacy cases is not that all radically localized decisions will be perfect but that only in extreme localization is there any possibility of personal completion or fulfillment. The right allows for control of a relatively narrow range of behaviors, but the aspiration is utopian.

There is, of course, nothing distinctively modern about the aspiration for personal fulfillment. But, as Tocqueville foresaw, the availability of material wealth increases the range and scale of human desires.[13] By the second half of this century, masses of Americans could afford to travel, to become educated, to enjoy leisure, and to live in comfort. It is surely no coincidence that it was during this period of unprecedented material well-being that the Supreme Court began announcing and developing the constitutional right to privacy. In earlier, less heady days it had been only natural for state and local governments to be considered appropriate settings for decisions about sexual behavior, education, abortion, and so on. The assumption had been that individuals' choices and goals should be limited and structured through law and by the political deliberations that went into shaping law. Some, like those forced to bear unwanted children because of prohibitions against abortion, would find their lives changed profoundly, but frustration and imperfection were expected. Collectively imposed moral constraints were simply one more limitation in a world full of limitations. As aspirations for self-fulfillment grew, however, imperfections created by decision making within these larger jurisdictions began to seem intolerable. The utopian localization inherent in the constitutional right to privacy reflects this broader change in attitude.

The policy of radical localization, established through the Supreme Court's constitutional interpretations, requires individuals to make certain crucial decisions about their identity and moral purpose in relative isolation from the people who make up nearby political communities. Because the most obvious effect of this policy is the allocation of decision-making authority to the individual, it is possible to miss the extraordinary centralization on which this privacy jurisprudence depends. The paradoxical (if obvious) fact is that these decisions to disqualify larger jurisdictions were made by an institution of the national government, itself the largest available jurisdiction.

In order for federal judges to determine the appropriate role of state and local governments in decisions that are central to self-definition and self-fulfillment, it is necessary for them to decide matters of (to say the least) considerable intimacy. Accordingly, the cases routinely contain discussions about the nature of marriage, the basis of the parent/child bond, the experience of dying, the psychological significance of homosexual acts, the impact of abortion on women and their families, and so on. While in some instances the privacy decisions result in radical localization of decision making, in all instances they represent the nationalization of discussion about highly personal matters.

The judiciary's nationalization of intimacy is intellectually possible, I think, only as a part of the much broader shift in the public's understanding of the role of the federal government that was described in chapter 2. This shift is a consequence of a complex but familiar set of legal and cultural factors, including the rise and maturation of the regulatory state, the existence of national electronic media, high mobility rates, secularization, and a reduction in participation in private associations. Because of these and other massive social changes, it has gradually come to seem normal for Congress and the executive branch to take responsibility for matters such as the safety and education of children, the structure of family life, the morality of homosexual conduct, the quality of medical care, and sexual relations at the job site—in short, the "variety of minute interests" that the framers of the Constitution thought would remain matters of state regulation. These specific shifts in policy-making responsibility have been part of an even more fundamental change in popular assumptions and expectations. It is now widely taken for granted that the central government is responsible not only for material welfare but also for psychic gratification.[14] The Court's policy of radical localization presupposes this centralization of attention and responsibility because it assumes that the federal judiciary has competence and responsibility to evaluate what personal decisions are necessary for individual self-definition and personal fulfillment and also what degree and kind of government control are consistent with those lofty objectives.

It is a sign of how accomplished this centralization is that, while the intermediate jurisdictions represented by state and local governments are perceived as a threat to the utopian aspirations animating the right to privacy, the national government's assertion of jurisdiction over these matters seems a normal fact of life. Indeed, the inevitable effect of the Court's policy of extreme localization is to redirect attention and political action on intimate matters to all three institutions of the central government. Constitutionalizing the right to privacy has meant that matters of personal self-fulfillment are

now debated and decided when the Senate gives "advice and consent" on the president's nominees to the courts, when Congress takes up proposals to expand or roll back the Court's decisions, and when amendments to the Constitution are proposed.

To summarize, the Court's privacy jurisprudence would be unthinkable except as a part of a more general centralization of power over intimate matters. The effect of the Court's decisions is to both localize and nationalize decisions thought to be deeply personal and pivotal. To a significant degree, then, public consideration of a range of sensitive issues takes place either at the national stage, where even rough reformist aspirations seem threatened, or at some radically localized setting, where the perfectionist impulse runs free within small arenas.

It is, of course, not possible to be certain about the consequences of this bifurcation of control over intimate issues. But perhaps something can be learned from the strikingly parallel bifurcation created by Americans' simultaneous devotion to privacy and celebrity. As I suggested at the outset of this chapter, these dual commitments have meant that the most intimate aspects of our leaders' lives are exposed at the remote level of national media attention even while it is believed that everyone, including those leaders, has a right to make decisions about intimate matters within the isolation of their families. What have been the consequences of this bifurcation of control over personal matters? And what do those consequences imply about the Court's policy of simultaneously nationalizing and localizing our decision making on issues like abortion, sexual behavior, and family life?

III

The phenomenon of celebrity, like the constitutional right to privacy, represents a form of centralization. Celebrity is a nationalized discourse on highly personal, even intimate matters.[15] The purpose of this discourse is to create an impression of familiarity with individuals who are actually remote figures on the national stage. Ordinary people identify with these celebrities and through them try to achieve some sense of visibility and significance.

Despite the intense identification that can exist between the members of the general public and celebrities, there cannot be, of course, any intimate relationship between them. In fact, the only sources of information about celebrities are printed articles, televised appearances, and the like. The celebrity must create a false appearance of intimacy. The personalized relationship between famous figures and the public, then, is fundamentally a fiction. The fiction is maintained by the scripting and staging of what Daniel Boorstin

calls "pseudo-events": by the use of false and manipulative language that purports to reveal private facts about the celebrity, by displays of public emotionality, and by symbolic acts (such as reaching out to touch members of an audience) that suggest closeness and availability.[16] These tactics keep public attention on the celebrity and establish a superficial sense of common understanding about the celebrity's subjective state. The public can enjoy a sense of connection and significance even while recognizing that the information allowing this experience not only is abstract and false but also is controlled by unseen advisors and publicists. That is, in order to achieve a sense of intimacy at great distance, the public must treat as emotionally significant information that they know to be untestable and essentially contrived.[17] In short, to get the psychic benefits that celebrities can provide, people must suspend their capacity for critical thought and even some of their autonomy. Boorstin puts it this way: "The American citizen thus lives in a world where fantasy is more real than reality, where the image has more dignity than its original. We hardly dare face our bewilderment, because our ambiguous experience is so pleasantly iridescent, and the solace of belief in contrived reality is so thoroughly real."[18] When this submission to a staged narrative is limited and self-aware, it has the quality of playfulness; when, however, participants fully lose themselves, their submission seems pathetic, degraded, or even insane.[19]

No matter how false and unsatisfactory the discourse of celebrity may be, it does produce a kind of national culture, for even scripted fictions can provide common identifications, aspirations, and understandings.[20] But celebrity, like the national right to privacy, also leads to radical localization or (as it is called in the cultural context) atomization. Celebrities, after all, remain distant. Although people are allowed to view and discuss staged versions of celebrities' private lives, the real celebrity remains largely unknown to the public, and individual members of the public are completely unknown to the celebrity. Even the relationships among members of the public that are built on the culture of celebrity are thin, for the saner, more playful participants in that culture understand the fictional quality of their discourse. Hence, the individual remains essentially alone while contemplating the lives of celebrities. The culture of celebrity divides consideration of intimate matters between an unsatisfactory national stage and people's private imaginings.

Indeed, the centralized culture of celebrity tends to deplete other, nearby communicative resources, increasing the isolation of private life. As Richard Sennett points out, because celebrities inevitably remain distant and essentially unknowable, the public demands ever more refined signals about what the famous are "really like."[21] The dismaying result, he claims, is that each

display of intimate information leads to further displays, a potentially endless process from which people eventually withdraw into the characteristic passivity of the modern audience. Moreover, Richard Schickel has described how the constant glamorization and excitement surrounding celebrities distracts attention from more immediate, real-world events and relationships by making them seem dull and uninteresting.[22] Because what is remote and essentially unverifiable seems central, what can be understood through direct experience or contacts comes to seem less important. The more life is lived through private imaginings about the unconstrained and romanticized opportunities available for celebrities, the less tolerable are the inevitable imperfections of ordinary social existence. Thus, the culture of celebrity diminishes the public life that is available in nearby associations. To revert to my earlier terminology, nationalization produces radical localization.

Because identification with famous figures can compensate for a depleted sense of social connection, moral direction, and even political efficacy, this isolation produces powerful needs that increase fascination with celebrities and thus promote further centralization.[23] Indeed, the paradoxical effect of radical localization is to nurture utopian aspirations. The more existence is private and self-centered, the more perfection seems attainable. And if life should be perfect for each individual, it should be perfect for all. This, of course, is the very egalitarian utopianism that finds a practical outlet in the culture of celebrity.[24] Radical localization produces nationalization.

If celebrities were politically dangerous, this kind of bifurcated culture—at once increasingly atomized and increasingly fixated on national symbols—would bring to mind the ruthless mobilizations that periodically have led to authoritarian suppression in the modern era.[25] Despite an occasional celebrity's foray into politics, the main influence of celebrities has to do with the individual's search for validation, excitement, and pleasure in private life, not politics and public policy.[26] Celebrities may draw their power from a weak or even unhealthy culture, but they are not potential tyrants. Except for some special cases (notably the Hitlerian spectacles used to whip up the crowds watching professional wrestling), nothing seems further from authoritarianism than the generally frivolous culture of celebrity. However, to the extent that the bifurcated discourse on the right to privacy entails an implosive dynamic, the possible implications are more troubling because that discourse does involve public policy and political power.

Is there reason to think that the nationalized discourse on intimate matters created by the right to privacy might, like the culture of celebrity, be operating to set up an implosive cycle? At first glance, such a comparison between celebrity and privacy seems far-fetched. For one thing, discourse on

privacy does not center on personalities in the way that discourse about celebrity does and consequently would not seem to involve the same kinds of emotional investments. Even without identification with specific personalities, however, the national stage can be a potent forum for personal affirmation if devoted to highly personal issues. For instance, the Supreme Court's depiction of the motive behind Colorado's Amendment 2 as "animus" against homosexuals has had profound psychic and symbolic importance for many members of the gay rights movement, who see in that word a vindication of their sexual behavior. Consider the emotion conveyed even in this academic commentary on the decision:

> What was shocking about *Bowers* [a decision upholding laws against sodomy] was the tone of it: the opinion drips with contempt for lesbians and gay men. The disdain and scorn was as raw and uninhibited as it is on the most dangerous American street after dark. . . . But . . . *Bowers* . . . is dead. It is dead because of the tone of *Romer. Romer* treats lesbians and gay men with respect. . . . To explain what I mean, I want to tell you about the first time I read the *Romer* opinion. It was May 26, 1996, a date I suspect I will always remember. I was sitting on my shabby little couch in my seedy little office. . . . [T]he Court was speaking not to lawyers, but to the country as a whole. . . . I choked up. . . . The message could not have been clearer. . . . [S]exual orientation discrimination . . . is just plain wrong, and good people in a civilized society do not countenance it.[27]

A correlative sense of invisibility and rejection has been keenly felt by many, who see in that same opinion a repudiation of their own sense of normalcy and morality.[28] Similarly, part of the significance of the Court's emphatic refusal to overrule *Roe v. Wade* was to provide psychological support for the millions of women who in recent decades have forsaken traditional domestic roles in favor of a place in the working world.[29] And, as for the psychic impact of *Roe* itself on traditionalists, listen to the words of one woman, a homemaker, who believed that her own birth had resulted from an unwanted pregnancy, remembering the day she read about the decision in her newspaper: "And it was [my son] Jamie's birthday. And I sat down, I was very upset. . . . I wanted to cry in a way. . . . All these things in my personal life . . . all came together in one."[30]

Because the process of formulating and imposing policies on highly intimate matters inevitably requires that the institutions of the central government make some people feel noticed and validated and others ignored and

rejected, national decision makers—like celebrities—can come to be seen as larger than life. Robert Bork was invested by some with devilish traits and intentions and by others with a superhuman intellect. Harry Blackmun was alternately shot at in his home and hugged in public. One sophisticated journalist said that to thank President Clinton for keeping abortion legal, she would be willing to provide him with sexual gratification.[31] Such intensely personal reactions, growing out of official stands on privacy issues, surely confirm that those issues are significant not only as substantive matters of public policy but also as symbolic matters of psychic affirmation. Indeed, these reactions indicate that policies on the right to privacy have such psychic meaning that the discourse on privacy and the discourse on celebrity are sometimes indistinguishable.

Nevertheless, the declaration and enforcement of privacy rights at the national level do not at first seem to involve a submission to manipulation and unreality in the way that the culture of celebrity does. Indeed, the debate over the constitutional right to privacy is often couched in philosophical terms. What could be more different, one might wonder, than, on the one hand, an essentially trivial and false public fascination with celebrities and, on the other, a profound constitutional discourse on issues like abortion, homosexuality, and the right to die?

On closer inspection, however, the high political discourse on privacy does seem to involve fictionalized narratives contrived by unseen professionals. For instance, while the American public knows, of course, that there are federal rules governing sexual behavior at the workplace, the source of these rules is largely mysterious. They were authorized through an arcane process of statutory interpretation by the federal judiciary; their specific content has been generated largely in various federal administrative agencies that are run by faceless experts who are themselves influenced by lawyers and experts. The government's rules, that is, involve immediate and highly intimate matters, but the authorities who produce these rules, as well as the intellectual processes used by these authorities, are distant and unseen. Most people, of course, accept the rules and try to live by them without much thought about their specific sources. But this submission involves a degree of fictionalization because the rules treat intimate matters in ways that do not accord with ordinary experience. Some of their main premises—for example, that the workplace is an inappropriate place for sexual flirtation or that sexual advances against women with subordinate status are inherently exploitative—are wildly improbable to most Americans, as was emphatically demonstrated by the success of President Clinton's argument that any sexual improprieties between him and a female intern in his offices were a private matter. Millions

of Americans in workplaces across the country nevertheless submit to regulations that must seem to them strange, a mysteriously scripted national account of human sexuality that has intense psychic significance but that is in important respects unreal.

Even when privacy rights have a visible author, they have a disconnected, dreamlike quality. Americans, of course, know that the justices of the Supreme Court, especially including the late Harry Blackmun, are the source of the constitutional right to abortion. Moreover, the public can read accounts of how these jurists explain the existence of the right. But those accounts are famously and profoundly confusing, accessible—if at all—only to professionals who make claims to specialized understandings about constitutional interpretation, *stare decisis*, and so on. Even where the judicial opinions appeal to kinds of knowledge that should be generally available, as when they describe fundamental American political traditions, the source of the right to abortion remains remote and obscure. At the extreme, the Court's depictions of those traditions read less like verifiable history than like calculated mythmaking.

To see how far this mythmaking has gone, it is helpful to return one more time to the language of the *Casey* decision. If for a moment we can drop the conventional frame that imparts a habitual sense of respectability to judicial opinions, we can see how *Planned Parenthood v. Casey* combines grandiosity and inaccuracy in a way that is not far different from the somber phoniness found in that apex of the culture of political celebrity, the presidential campaign film. Although these films, which for decades now have been central features of national political conventions, are self-serving melodramas, they are presented as documentaries.[32] Accordingly, a simultaneously cynical and credulous public pays attention to them as important, if false, political communications.

One standard part of the melodrama is the depiction of the candidate (whose policy positions have, of course, been compromised and varied through the years) as having been consistently devoted to inspiring ideals. Similarly, in *Casey* the Court describes its privacy decisions by first quoting from a few cases involving such matters as the right to use contraceptives and to educate children; it then depicts what is actually a rather checkered and even incoherent judicial record on privacy as involving "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[33] The justices build quickly to a crescendo, concluding that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[34] As if this were not enough exaggeration and self-importance

for one opinion, the Court then declares that the interest it is protecting is nothing less than "[t]he destiny of woman[, which] must be shaped to a large extent on her own conception of her spiritual imperatives. . . ."[35]

Another common feature of the campaign film is the portrayal of the candidate's life story as heroic; the candidate is shown as rising from humble circumstances, overcoming enormous adversity, and standing as a bulwark against social and political disintegration. Remember that a similar, if not more extreme, institutional biography of the Supreme Court's role in the abortion controversy is offered in *Casey*. This role, say the justices, was to call "the contending sides . . . to end their national division. . . ."[36] This brave effort was then threatened by "political pressure," even "political fire." In response, the Court was remaining "steadfast" to those who had accepted the "rule of law."[37] The Court had made a "promise of constancy"; and a "willing breach of it would be nothing less than a breach of faith."[38] Like any hero, of course, the Court is not concerned that such a breach of faith would affect its own self-interest. No, just as a candidate is never depicted as motivated by the desire for office, the Court does not depict itself as concerned with anything so mundane as the power of the judiciary to enforce its will. The Court is concerned "not for the sake of the Court" but for the American people's belief in themselves as "a Nation of people who aspire to live according to the rule of law."[39]

In portraying itself as the heroic protector of political tranquility and the rule of law, the Court in *Casey* engages in one of the central and most disquieting aspects of political propaganda. Just as candidate Clinton's first campaign film portrayed him as a faithful family man and as a politician too principled for ordinary deal-cutting,[40] on its central vulnerabilities the Court inverts the truth. When fictionalization is taken this far, the public can indulge the convention that the opinion (or the film) is to be taken seriously only by suppressing the evidence of its own senses or by proceeding on the assumption (certainly common to the culture of celebrity) that belief and reality are for practical purposes interchangeable.

The *Casey* opinion is remarkable for the degree to which it makes this latter assumption explicit. Thus, in discussing the constitutional validity of its abortion opinions, the Court repeatedly veers off into a discussion of the public's belief that those opinions are valid. Thus, it claims that "the thoughtful part of the Nation" could accept a reversal of *Roe* if the reversal were based on "changed circumstances. . . ."[41] If the reversal, however, were based on changed legal judgments rather than changed perception of facts, "the Court *could not pretend* to be reexamining the prior law with any justification beyond a present doctrinal disposition. . . ."[42] Similarly, the justices later de-

clare that to reverse *Roe* something more would be required than a justification "furnished by apposite legal principle. . . ." In fact, the Court "must take care to speak . . . in ways that allow people to accept its decisions on the terms the Court *claims* for them, as grounded truly in principle, not as compromises with social and political pressures. . . ."[43] In these and other passages the Court comes very close to adopting the argument that in order to maintain the public's belief that the Court consistently applies valid legal principles, it must speak as if major cases, even those that are legally invalid, are reversed only because of changed factual circumstances. Or, to use blunter words, the justices come close to arguing that the Court must continue on a lawless path in order to maintain the myth that its decisions are lawful. In short, the extravagant argumentation of the *Casey* opinion, like the soaring symbolism and rhetoric of the campaign film, threatens the distinction between deep political aspiration and the big lie.

More generally, now that the abortion debate has been nationalized, the dominant rhetoric in the wider world of political decision making also is increasingly a fictionalization. Most people in their daily lives do not see abortion to be mere medical procedures or an exalted attribute of citizenship, but they do not see it as the exact equivalent of murder either. Yet these are the defining polar positions of the national debate.[44] One side defends even partial-birth abortions while the other imagines a constitutional right to life from the moment of conception. Americans live, numbed but morbidly fascinated, under a scripted national account of abortion that does not accord with ordinary experience and moral intuition.

There are many reasons why national policies on issues like sexual behavior and abortion do not track common understandings. For one thing, a discourse carried on at that distance is inevitably funneled through national opinion leaders whose lives have been dominated by intense interest in a narrow set of issues. Moreover, these leaders are influenced by the relatively extreme demands of the energized components of their membership, and this energetic component is likely to be seeking in national policy not only substantive results but also a personalized symbolism. Like public relations advisors to celebrities, these leaders (and the experts on whom they rely) contrive events and manipulate language to produce a script that calls attention to their issues in an exaggerated way. Even as the terms of this debate become more intimate and extreme, they mean less and so must be inflated yet again. In 1991 the nation was shocked by the allegations, made and explored in nationally televised confirmation hearings, that Clarence Thomas had used explicit sexual language in conversations with Anita Hill, an employee of his agency. By 1999 the same shock value could not be produced

by Independent Counsel Kenneth Starr's lengthy and detailed account of specific sexual acts committed by President Clinton with the intern Monica Lewinsky, an account made available to all in interminable televised reports, in book form, and on the Internet. Or, to use a different kind of illustration, in 1992 Congress debated whether to reinstate the so-called trimester scheme imposed on the nation by *Roe v. Wade* and then abandoned by the Court in *Casey*.[45] This debate required public consideration of the consequences and wisdom of restricting abortions to approximately the first five months of pregnancy. By 1996 Congress was debating the Partial-Birth Abortion Ban Act, a debate that required both an explicit description and a moral defense of a procedure whereby the fetus's head is crushed while the fetus is emerging from the birth canal.[46] People cannot help, of course, but pay attention to information about Clinton's sexual behavior or the gruesome details of late-term abortions. But intimate policy issues, like the intimate details of celebrities' lives, remain essentially distant and abstract, so that more detail is constantly needed. Even as they watch, people withdraw in embarrassment and dismay.

They tend, however, not to withdraw into nearby political and associational settings where privacy issues might be debated with more moderation and more sense of reality. The glamour and excess of nationalized policy making delegitimizes intermediate decision makers either directly (by limiting their jurisdiction) or indirectly (by making the terminology of immediate experience seem common, dull, or even prejudiced). While watching the national debate, therefore, people turn away from nearby social interactions toward the seclusion of their own private lives.

These private lives, of course, cannot be lived as if there were no national debate on intimate matters. They are inevitably influenced by the unconstrained ideological standards set by the national debate on privacy. The greater this influence, the less tolerable are the remaining compromises imposed by society. The process of utopian withdrawal builds on itself. Just as fascination with celebrity increases in response to the atomization that celebrity causes, the withdrawal caused by the nationalization of privacy policy unleashes a perfectionism that builds back toward the grand stage of national policy making.

In promoting and, indeed, romanticizing the term "privacy," the institutions of the national government promote the illusion that individuals are sovereign jurisdictions,[47] entitled to and able to exercise the most significant personal liberties without concern for others. Under this illusion, each person lives in a separate glassed-in space, freed from frustration and compromise in a jurisdiction so small that it is possible to imagine a costless perfection.

And this utopianism eventually finds its outlet again in the coercive rules mandated by the central government.

Americans, therefore, increasingly understand intimate matters from the vantage points of two opposite dream-states: one where standards are impersonally scripted and collective; the other where autonomous individuals are free to pursue their happiness without consequences for others. Both of these states are false and inevitably dissatisfying, and the danger is that the oscillation between them is implosive, that atomized individuals will increasingly try to realize their utopian aspirations by subjecting their most personal needs and understandings to the ungrounded scripts of national regulation.

IV

Notwithstanding the bleak depiction just offered, I recognize that the bifurcation of discourse about private matters can be—and in influential circles generally is—viewed as a healthy development. In fact, there is virtual unanimity in our culture that individuals (along with those closest to them) are the right venue for immediate control over personal decisions. Moreover, even if the extent to which centralized regulation shapes and constrains those personal decisions is not fully appreciated, a national forum on privacy issues is widely accepted as appropriate. Indeed, the consensus at least in most intellectual circles is that discourse at that level is likely to be more enlightened and less parochial than the discourse available at the state and local levels. Even the exaggeration, the posturing, and the abstraction of nationalized debate can be seen as advantages because they allow for the kind of vividness and inspiration necessary for high moralism and intense politics. And I do not deny that centralized discourse can have these advantages. Just such advantages, for example, characterized the civil rights movement of the 1960s, a movement that undoubtedly produced great social advances on issues, like marriage and education, that have profoundly personal aspects. When nationalized moral direction of this kind is combined with a strong legal commitment to cordon off areas for autonomous personal decision making, the combination is powerfully attractive—which is why American political culture so highly values both the nationalization of intimacy and what it calls the right to privacy.

Like any complex social phenomenon, our nationalized discourse on intimate matters can have great advantages at the same time that it poses dangers. Indeed, the advantages may create the dangers. Confident, realistic, self-reliant individuals—the kind who can make good decisions for themselves and also keep the excesses of centralized political discourse in per-

spective—tend to emerge from the intermediate terrain that bifurcation gradually consumes. Perhaps more than its many advocates appreciate, then, the successes of the currently dominant model might depend on the degree to which it has so far triumphed only incompletely.

The celebritization of political discourse that I have tried to describe is, therefore, troubling. Already there are obvious signs of political passivity, of selfishness, and of moralistic collectivism. To some degree the citizenry is now an audience, submitting its sense of reality to a nationalized political culture while withdrawing into private dreams of perfect satisfaction. Worse, as I have tried to explain, there are reasons to think that this is a process that builds on itself. But, needless to say, American society remains amazingly varied, layered, and healthy. The danger, then, is real but for the moment limited by the rich experiential resources still available to people in their immediate social interactions. Efforts to create national solutions to the problems of personal life—efforts that are powerfully attractive and can be expected to continue as a central feature of our political life—are depleting those resources.

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10

Nationalized Political Discourse

I

The somewhat misnamed constitutional right to privacy is, I have said, a part of a general pattern of nationalized discourse about intimacy. This broader phenomenon, like the analogous phenomenon of celebrity, results in cumulative cultural deterioration because policy centralization on privacy issues increases personal isolation and personal isolation, in turn, promotes policy centralization. Some degree of devolution of regulatory control over highly personal matters might, one would think, help slow this process. As healthy as such devolution might be, however, it is necessary to acknowledge that the nationalization of intimacy is itself a function of inescapable conditions of modern life. Not only on privacy issues but on issues across the board, those conditions have produced a level of political discourse that is frequently disappointing and demeaning.

It is not possible here to provide a full or systematic description of modern political discourse. I can, however, summarize an assortment of rather typical political communications, an assortment that at first appears odd and discordant but that, on reflection, forms a coherent and discouraging picture. Consider:

- During his State of the Union speech, a president looked towards his wife in the balcony and mouthed the words, "I love you."[1] The same president had on a number of earlier occasions, while embroiled in a very public controversy involving his sexual infidelities, been filmed leaving church prominently carrying a Bible.[2] This president is without doubt a brilliant communicator with almost movie star charisma, and both his speech and his public religiosity were widely regarded as political successes.
- During his State of the State address, a governor of Alabama declared:

> [W]hen a state or federal court—a part of the non-lawmaking judicial branch of government, rules that an establishment of a national religion has occurred by posting the Ten Commandments on a courtroom wall . . . , or presenting a nativity scene in school . . . , or offering a pre-game prayer by coaches and players or praying for the safety of our soldiers in harm's way by a class at school, or acknowledging God at a graduation ceremony . . . , such court has violated the U.S. Constitution to which you and I and all the Judges have taken an oath of office to uphold. . . . Today, across this land governors, U.S. Congressmen, U.S. Senators, State legislators, legal scholars, and the people are deeply concerned over reckless, illegal, and arrogant rulings by our imperial judiciary. I will be true to my conscience and my oath of office and resist illegal usurpation of authority by any court with all legal and political means I can muster.[3]

  These words, despite being supplemented with historical and legal documentation, were greeted by commentators with open derision. The governor who spoke them lost in the next election.
- In 1989 the Pennsylvania House of Representatives was debating a bill that would impose a number of restrictions on the right to abortion—restrictions that would eventually be litigated before the U.S. Supreme Court in *Planned Parenthood v. Casey* and would elicit from that court cries of anguish about political attacks on the legitimacy of its decisions. One of the chief proponents of the bill rose to say as follows:

> Remember what *Roe v. Wade* said, and what it said was that abortions which are necessary are permitted. So the issue comes down to, what is a necessary abortion? It strikes me, for example, that even the old court would find that it is not a necessary abortion to have sex selection; that it was not an infringement on an abortion to have informed consent; that in fact an abortion after 24 weeks, except to save the mother's life or to avert substantial

> and irreversible impairment of major bodily function, can never be considered necessary. So there is a framework there right now where in fact each provision could be ruled constitutional. Remember this, however: Simply stated, when you cut to the chase, constitutionality is what five or more Justices . . . at any given time say it is.[4]

Proponents of the bill also insisted that their legislation was consistent with other Supreme Court precedent and, indeed, that to the extent that the bill might alter existing case law, justices on the Court had effectively invited an opportunity to rethink their earlier decisions.[5] For their part, opponents argued that the bill would be unconstitutional under existing case law and that this fact precluded enactment:

> So . . . we will pass today an unconstitutional act, in violation of our oath, in the hopes that perhaps, by inferences, some members of the Supreme Court may change their minds. . . . Right now the law of the land is the Supreme Court's current determination. That is what we are bound to abide by.[6]

- During his confirmation hearing on his nomination to the Supreme Court, a nominee was asked whether "there is a core of political speech that's entitled to greater constitutional protection than other forms of speech." The nominee, a former professor and judge, replied by referring to "what I think of as dialogue in a civilized society." He went on:

> Actually, it's Michael, my son, who really gave me a good compliment once that set me thinking about this. What he said—and I don't always get compliments from him—(chuckles)—but what he said was, well, we did use to argue a lot at the dinner table—I mean discuss—and he said, "You know," he said, "I always felt you were listening to me." Now that of course doesn't mean we always agreed. But you see, there is something in that idea of listening that promotes the dignity of the person who is listened to, and I've noticed . . . [that if a judge listens to both sides in court], it promotes a good feeling because people feel they've been listened to even if you disagreed with them. . . .[7]

Similar episodes in confirmation hearings are now legion. An earlier nominee to the Court, for example, replied to a question about his

understanding of a woman's position in facing an unwanted pregnancy by recalling that twenty-four years earlier as a dormitory proctor he had had a conversation with a young pregnant woman who was uncertain and upset. This nominee did not reveal the content of that conversation, but he did mention that it took two hours, was held in the most private place he could find, and that he had counseled her. He concluded by saying, "And I think the only thing I can add to that is I know what you [Senator Howard Metzenbaum] are trying to tell me, because I remember that afternoon."[8]

- During joint Senate/House committee hearings on the Partial-Birth Abortion Ban Act, the legislative director of the National Right to Life Committee quoted a physician who had performed the procedure:

> With a lower [fetal] extremity in the vagina, the surgeon uses his fingers to deliver the opposite lower extremity, then the torso, the shoulders and the upper extremities. The skull lodges at the internal cervical os [the opening to the uterus]. . . . At this point, the right-handed surgeon slides the fingers of the left hand along the back of the fetus and "hooks" the shoulders of the fetus with the index and ring fingers (palm down). . . . [T]he surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger. . . . The surgeon then forces the scissors into the base of the skull. . . . The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents.[9]

Shocking descriptions, of course, are used by both sides of the abortion debate. In defending the proposed Freedom of Choice Act of 1992, a senator stated, "When abortion was illegal . . . [t]housands of women died at the hands of back alley butchers . . . ," and he quoted a physician as saying:

> I have seen firsthand the horrors of illegal abortions. . . . I know of women who were blindfolded and alone, moved by total strangers from place to place before they were brought to a secret place where the abortion was performed and then left on a street corner to find their way home.[10]

- The voice that comes over my National Weather Service radio is oddly mechanical. It has no normal cadence or inflection or accent, and it

mispronounces local place-names. One morning it delivered a lengthy warning about the onset of tornado season in my home state of Colorado. The voice advised that people should not try to outrun a tornado, that in an emergency they can seek shelter in a ditch, and that if someone does lie in a ditch it is important to watch out for running water. Despite its solicitous (not to say, condescending) advice, the voice is not human. It is a computer-generated voice that is used throughout the country. The impersonality of this expression of governmental concern may be extreme, but less stark examples are commonplace. For instance, a television advertisement sponsored by the Department of Health and Human Services shows a series of photographs of a charming child while a voice intones: "His father left today. Forever. He'll be twice as likely to drop out of high school. 30% more likely to attempt suicide. Even if you don't live with your kids, your emotional and financial support gives them a better chance." The screen fades to black behind these words: THEY'RE YOUR KIDS BE THEIR DAD. The child, of course, is an actor. The voice belongs to no one in particular and is reading from a script.

- One of the most intellectually formidable federal judges in the country faced the question whether nude dancing "of barroom variety" is speech protected by the First Amendment.[11] The judge's opinion contains references to the satyr plays of the ancient Greeks, the Folies Bergère, the Dance of the Seven Veils in Richard Strauss's opera *Salome*, Diaghilev's *L'après midi d'un faune*, Isadora Duncan, Les Ballets Africains de Keita Fodeba, Richard Strauss's *Ein Heldenleben*, Gustav Holst's *The Planets*, and Debussy's *La cathédrale engloutie*, as well as to several important treatises on the history of dance and eroticism, including Sachs, *World History of the Dance* (1937). It also contains the judge's evaluation of the actual dances at issue in the case ("The dancers are presentable although not striking young women. They dance on a stage, with vigor but without accomplishment . . ."). [12] It notes that the goal of erotic dancing is to "express erotic emotions, such as sexual excitement and longing," and attempts a brief explanation of how striptease accomplishes this goal: "Nudity is the usual state in which sexual intercourse is conducted in our culture, and disrobing is preliminary to nudity. . . . [The dance] make[s] plain that the performer is not removing her clothes because she is about to take a bath . . . or undergo a medical examination. . . ."[13]
- Some years ago the Minnesota Supreme Court faced the question whether a drunk-driving suspect has the right under the state's constitution to consult a lawyer before taking a breath test.[14] The court referred to previous cases where it had adopted a requirement that

> the state demonstrate a "compelling state interest" for vehicular safety rules and that the rules constitute the "least restrictive alternative." It then adopted something called the "critical stage" test for the right to counsel and went on to say that the denial of access to counsel had to "be weighed against the state's interests."

No doubt it is possible to select from the world of contemporary political communications (from the misleading political ads, the windy legislative debates, the hysterical Internet messages, the mindless shouting on televised talk shows) more spectacular illustrations than I have chosen. Indeed, some of my examples, such as the Minnesota court's use of federal doctrinal language in interpreting state constitutional provisions or the computer-generated voice used by the National Weather Service, may seem unexceptionable. And all of my examples have some redeeming aspects. Even President Clinton's public displays of affection and religiosity may have represented, under the circumstances, a limited kind of symbolic moral leadership. Certainly, an understanding of the concrete effects of both abortions and abortion bans is highly relevant to moral deliberation. Upon consideration, however, each of my illustrations is dismaying in important and depressingly familiar respects.

An obvious problem with Clinton's actions, for example, is that they substituted gesture for substance. The public, of course, is well aware that national politicians routinely stage events and that some part of the resulting "message" may well be substantively false. This knowledge can produce cynicism, or it can produce a limited suspension of disbelief whereby the audience treats political gestures as a part of the game or as a literary convention, to be taken seriously at the same time they are understood to be fictional. Like celebritized discourse on privacy, then, public discourse based on gesture tends to lead to either of two generally characteristic modern developments: political withdrawal or shallow, playlike participation.

Governor Fob James's challenge to Supreme Court interpretations of the religion clauses was in the abstract both substantive and important.[15] It sounded like a foolish joke, however, partly because governors, especially southern governors, do not have the intellectual or moral stature to question a respected national institution like the Court and partly because the political hopelessness of his cause made his threat to "resist . . . with all . . . means I can muster" sound like yet another empty gesture. By way of contrast, the Pennsylvania legislative debate achieved some respectability but only by minimizing substance. The disturbing jurisprudential and institutional questions arising from the Court's abortion decisions were not explored. Indeed, in

graphic contrast to the *Casey* Court's later charge that "political fire" was threatening its authority and the rule of law, the legislative debate actually reinforced the legitimacy of the Court's role, as all sides used as touchstones for the propriety of their positions strained interpretations of existing cases or predictions about how the Court might rule in the future. As so often happens, a potentially profound political and constitutional debate was reduced to crass legalistic analysis.

Judicial nominees Breyer and Souter used personal anecdotes to evade answering questions. Senators and their constituents could read whatever answer they wanted into their meandering stories. Moreover, reliance on autobiographical details, while probably interesting and sometimes revealing, has the unfortunate consequence of moving significant political events in the direction of soap opera. The substitution of the personal, the simplistic, and the sentimental for the political—a trend that increasingly dominates presidential politics and now can be commonly found even in the judicial nominating process—infantilizes public debate.[16]

The testimony in the hearings on abortion legislation is nothing if not substantive. But both the clinically cruel description of the so-called partial-birth abortion procedure and the highly emotional claims about back-alley butchers and blindfolded women are, like Breyer's and Souter's testimony, efforts to personalize policy debate. Moreover, in the same way as televised pictures of the return of dead soldiers in body bags, this kind of information is in some ways too powerful. It is so urgent and one-sided as to leave no room for broader perspective or compromise. It makes opponents into enemies and thus induces both hatred and a sense of futility. Worse, these defects are progressive, for extreme moral claims of this kind can be answered only by ratcheting up the intensity of argumentation. As charges fly back and forth, even the very basic inhibition against using falsehoods begins to drop away.[17]

The computer-generated voice of the National Weather Service is in many ways the opposite of the legislative debates on abortion. The subject matter is benign and noncontroversial; this is the government as concerned friend rather than moral arbiter. Moreover, the voice has no individuality and no regional associations, and it can be heard all across the country. Thus, it reinforces the sense that we are one people without potentially divisive variations. Nevertheless, *especially* because the government is speaking to its citizens out of concern for health and safety, it is jarring to hear a voice that is a rather perfect expression, disembodied and rote, of impersonal bureaucracy. Moreover, the message establishes an inappropriate relationship between government and citizen inasmuch as the government seems to be assuming

that its citizens are unaware of the most obvious dangers and, like children, require the most elementary advice.

The public service advertisement about the importance of fatherhood is bothersome for similar reasons. To be advised by the government that it is important to be "your kids' dad" is only slightly less insulting and a good deal more vacuous than to be instructed to watch out for water while lying in a ditch during a storm. What exactly is the government telling us about fatherhood? Children are better off if "dads" don't leave home, apparently, but the ad does not even advise fathers to stay at home; instead, it encourages "emotional and financial support"—and not on the ground that this will avoid the distressing outcomes that are itemized but because this will give the child "a better chance." The Department of Health and Human Services believes that citizens are so bankrupt and yet so malleable that they will be able to benefit from this brief and vapid piece of advice. And the messenger, this time a real voice, is actually as impersonal as the Weather Service's announcer. The speaker is unidentified and, like the computer, is not using his own words; despite his earnestness, he is generating lines that have been written for him. This charade is all the worse because it trivializes something—the importance of family ties—that relates to the deepest instincts of the individual and the strongest interests of society. Advice on the significance of fatherhood from a family member or a friend or even a physician can have great importance precisely because it is the opposite of the public service message: It comes from someone who is known and trusted, it is heartfelt, and it arises out of two-way conversations that are grounded in experience and as detailed as necessary.

Judge Posner's voice, in one way the opposite of the public service ad, is strong and substantive. But to whom is all this erudition being addressed? Surely not to the owner or patrons of the Kitty Kat Lounge, where the expressive activity had taken place, and surely not to practicing lawyers and—one supposes—not to the public generally. Each of those groups knows perfectly well that nude dancing is expressive, and each knows what it expresses. Like the Weather Service warning and the public service ad, Posner lectures as if the public were ignorant. And, even assuming that somewhere there is an audience in need of basic instruction on the erotic nature of nude dancing, what can account for Posner's lavish commitment of intellectual resources? His opinion is the voice of a government that is at once superior and ridiculous.

The Minnesota Supreme Court's opinion has none of Posner's force or individuality. It is in fact, as Justice Hans Linde has demonstrated, a weak

and inappropriate imitation.[18] A state constitution, which has its own text and history and authority, is interpreted as if it were a knockoff of the federal Constitution. Worse, the words that are being appropriated are not the impressive words of the original text but the stilted and clumsy doctrinal formulations of U.S. Supreme Court justices interpreting that text. Like the unexpressive computer-generated voice of the Weather Service, the words of the formulaic constitution can be heard all across the country.

II

The empirical hypotheses that emerge from these observations are that, on the one hand, political dialogue at the state level tends to be bland, insubstantial, derivative, and unserious and, on the other, that political dialogue at the national level may often be spectacular, extreme, dishonest, personalized, polarized, and staged. These hypotheses are, I think, consistent with common impressions. More importantly, they are consistent with the basic conditions under which modern political dialogue is conducted.

Those conditions are matters of common knowledge and elementary inference. First, as I explained in chapter 2, the range of subject matter that is relevant to national political discourse includes not only issues, like foreign policy, that are not ordinarily relevant to state-based discourse but also virtually everything, including safety and health care and education, that is discussed within state-based venues. Second, the potential audience for national political discourse is, by definition, far larger and more varied than for any state-based discourse. This means that even when the issues under consideration are held constant, national decision making will be more complex because (if for no other reason) the scale is greater. It also means that, again, if the issues are identical, the potential consequences of national decision making are more significant than for more localized decision making. Third, although electronic forms of communication are used at both levels, nationalized discourse is relatively distant and, therefore, is characterized by a lower proportion of personalized contact and a higher proportion of remote or abstract communications.

One of the consequences of these conditions is to create what might be called a "winner-take-all" political market.[19] Just as a few top performers in professional sports or in fiction writing can now dominate entire national (and, indeed, international) economic markets, a relatively few leaders can now dominate a vast political market. Once a certain level of prominence is achieved, the words and images and policies of these leaders can be com-

municated across the whole nation. As Robert Frank and Philip Cook say of economic markets, "What is new is the rapid erosion of the barriers that once prevented the top performers from serving broader markets."[20]

Winner-take-all markets have many advantages, but one disadvantage is what the sociologist William Goode termed "the failure of the somewhat less popular."[21] Just as the dizzying returns available to the few who attend elite law schools create hypercompetition for admission to those schools,[22] the astonishing power and prestige available to the few who become national leaders mean that the somewhat less important state institutions, like second-tier law schools, suffer a disproportionate loss of attention and prestige. The bland, derivative quality of political discourse at the state level, then, is a predictable result of the demise of any real limitation on national regulatory power combined with the modern information revolution.

In contrast, the hypercompetition for national power naturally will tend to produce leaders, like William Clinton, who are enormously skilled and colorful. Because the issues that these leaders confront are massive in scale and complexity and because the leaders must communicate from a relatively remote stage, it is predictable that they should personalize issues and resort to symbolic gestures. Personalization allows a large and uneasy public to focus on what they can easily understand and ultimately allows for trust in the leader to substitute for substantive evaluation of complex issues. Gestures of the sort that Clinton made, moreover, are reassuringly simple and can be efficiently communicated.

Governor James's ill-fated effort to challenge the Court's establishment clause cases was in part a "failure of the somewhat less popular." His effort appeared even more pathetic than it was because the prestige and power of the Court dwarfed the status of a state officer. The fact that his analysis might have been as good as the Court's meant no more than the fact that a relatively unknown writer's novel is as good (or almost as good) as a recognized best-selling author's when both compete for a publisher or a reviewer.[23] As this dynamic continuously plays out, it becomes obvious to all that the quality of state-level arguments challenging decisions of august national institutions will be discounted or ignored. Consequently, even those who have powerful objections to the decisions of national institutions often attempt to frame their positions as if they were consistent with or even derivative from the very decisions they condemn. Like the Pennsylvania legislators proposing a law aimed at overturning *Roe v. Wade*, such critics end up reflexively reinforcing the prestige of national institutions.

Federal judicial nominees resort to sentimental anecdotes for many of the same reasons that President Clinton told the nation that he loves his wife.

But this device is responsive to another aspect of nationalized communication as well. The larger and more diverse the audience and the more significant the issue, the more the leader faces the likelihood of deeply offending some significant segment of the public. The potential rewards of gaining national office are extraordinary but the danger of infuriating opponents is almost unavoidable. One solution is to tell vague or sentimentalized autobiographical stories into which each segment of the public can read acceptable morals.

Paradoxically, when salient issues cannot be evaded or personalized, the incentives of nationalized discourse encourage stark, exaggerated, and dishonest claims. This is so because, first, in a winner-take-all competition the difference between first and second place is the difference between day and night and because, second, each contestant knows that the other will be tempted to resort to extreme measures.[24] National political discourse on issues like abortion moves quickly to extreme and divisive charges for the same reason that professional athletes are tempted to take steroids and televised sitcoms get ever raunchier. There are, of course, limits on this kind of competitive degeneration. Personal ethical standards, group pressures, and cultural expectations all set boundaries. However, the speakers strutting on the national stage are by definition relatively distanced from the types of primary associations that create and enforce such constraints. Moreover, the members of these associations feel distanced from the national leader as well. The national leader, having become larger than life, is presumably subject to pressures and rules that do not apply to everyday people. Hence, even those primary associations that do manage contact with the national leader may be uncharacteristically restrained and ineffectual.

Since one key to being a winner-who-takes-all is to utilize inexpensive communication that reaches a very wide audience, nationalized debate depends heavily on quick visual symbols, sound bites, and other highly economical methods.[25] The Weather Service replaced its human announcers with a single computer-generated voice in order to save the costs of printing out and reading forecasts and warnings. This change has the disadvantage of making the national government seem even more remote and faceless, a difficulty that might well encourage the agency to compensate by issuing ever more messages of concern. These messages are often so strikingly condescending partly because the national government is in fact relatively remote from and out of touch with its audience and partly because in so large an audience there are bound to be measurable numbers of risk-takers and incompetents.

The Health and Human Services admonition to "be your kids' dad" is not only condescending but also inappropriately familiar and empty. Vacu-

ousness, like condescension, is a predictable result of the size and heterogeneity of the national audience. After all, this country contains many subgroups that hold strikingly different views about parental roles and responsibilities. It would be profoundly threatening to have the distant and uncontrollable national government seeking to improve child-rearing practices unless that government's influence came in the form of ostensibly chummy advice rather than coercive rules and unless the advice itself were so vague as to be compatible with virtually any conception of fatherhood.

Judge Posner's lavish opinion on the erotic messages conveyed by nude dancing is precisely the kind of excessive investment to be expected from the winner-take-all contests spawned by a vast political market. As Frank and Cook point out, the differences in skill between a championship tennis star and a second-tier player may be so slight as to be imperceptible to all except experts and fanatics.[26] Nevertheless, the few who reach star status will have their matches broadcast around the world while the players just below the top play in relative obscurity. Due to his extraordinary intellect, Posner is one of the few federal judges not on the Supreme Court who can compete for national recognition and influence. His judicial decisions get attention from other jurists and from professors at elite national law schools, and his books, which are published by eminent presses and reviewed in places like the *New York Review of Books*, affect the thinking of national opinion leaders. The extravagance of his writing in the nude-dancing case, then, is a display of championship-level virtuosity, no doubt encouraged by the elaborate dissenting opinion from Judge Frank Easterbrook, who is, of course, another nationally prominent jurist. Championship matches are better than they have to be—sometimes ridiculously good.

Those who toil in relative obscurity, like the Minnesota Supreme Court, suffer the consequences of overinvestment at the top. Original, thoughtful research into the specific circumstances and history of a state constitution will not get the national limelight. Most of the best clerks, who might have helped with that research, attended elite national law schools, not the state law school, and went to clerk for someone like Posner or Easterbrook. Indeed, even the faculty at the state law school is unlikely to concentrate much on state constitutional law or the state legal system generally. If consulted by the Minnesota jurists, their writings will probably point right back to the doctrines of federal constitutional law. These doctrines do not have the flair and power of a Posner opinion, but they are fairly easy to find and to utilize. The voices of state institutions begin, like the voice of some vast bureaucracy in Washington, to sound mechanical and homogenized.

III

In theory, localized political discourse has certain inherent advantages over nationalized discourse. Participants are more likely to have had some personal contact with one another. They can draw more on common experience. They have less need for gestures and evasions. Debate can be less personalized, less extreme, and less threatening. Issues examined at a smaller scale are more understandable, and words can be used to convey more content.

However, given the current eclipse of state institutions, which have suffered the sad fate of "the somewhat less popular" in a winner-take-all society, state-based dialogue is often dull or unimportant. If significant responsibility for constitutional discourse could somehow be moved to state institutions (as a robust version of federalism requires) or if crucial policy issues like privacy were deconstitutionalized so that control could be devolved back to the states, politics at the state and local level might well gain in significance and dignity. Some of the intellectual and personal resources now so committed to the national stage might begin to disperse. In short, fuller state participation in highly visible and important issues might be a partial solution to the unhealthy communicative dynamics now in place.

At the margin, all this may be possible. However, it is unlikely that the established facts of modern political life are going to be altered fundamentally. Even if the national government were somehow made to share more fully with state and local governments responsibility for constitutional decision making and crucial policy making, the national government would continue to exercise significant control in these areas. Given this and given the irreversible facts of modern communication technology, the basic conditions for a winner-take-all political market will continue to exist. To its dismay, the public in all probability will continue to endure a politics where there is too much overheated and dishonest discourse at the national level and too much tepid, derivative discourse at the local level.

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11

Lies and Nationhood

I

The theme of this book has been that maintaining limits on the power of the national government depends upon certain intellectual and psychological resources and that these resources are now so diminished that there is little energy left to resist the heavy pull of the center. Our mixed structure of competing sovereigns is a complex, contradictory, open-ended system that requires a capacity to tolerate incomplete resolution, imperfection, conflict, and continuing disagreement even about fundamentals. It requires that the locus of ultimate authority remain ambiguous and that progress remain debatable and uncertain. It requires that political challenges to legally prescribed meanings not be viewed as anarchy and that deep moral disputes not be confused with chaos or warfare. It requires that individuals retain the kind of maturity and realism about intimate matters that arises from intermediate social connections and, finally, that political discourse not be degraded by the frenetic competition generated by extreme centralization. The materials that I have been examining (chiefly, the decisions and commentary of our national constitutional law establishment) are not reassuring on any of these counts. Indeed, these materials suggest that the attractive personal and cul-

tural resources necessary to resist radical nationalization arise from the very institutions and experiences that are now being depleted. Centralization, then, is a process building on itself in an implosive cycle. This cycle has ominous implications not only for our constitutional structure but also for our national character and social fabric.

The elite lawyers who make up the constitutional law establishment are certainly not representative of the whole country, and therefore, their writings cannot provide anything like a definitive assessment of our situation. Those writings do, however, have great influence, and they do reflect important currents of thought. Indeed (as has long been observed), Americans are uniquely dependent on judges, lawyers, and legal processes. The impatience, combativeness, and perfectionism that were a natural outgrowth of the circumstances of our early history and the long westward expansion have for many decades now increasingly found expression in a fascination with legal argumentation and courtroom drama.

Even our sense of nationhood is profoundly legalistic. Most of our sustaining political myths—including the unshakable but historically inaccurate notion that the Constitution of 1787 was an act of the undifferentiated people of the whole nation—have to do with legal authorization and constitutional meaning. To the extent that the restless, rootless energy of Americans has gradually turned from physical expansion to the kinds of personal and programmatic conquests possible in an elaborate adversarial system, the number of constitutional myths has multiplied and their nature has changed. No longer concerned only with overarching ideas, constitutionalism has exploded into the detailed operational prescriptions of "constitutional law"—decisions that protect particular medical procedures like partial-birth abortion or tinker with state vote-counting procedures. Myths pushed this far lose their status and begin to look like ordinary lies.

I close this book with an examination of one of the signal political events of recent years, the controversy over the impeachment of President Clinton. This controversy demonstrates, I think, the depth of our culture's dependence on the thinking of the legal elite and the degree to which the implosive weaknesses revealed in that thinking are widely shared. Moreover, the Clinton impeachment controversy confirms that only a fine line separates the elaborate conventions of constitutional argument from lies. To the extent that our political decision making and even our sense of nationhood are profoundly legalistic, our system rests precariously on the edge of systematized dishonesty. National identity this insecure must be buttressed, first, by more lies and, then, by bombastic lies and, eventually, by the nervous use of excessive force. Psychologically, at least, it is only a short distance from the

hysterical words of the Supreme Court in cases like *Planned Parenthood v. Casey* to oppression by executive action. Governmental brutality arises not only from personal viciousness and official miscalculation but also from deep anxiety about the rule of law. Brutal overreactions, such as the decision of the Justice Department to deploy tanks around the compound of an armed religious cult or to unleash dozens of masked federal police in a midnight raid to retrieve a Cuban child from contentious relatives, are still rare and incompatible with our national self-image. But they may be telltale signs of a system collapsing inward.

II

Of all the fears of political disintegration expressed in our modern era, none was so heartfelt and yet so odd as the cry raised by Clinton's congressional defenders that his impeachment was an effort at a coup d'etat. The cry, raised often and vehemently, was surely an expression of the belief that dangerous and malevolent forces were attempting to drive an elected president from office. A member of Congress said this in the well of the House: "This is indeed a Republican coup d'etat. Mr. Speaker, . . . the Republicans will couch this extremist radical anarchy and pious language which distorts the Constitution and the rule of law. . . . [T]he Republicans are the vehicles being used by the right wing Christian coalition extremists to direct and control our culture. . . . I am greatly disappointed in the raw, unmasked, unbridled hatred and meanness that drives this impeachment coup d'etat. . . . [W]hat they do here today will long be remembered . . . as one of the most despicable actions ever taken by the Congress of the United States of America."[1] Even after the heat of the political moment had subsided, a highly respected journalist invoked the same terminology: "Kenneth Starr's attempt to drive Clinton from office was the climax of years of effort by others to destroy him. . . . People on the political right set out to unseat a president. . . . [T]his country came close to a coup d'etat."[2]

There are, as I said at the beginning of this book, many reasons to fear political disintegration, and as I explained later, there are inherent reasons to expect nationalized discourse to be extreme. Nevertheless, the repeated charge of a coup d'etat was striking because it inverted the truth. Impeachment, even for debatable reasons, is a constitutionally authorized procedure and in this sense is the opposite of a forcible overthrow.

If Clinton had been impeached for reasons that were clearly unconstitutional, as many defenders claimed, the charge of coup d'etat would have been more defensible, perhaps only (as they say) a slight exaggeration. How-

ever, the simple fact is that the constitutional standard for removing a president leaves considerable room for political judgment. Clinton's impeachment and removal were neither required nor prohibited by the Constitution.[3] The many scholars and politicians who said that the charges against Clinton clearly did not constitute "high crimes and misdemeanors" were displaying that characteristic American insecurity that finds relief in the myth of comprehensive legal prescription.[4] Some, perhaps, were just lying for political reasons.

In the high debate about impeachment, many lawyers gloried in their central place even as they used that place to obscure and hide from the basic facts of constitutional law. It was, however, the low debate (also dominated by lawyers' desperate argumentation) about the specific charges against President Clinton that held—and still holds—an especially morbid fascination. After all, a persistent and increasingly central theme in that controversy was whether statements that result from "thinking like a lawyer" are meaningfully different from lies. For instance, the president's famously creative use of the words "is" and "alone" and "sexual relations" (first in his deposition in the Jones lawsuit, then before a federal grand jury, and then in his answers to eighty-one interrogatories put to him by the House Judiciary Committee) was represented by his defenders to be "legally correct" but was derided by his critics as "legalism" or "legal hairsplitting" or "legalese."[5] Thus, the accusation of perjury against President Clinton raises the intriguing but distressing question whether an individual who claims to be speaking like a lawyer ought to be understood to be lying. That, in turn, raises the more general question whether and to what extent legal arguments are lies. To the extent that legal arguments cannot be distinguished from ordinary lies, it is necessary to face the disturbing possibility that much of the public's understanding of our constitutional system and, indeed, much of our national identity are based on a tissue of untruths.

Before pursuing these questions and their implications, it should first be emphasized that Clinton's statements are lawyer-*like*, not the statements of a lawyer. To be a lawyer is by definition to take on a set of professional roles; the conventions of legal argumentation all have their meaning and justification only in the context of these roles. Therefore, although a person can have various characteristics that are similar to the characteristics exhibited by people acting in legal roles, strictly speaking one cannot have a lawyer's personality or mind outside those roles. So to the extent that President Clinton's defense to the charge of perjury was, "I have a lawyer's mind and must be understood to have intended legalistic meanings," the precise question he

confronts us with is this: Are legalistic meanings, when used outside the lawyer's professional roles, descriptively different from lies?

Since there are many kinds of legalisms, there can be no simple answer to this question. I take it as obvious that legal thinking and legal argumentation are not always or necessarily dishonest. But one identifiable and important form of legal argument does seem descriptively to overlap significantly with lying. Because of my suspicion about where President Clinton was introduced to this form of legal thinking, I will call it the "Yale Argument."[6] By using this phrase, I do not mean that this kind of argument is of recent derivation or that it is used only or primarily at the Yale Law School. I do mean that it has a high pedigree and that many important institutions celebrate and promote it.

The most characteristic, and perhaps the most basic, element of the Yale Argument is the manipulation of levels of abstraction. For example, in the hugely significant line of cases that in recent years has helped to nationalize intimacy, the Supreme Court has repeatedly said that the specific liberties protected by the Constitution, such as the right to be free from unreasonable searches and seizures, imply a more general liberty—the right to privacy.[7] And then by degrees the Court has expanded this right to privacy so that now it protects the even more general right of personal autonomy, indeed, as you will recall from *Casey*, the right "to define one's own concept of existence, of meaning, of the universe."[8] Abstraction taken to this extent strikes many people as absurd, and even when used less extravagantly the underlying intellectual argument can be seen as a kind of trick. Nevertheless, the most central contribution of our most prominent legal philosopher, Ronald Dworkin, is his elaboration of the argument that defining rights at high levels of abstraction is an essential aspect of a coherent constitutional philosophy.[9] This lofty claim notwithstanding, we can see a strikingly similar impulse at work in President Clinton's lowly prevarications. A person might be thought not to be "alone," you may recall, if the relevant boundary line is expanded beyond the room he occupies to include his office or, beyond that, his suite of offices or, beyond that, a whole wing of the White House. Why not, inspired by the Court's poetic invocation of the most general interest in defining one's place in the universe, move the line out to include the whole, heavily populated East Coast or, indeed, this crowded planet itself?

I grant that the apparent similarity between the most influential intellectual move of modern constitutional law and President Clinton's laughable dodge may be only superficial. But functionally the use of high levels of abstraction in constitutional interpretation operates to accomplish what Clin-

ton was trying to accomplish, that is, to assign a surprising or counterintuitive meaning to an ordinary word. In all its various forms this is a pervasive aim of the Yale Argument. Thus, to take one of innumerable examples, some years ago the Supreme Court decreed that patronage systems violate the free speech clause.[10] It declared that replacing a public employee because of that person's political affiliation is to "penalize" political belief. This understanding of "penalize" was, at the time, startling in part simply because of the inertial weight of common practice. That is, patronage had been used around the country for hundreds of years and had been regarded as a normal aspect of political accountability rather than a punishment. There never was, of course, anything logically necessary about this view of patronage. It had always been possible, as the Court eventually decided to do, to view patronage from a different and imaginative angle—that is, to emphasize the loss to the individual dismissed rather than the gain to the political system from the new person hired. When the Court shifted our perception of the word "penalty," it obviously was using language in a highly creative way. This kind of creativity is so basic to modern constitutional interpretation that it is taken for granted. Lawyers, especially, think there is nothing odd about calling acts like burning a flag or spending money "speech," and when someone notices the unusual way words are being used in constitutional law (as when Justice White labeled the argument that homosexual sodomy is "a traditionally protected American liberty" facetious),[11] many members of the constitutional law establishment react with indignation. As we have seen, this establishment even insists that creative judicial interpretations are somehow a source of stability in constitutional meaning.

Needless to say, there is nothing necessarily wrong or unjustifiable in jurists' creative use of language. Our most eminent judges and academics are respected because they have done so. Think of Justice Marshall's brilliant opinion in *McCulloch v. Maryland*, the case that began the slow burial of the idea of limited national powers. He construed the words "necessary and proper" to mean "convenient."[12] Or think of virtually any constitutional argument made by Ronald Dworkin or Laurence Tribe.[13] But, as the incredulous public reaction to Clinton's creative interpretations of words like "alone" and "sexual relations" illustrates, it is one thing that liars also do.

Because the objective of the Yale Argument is to establish a meaning that is different from the ordinary, customary meaning of a word, it typically disparages existing perceptions and understandings. A soft form of this disparagement is to minimize the weight of the historical practices that shape those understandings. Thus, in the patronage case, the Court mentioned the long history of patronage in the United States but insisted that the recent

"strong decline" in its use was of greater significance.[14] Similar historical arguments have been made in efforts to establish that abortion and unmarried parenthood are traditionally protected rights.[15] Perhaps the most extreme form of disparagement is to deny that anyone does or could use the contested word in its ordinary or customary sense. In *McCulloch*, for instance, Chief Justice Marshall wrote that a literal meaning for the phrase "necessary and proper" would have been "an extraordinary departure from the usual course of the human mind."[16] Similarly, Dworkin argues that members of the pro-life movement do not actually understand their own moral position on abortion and mean something different from what they say on that issue.[17] Indeed, Dworkin goes so far as to claim that the thoughts that pro-lifers think they have actually do not exist and that, therefore, it would be "uncharitable" to think they mean what they say.[18] Clinton, then, was following a proud argumentative tradition when he claimed that the grand jurors to whom he was speaking would probably understand "sexual relations" to exclude oral sexual behavior and, indeed, that most ordinary Americans would. Disparagement or denial of existing understandings is not always a part of a lie but it can plainly serve the purposes of a liar because it undermines the standard in relation to which the deception can be identified.

The radical alteration of existing practices and understandings, which is the purpose of the Yale Argument, is a difficult task. The argument, therefore, is characterized by an array of opportunistic claims to authority. If evidence of historical intent can be mustered for the desired outcome, the mythical status of the "founding fathers" will be invoked; if that evidence is missing or if it points in the wrong direction, the appeal will shift, perhaps, to the need to keep the Constitution "up-to-date." Or, if it will help the cause, specific text will be emphasized, but if the precise language works against the argument, the interpreter will point instead to the general "structure" of the document. If all else fails, the very pretense of persuasion and justification will be dropped, and the authority relied on will be a bald claim of hierarchical status, as when a majority of the justices in *Casey* sputtered, "We are the highest court in the land and we have already spoken on the issue of abortion and that is the end of the matter."[19]

No matter what the specific form of justification, in the Yale Argument there is almost always an implicit claim of superior effort or skill or intelligence. In his effort to reframe the Catholic position on abortion, Dworkin presents himself as having thought harder than the pope about Catholic theology.[20] Indeed, the underlying aesthetic of constitutional interpretation, as expressed in both judicial decisions and academic commentary, is largely a claim of authority-from-effort. Hence, opinions, as well as articles, sink under

the weight of detailed footnotes, of laborious argumentation, and of exhaustive recitation of precedent.[21] The Yale Argument turns the surprising newness of its understandings into an asset by equating originality with intellectual effort and sophistication and by dismissing older beliefs as unthought-out or outmoded.[22] In constitutional decisions traditional moral views are frequently dismissed as "irrational" and historical patterns of behavior as unproven.[23] In the end the authority of the Yale Argument rests on unceasing verbal energy, on the kind of will-power that has inverted the truth about which contemporary position on federalism is radical. While only quiet history stands behind the understandings and practices of the past, the new terminology is backed by a virtual torrent of words. Like Clinton's protestations before the grand jury—his claims of careful thought, his garrulous explanations, and his earnest posture of helpfulness—the stance behind the Yale Argument is by turns studious, solicitous, arrogant, and authoritarian. Like the lies in Clinton's testimony, the Yale Argument desperately utilizes whatever works.

The Yale Argument proceeds from the best of motivations. It begins with the characteristically American desire to improve the world. But as the political scientist Rogers Smith and others have pointed out, in order to mandate progress in the name of law, especially in the name of constitutional law, it is necessary to deceive.[24] Where the law is backward, it must be made to seem progressive. Where the law is uncertain or permissive, it must be made to seem definite and mandatory. Where arguments are limited and honestly debatable, they must be made to seem comprehensive and inescapable. Where opponents refuse to yield, their positions must be distorted or they themselves must be belittled and insulted. Similarly, Clinton felt that his unconventional use of language before the grand jury was benignly motivated; indeed, he felt this so keenly that his testimony, like constitutional argumentation, took on a self-righteous cast. He regarded the objectives and tactics of the Paula Jones lawsuit as "deplorable." In fact, by describing that lawsuit as a political attack, Clinton signaled his perception of that suit as a threat to the progressive policies that might have resulted from his presidency. Lies, as Sissela Bok points out, are very frequently motivated by the desire to reform the world, at least according to the liar's lights.[25] And the need to manipulate arises in response to obstacles (which are likely to seem outrageous in proportion to the reformer's moral self-assurance) that are preventing progress.

The Yale Argument has, as its name suggests, high prestige. It is portrayed as an intellectual discipline. Its foremost practitioners are not only respected but admired as heroes. It has inspired almost religious devotion.[26]

And it has been used successfully to establish hugely ambitious and controversial plans of social reform. It is in fact so much an accepted part of our political heritage that its descriptive similarity to lying is almost always overlooked or explained away. But at core, it seems to me that President Clinton's testimony was essentially a Yale Argument and that neither his argument nor the fancy constitutional interpretations that it so resembles can be meaningfully distinguished from lies.

To the extent that the Yale Argument is similar to lying, it is surely curious that Americans have become increasingly dependent on (even reverent toward) judicial authority to interpret the Constitution. Before speculating on what this susceptibility might mean, I should address two objections. First, whereas a liar claims what is false to be true, it might be said that the Yale Argument claims only what may be true to be true. The Yale Argument, under this view, urges one possible view of reality. A patronage dismissal *can* be viewed as a penalty (if you focus on the individual's interest rather than society's interest), and the right to abortion *can* be viewed as an aspect of the traditional American liberty of privacy (if you are convinced that a broader principle was inchoate in specific past practices). There is no denying that in law truth is hard to discover and controversial, but so it is in science and everyday life. We still are able to identify lies. One ordinary way to do so is to distinguish the person who, while actually appealing to a new or specialized meaning of a word, nevertheless falsely says, "I know how you understand my words and I am appealing to *that* established meaning." It was a deception, I think, for judges to say that abortion has been a part of our "fundamental traditions" knowing that many citizens would understand those words in the normal sense,[27] just as it was false for President Clinton to say that he was never "alone" with Monica Lewinsky knowing that the grand jurors would understand that word in its normal sense.

A second and related objection arises from the fact that a lie is a message meant to make others believe what the liar asserts but does not believe. A lawyer making a Yale Argument (or a lawyer-like Bill Clinton testifying under oath) might be thought not to be lying because he believes the truth of his claims. In his grand jury testimony, Clinton appealed to this idea when he speculated that both Clarence Thomas and Anita Hill "thought they were telling the truth."[28] People relying on this defense might, of course, have deluded themselves into their beliefs—either out of a fervent desire to improve the world or out of self-interest or some combination—but in either situation the speaker would not be claiming what he does not believe to be true. At worst, one might say that the speaker is making an argument that might well be false but that the speaker has talked himself into believing. At

best, esoteric considerations (perhaps alluded to by President Clinton when he called this "the most mysterious area of human life")[29] might suggest, just as aspects of the *Casey* opinion suggest, that belief somehow creates reality or is the only reality.

Here the similarity between Clinton and lawyers engaged in the Yale Argument is eerie. It is common to read incredulous speculations about whether Clinton, our first postmodern president, might at least momentarily believe everything he says.[30] In the same way, law professors often wonder in private whether it is possible that highly intelligent people like Tribe and Dworkin, ignoring how unlikely it is that their political preferences should so often coincide with a correct understanding of the Constitution, might actually believe their own arguments. In both cases sincere belief seems both possible and impossible at the same time: possible because of the relentless earnestness of the speakers, impossible because of the evident speciousness of their stories.

Let us assume that the mind can be convinced of almost anything if incentives are strong enough and that in people like both President Clinton and Professor Dworkin there is true belief. Under this assumption, the difference alluded to earlier between being a lawyer-like person and a lawyer in a professional role is important. Part of the professional discipline required by the lawyer's role is the capacity to compartmentalize self-delusion. Thus, the fervent advocate may well feel during oral argument that his claims are true. But this is understood to be a momentary consequence of doing the job, and after dinner and a drink the lawyer can acknowledge privately his personal belief that his argument was weak or wrong. Society not only forgives but encourages this capacity for temporary self-delusion because of the presumed benefits of strong advocacy. Society even tolerates the obnoxious lawyer who loses the capacity for compartmentalization and always (even after dinner) believes his clients are in the right. It also, I might add, tolerates and even lionizes the authoritarian judge who actually believes that his highly imaginative interpretations of the Constitution are true. Both the endlessly argumentative lawyer and the hopelessly self-assured judge are, like the frenzied oral advocate, in a sense depleted individuals because their roles have consumed them. But this depletion is considered part of the price of a complicated and ambitious legal system. A person not filling the socially sanctioned role of lawyer or judge, however, is not necessarily forgiven a lie just because of self-delusion. Here, as Bok points out,[31] there are many shades of gray, but in ordinary relations we recognize that at some point along the scale of objective improbability a liar's convenient sense of conviction does not excuse the lie.

III

If I am right, then, that as a descriptive matter the Yale Argument and President Clinton's deceptions cannot be meaningfully distinguished, lying is far more a part of the high political practice of constitutional interpretation than we usually admit. Why do Americans tolerate this when they usually condemn lying in ordinary interactions? President Clinton, I think, is instructive on this question. He vividly demonstrates that lying has its charms. The very obviousness of Clinton's lies invites a willing suspension of disbelief so that, if we but accede to a creative reformulation of language, reality can be altered and improved. President Clinton, that impressive and attractive leader, need not be a felon and his presidency need not end in tatters. All that is necessary to avoid these dire possibilities is for us to put aside what we know words mean and to enter into the liar's world. In short, lying is magical and liberating.

In this, lying tracks some fundamental and admirable American traits. Americans, whose optimism and energy once propelled them in waves across a dangerous and largely empty country, still tend to think that any problem can be solved, that progress is always possible. When these happy assumptions collide with facts, the temptation is great to reform the world by reforming language.[32] The country is no longer empty, but through constitutional interpretation we can build a history, a people, and a nation that do not really exist.[33] Those who cannot convince enough of their fellow citizens that patronage is a bad practice tell us that enforcing political qualifications for public jobs is akin to imprisoning an editorial writer. Those who believe that abortion should be freely available get the judiciary to tell us that this right has already long been a part of our fundamental liberties. Indeed, well-intentioned but frustrated citizens can accomplish much in this way. To protect the country from those perceived to be fanatical or intolerant or prejudiced, all the enlightened need do is reform words. The purpose of such lies is to bend others to the liar's will by distorting language, and the easiest marks are those who want deeply to believe that good things are always possible.

While American optimism makes us susceptible to certain high forms of lying, it is also true that American contentiousness and competitiveness encourage an appreciation for all the everyday forms of deception that are endemic to the adversary system. It is not too much to say that we have a legal system that from top to bottom is built in significant part on half-truths, exaggerations, distortions, omissions, and falsehoods.[34] Americans know this and scorn lawyers because of it, but Americans also depend heavily on this system and admire those who function effectively within it.

Quite aside from the subject matter of his lies, it is no wonder, then, that there was widespread reluctance to impeach and remove President Clinton for testifying in a lawyer-like way.[35] How can such testimony be viewed as a serious threat to the constitutional system when the constitutional interpretations that authoritatively define that system are themselves built on very similar, if fancier, deceptions and when the legal apparatus that is such an important part of that system organizes and regularizes deception on a massive scale? Or, to put the point more concretely, the televised version of Clinton's grand jury testimony conveyed, not the dangerous image of a potential tyrant, but the familiar and unthreatening impression of a dogged and inventive advocate arguing a difficult case.

This innocuous impression, however, may have been misleading. In fact, Clinton's lies can be viewed as threatening to the system precisely because the system relies so heavily on legalistic deceptions. As Bok (not to mention nearly every parent) emphasizes, lying tends to lead to more lying.[36] This is, of course, partly because of the internal dynamics of deception, but it is also partly because of the external dynamics, that is, the breakdown of social inhibitions and taboos. American reliance on deception in constitutional interpretation and in the legal system more broadly is, therefore, highly dangerous. Legal lying is cabined, to the extent that it is, by some rather thin lines. One of these is the distinction between the lawyers' role and authentic personality. To the extent that our society blurs that distinction, we will have to pay the price of being governed by individuals like Clinton who make an undifferentiated claim to the high prerogatives of the Yale Argument and also to the low prerogatives of the adversarial lawyer and who claim these prerogatives in personal relations, as sworn witnesses in civil and criminal cases, and in general political discourse. Our form of government has long relied heavily on a legal system that utilizes the heavy-handed tactics of verbal manipulation. It is no small matter to watch those tactics break out of the legal arena and infect the office of the presidency and, indeed, the culture more generally. From this perspective the impeachment decision should be viewed not only as a judgment directed against an officeholder but also as a rather hopeless effort to construct a barrier against our own weaknesses.

Ironically, those same weaknesses generated the ungrounded scripts of national sexual harassment laws that ensnared President Clinton. Thereafter, these weaknesses caused us to defend his little lies with lies of constitutional dimension. Thus do we protect the institutions and symbolism of nationhood. But to the extent that optimism, progress, and unity all seem to depend on lying, the structure rests on a fragile base. More lies will be needed, and the lies will have to be backed by authoritarian claims, and these claims will

have to be backed, eventually, by repressive acts. This is a fear, like so many modern fears, of breakdown. But this breakdown would not result from centrifugal forces pulling our government apart. On the contrary, it would be caused because American energy and exuberance gradually turned inward, consuming the understandings and practices that had maintained the political distance between governments—a distance that both depends upon and promotes confidence, realism, and moderation.

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Notes

Chapter One

1. James Davison Hunter recently followed up his famous book *Culture Wars* (1991) with one called *Before the Shooting Begins* (1994).

2. The legal scholar Richard Delgado recently authored a book with the title *The Coming American Race War?* (1996).

3. Writing in 1991, Arthur M. Schlesinger, Jr., decried a "cult of ethnicity" that puts "in peril" the very idea of "a unifying American identity. . . ." Arthur M. Schlesinger, Jr., *The Disuniting of America* 16–17 (1991). This modern ethnic "upsurge" threatens, Schlesinger continued, to become "a counter-revolution against the original theory of America as 'a common culture, a single nation.' " *Id.* at 43. Seven years after the original publication of his book, Schlesinger added that militant multiculturalism is leading an "assault" on that central tenet of our national political identity, the Bill of Rights. Arthur M. Schlesinger, Jr., *The Disuniting of America: Reflections on Multicultural Society* 150, 153–54 (revised and enlarged ed., 1998). Inspired in part by Schlesinger, others have voiced their fears. In his best-selling book, Samuel P. Huntington speculates generally about problems of political disunity in the West. Samuel P. Huntington, *The Clash of Civilizations: Remaking of World Order* (1996). Pointing more specifically at multiculturalism, he says that rejection of the American political creed "means the end of the United States as we have known it." *Id.* at 306–7. A United States without a cultural core would amount only to a loose confederation, a "United Nations." *Id.* at 306.

4. Tony Horwitz, *Confederates in the Attic* 386 (Vintage Departures Edition, March 1999).

5. Something like this outcome is actually embraced (very tentatively) by an eminent expert in international politics, George F. Kennan. Emphasizing the size and remoteness of the government in Washington, D.C., and the range of cultural and ethnic communities that it must accommodate, Kennan wonders whether we might not eventually be better off if the country, while retaining some rudiments of a national government, were to be decentralized "into something like a dozen constituent republics." George F. Kennan, *Around the Cragged Hill: A Personal and Political Philosophy* 149 (1993).

6. Whittington does not foresee radical or unhealthy degrees of decentralization, but he does hold out the possibility of very significant structural changes.

Keith E. Whittington, "Dismantling the Modern State? The Changing Structural Foundations of Federalism," 25 *Hast. Const. L. Q.* 483 (1998).

7. Michael S. Greve, *Real Federalism: Why It Matters, How It Could Happen* 23 (1999).

8. *The Federalist No. 15,* at 111 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

9. *The Federalist No. 17,* at 119 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

10. *Id.* at 119–20.

11. *Id.* at 120.

12. Alexis de Tocqueville, 1 *Democracy in America* 385 (Henry Reeve trans., Phillip Bradley ed., 1945).

13. *Id.* at 414.

14. *Id.* at 387.

15. Frederick Jackson Turner, *The Frontier in American History* (1986). Jackson, of course, saw powerful nationalizing tendencies in the western movement, and I return to this aspect of his work in section II of this chapter.

16. Robert H. Wiebe, *The Segmented Society: An Introduction to the Meaning of America* (1975).

17. *Id.* at 91.

18. *Id.* at 125, 149.

19. *National League of Cities v. Usery,* 426 U.S. 833, 856, 880 (Brennan, J., dissenting) (1976) was overruled in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985).

20. 514 U.S. 779, 804, 837–38, 820–21 (1995).

21. *Id.* at 840 (Kennedy, J., concurring).

22. *EEOC v. Wyoming,* 460 U.S. 226, 248 (Stevens, J., concurring) (1983).

23. *FERC v. Mississippi,* 465 U.S. 742, 761 (1982) (quoting *Testa v. Katt,* 330 U.S. 386, 389 [1947]).

24. Linda Greenhouse, "Focus on Federal Power," *New York Times,* May 24, 1995, at A1.

25. In the *New Republic* Jeffrey Rosen described the same justices referred to by Greenhouse as "[h]aving rejected the constitutional legacy of the New Deal . . . [and as being] inclined to question the legacy of Reconstruction as well." Jeffrey Rosen, "Terminated," *New Republic,* June 12, 1995, at 12. In the *Michigan Law Review* Daniel Farber asserted that "new federalists," such as the *Term Limits* dissenters, conceive of states as being in some measure "independent nations." Daniel A. Farber, "The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding," 94 *Mich. L. Rev.* 615, 625 (1995). Laurence Tribe claimed that the justices are "close . . . to something radically different from the modern understanding of the Constitution." *See* Greenhouse, *supra* note 24.

26. Greenhouse, *supra* note 24.

27. Steven G. Calabresi, "A Government of Limited and Enumerated Powers: In Defense of *United States v. Lopez,*" 94 *Mich. L. Rev.* 752, 752 (1995).

28. Michael S. Greve, *Real Federalism: Why It Matters, How It Could Happen* 9 (1999).

29. *See, e.g.,* Whittington, *supra* note 6. Greve, *supra* note 7, also is circumspect in his evaluation of the Court.

30. *The Federalist No. 17,* at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

31. *Id.* at 118.

32. Turner, *supra* note 15 at 22–23.

33. *Id.* at 32.

34. Tocqueville, *supra* note 12, at 318.

35. Edward L. Rubin and Malcolm Feeley, "Federalism: Some Notes on a National Neurosis," 41 *UCLA L. Rev.* 903, 944 (1994).

36. Christopher Lasch, *The True and Only Heaven: Progress and the Critics* 447 (1991).

37. E. Digby Baltzell, *Puritan Boston and Quaker Philadelphia* (1979).

Chapter Two

1. *The Federalist No. 44,* at 286 (James Madison) (Clinton Rossiter ed., 1961).

2. *The Federalist No. 46,* at 298 (James Madison) (Clinton Rossiter ed., 1961).

3. *Id.* at 299.

4. *The Federalist No. 17,* at 119 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

5. For a revealing description, *see* Gerald F. Geib, "You Can Get Away from Washington—But Not Government," *Wall Street Journal* (Wednesday, June 21, 1995), at 1.

6. 514 U.S. 549 (1995).

7. *United States v. Morrison,* 529 U.S. 598 (2000).

8. 514 U.S. at 559.

9. *Id.* at 564.

10. *Id.*

11. 379 U.S. 294 (1964).

12. *See generally* Jack M. Bloom, *Class, Race, and the Civil Rights Movement* (1987). *See also* Gary Becker, *The Economics of Discrimination* 6, 19 (2d ed., 1971); Joan Hoffman, *Racial Discrimination and Economic Development* 4–18 (1975).

13. 514 U.S. at 565.

14. *Carter v. Carter Coal Co.,* 298 U.S. 238, 307–10 (1936).

15. *Hammer v. Dagenhart,* 247 U.S. 251, 272 (1918).

16. *Wickard v. Filburn,* 317 U.S. 111, 128 (1942).

17. 514 U.S. at 562, 563. The basic logic of *Lopez* began to devour the first of these provisos when the Court invalidated the Violence against Women Act. That act had been based on findings that tended to demonstrate a link between violence and diminished productivity, but the Court replied that this sort of link would "completely obliterate the . . . distinction between national and local authority. . . ." 120 S.Ct. 1740, 1752 (2000). Strikingly, however, the Court also signals that, with or without congressional findings, it is free in the future to approve regulation of "noneconomic activity" on the basis of aggregated effects on commerce. *Id.* at 1751. Thus in *Morrison,* even as the logic of *Lopez* destroys its own

limitations, the Court affirms the validity of the competing principle that may prevail in a future case.

18. *See, e.g.*, William Van Alstyne, "The Second Death of Federalism," 83 *Mich. L. Rev.* 1709 (1985).

19. *See New York v. United States,* 505 U.S. 144, 168–69 (1992).

20. Federalism, of course, is what creates complicated lines of accountability. If states were fully subordinate to the national government, it would be clear where responsibility lay. Moreover, within the complex layers of state and local governments it is not uncommon for lines of accountability to be confusing. For one interesting example, *see* Franklin Zimring and Gordon Hawkins, *The Scale of Imprisonment* 211–12 (1991). Nevertheless, an influential scholar argues that political accountability is an important value of federalism. D. Bruce LaPierre, "Political Accountability in the National Political Process: The Alternative to Judicial Review of Federalism Issues," 80 *Nw. U. L. Rev.* 577, 639–65 (1985).

21. Already, however, the Court has passed up an opportunity to begin any such process. *United States v. Robertson,* 514 U.S. 669 (1995).

22. 505 U.S. 144, 201 (1992) (White, J., concurring in part and dissenting in part) ("... the Court does not intend to cut a wide swath through our recent Tenth Amendment precedents. . . .").

23. *Reno v. Condon,* 528 U.S. 141 (2000); *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265 (1995); *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993); *Dennis v. Higgins,* 498 U.S. 439 (1991); *South Carolina v. Barker,* 485 U.S. 505 (1988); *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd. of Mississippi,* 474 U.S. 409 (1986); *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985); *EEOC v. Wyoming,* 460 U.S. 226 (1983); *FERC v. Mississippi,* 456 U.S. 742 (1982); *New England Power Co. v. New Hampshire,* 455 U.S. 331 (1982); *United Transportation Union v. Long Island Railroad Co.,* 455 U.S. 678 (1982); *Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc.*, 452 U.S. 264 (1981); *Fry v. United States,* 421 U.S. 542 (1975).

24. In the past twenty years four cases have approved taxing and spending statutes: *New York v. United States,* 505 U.S. 144 (1992); *South Dakota v. Dole,* 483 U.S. 203 (1987); *Fullilove v. Klutznick,* 448 U.S. 448 (1980); *Harris v. McRae,* 448 U.S. 297 (1980).

25. 491 U.S. 397 (1989).

26. 505 U.S. 377 (1992).

27. 514 U.S. 334, 371 (Scalia, J., dissenting) (1995).

28. 505 U.S. 833 (1992).

29. *Stenberg v. Carhart,* 530 U.S. 914 (2000).

30. 488 U.S. 469 (1989); 505 U.S. 377 (1992).

31. 526 U.S. 489 (1998).

32. 394 U.S. 618 (1969).

33. 527 U.S. 41 (1999).

34. 121 S. Ct. 525 (2000).

35. *See Missouri v. Jenkins,* 515 U.S. 70 (1995); *Freeman v. Pitts,* 503 U.S. 467 (1992); *Board of Education of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237 (1991). The word "disestablish" was approved in the first *Missouri v. Jenkins,* 495 U.S. 33, 55 (1990). These cases are discussed in chapter 3.

36. A decentralization proposal was derailed in Colorado and elsewhere by just such groups. *See* Lynn Gorham, "Adkins Yanks Resolution on States' Parley off Table," *Capitol Reporter,* May 8, 1995, at 2.

37. The Unfunded Mandate Act exempts some of the most important areas, such as civil rights (including protections for the disabled) and social security. Moreover, in areas that are not exempted, Congress is still free to impose unfunded mandates by a majority vote. The effect of the law is only to require that unfunded mandates be identified and debated. *See* Louis Fisher, "The 'Contract with America': What It Really Means," 42 *N.Y. Rev.* 20 (1995).

38. *See* Whittington, *supra* chapter 1, note 6, at 483.

Chapter Three

1. *The Federalist No. 46,* at 299 (James Madison) (Clinton Rossiter ed., 1961).

2. Akhil Reed Amar, "Of Sovereignty and Federalism," 96 *Yale L. J.* 1425, 1436 (1987).

3. *Id.* at 1500.

4. For some of the reasons, *see* Robert F. Nagel, "Federalism as a Fundamental Value: *National League of Cities* in Perspective," *Supreme Court Review* 81 (1981).

5. *National League of Cities v. Usery,* 426 U.S. 833, 875 (Brennan, J., dissenting) (1976).

6. *Id.* at 868.

7. *The Federalist No. 45,* at 292 (James Madison) (Clinton Rossiter ed., 1961).

8. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 552 (1985).

9. *South Dakota v. Dole,* 483 U.S. 203 (1987).

10. *South Carolina v. Baker,* 485 U.S. 505 (1988).

11. *Id.* at 513.

12. *Gregory v. Ashcroft,* 501 U.S. 452 (1991).

13. *Id.* at 461.

14. *New York v. United States,* 505 U.S. 144 (1992).

15. *Id.* at 210.

16. *Id.* at 201.

17. *Id.* at 175.

18. *Id.* at 160.

19. 521 U.S. 898 (1997).

20. 527 U.S. 706 (1999).

21. *Id.* at 715. *See also Kimel v. Florida Bd. of Regents,* 528 U.S. 62 (2000).

22. 527 U.S. 666 (1999).

23. *Id.* at 690.

24. For an argument that constitutional rights are "vanishing," *see* Erwin Chemerinsky, "The Vanishing Constitution," 103 *Harv. L. Rev.* 1027 (1989). For a suggestion that progressives turn to politics, *see* Robin West, "Progressive and Conservative Constitutionalism," 88 *Mich. L. Rev.* 641, 713–21 (1990).

25. 495 U.S. 33 (1990).

26. *Id.* at 55.

27. *Id.* at 53.

28. *Spallone v. United States,* 493 U.S. 265 (1990).

29. *Id.* at 266.

30. *Board of Education of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237, 248 (1991).

31. *Id.* at 238.

32. *Id.* at 250.

33. *Freeman v. Pitts,* 503 U.S. 467 (1991).

34. *Id.* at 483.

35. *Id.* at 487.

36. *Id.* at 491.

37. *See, e.g.,* Rogers M. Smith, "The Inherent Deceptiveness of Constitutional Discourse: A Diagnosis and Prescription," in Ian Shapiro and Robert Adams (eds.), *Integrity and Conscience* 218 (NOMOS 40, 1998).

38. This aspect of *New York* was recently reaffirmed in *Reno v. Condon,* 528 U.S. 141 (2000).

39. Even sophisticated commentators call this "anarchy." *See* Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation," 110 *Harv. L. Rev.* 1359, 1379 (1997).

40. *City of Boerne v. Flores,* 521 U.S. 507 (1997); *Dickerson v. United States,* 530 U.S. 428 (2000).

41. *See* chapter 2.

42. *United States v. Lopez,* 514 U.S. 549 (1995) (guns); *Davis v. Monroe County Board of Education,* 526 U.S. 629, 654 (Kennedy, J., dissenting) (1999) (sexual harassment).

Chapter Four

1. Charles Fried, "Revolution?" 109 *Harv. L. Rev.* 13, 14–15 (1995).

2. For an example in the literature on federalism, *see* David L. Shapiro, *Federalism: A Dialogue* (1995).

3. 4 *The Papers of Alexander Hamilton* 211 (Harold C. Syrett ed., 1962). For various interpretations of what he meant in calling for the elimination of state sovereignty, *see id.* at 178, 187, 195, 202, and volume 5 at 135, 138–39.

4. Edward L. Rubin and Malcolm Feeley, "Federalism: Some Notes on a National Neurosis," 41 *UCLA L. Rev.* 903, 908–9 (1994) (arguing that states could be replaced by "other subdivisions of the nation" but that the change would be disruptive).

5. *The Federalist No. 39* (James Madison) (Clinton Rossiter, ed., 1961).

6. 514 U.S. 779, 838 (Kennedy, J., concurring) (1995). For an example of academic endorsement *see* Daniel A. Farber, "The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding," 94 *Mich. L. Rev.* 615, 639 (1995).

7. *The Federalist No. 39,* at 244 (James Madison) (Clinton Rossiter ed., 1961).

8. U.S. Const. Art. V states that "Congress . . . shall propose Amendments to this Constitution, or, . . . shall call a Convention for proposing Amendments. . . ."

9. Bruce Ackerman, *We the People: Foundations* (1991).

10. *See, e.g.,* Arthur J. Goldberg, "The Proposed Constitutional Convention,"

11 *Hast. Const. L. Q.* 1 (1983); Laurence H. Tribe, "Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment," 10 *Pac. L. J.* 627 (1979).

11. For a straightforward acknowledgment that interpretation has been used as a substitute for amendment, *see* Cass R. Sunstein, "Making Amends," *New Republic,* March 3, 1997, at 38.

12. *See* Akhil Reed Amar, "A Constitutional Accident Waiting to Happen," 12 *Const. Commentary* 143 (1995); William N. Eskridge, Jr., "The One Senator, One Vote Clause," *id.* at 159; Suzanna Sherry, "Our Unconstitutional Senate," *id.* at 213.

13. *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 804 (1995).

14. *Id.* at 838.

15. *Marbury v. Madison,* 1 Cranch (5 U.S.) 137 (1803).

16. *See* Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* 126 (1996).

17. *See* Robert F. Nagel, *Judicial Power and American Character: Censoring Ourselves in an Anxious Age* 61–80 (1994).

18. 514 U.S. 549 (1995).

19. *See, e.g., id.* at 1651 (Souter, J., dissenting); Farber, *supra* note 6, at 642.

20. *See* Farber, *supra* note 6.

21. *Id.* at 627–28.

22. *Id.* at 638–39.

23. *Id.* at 644.

24. *Id.* at 640–42.

25. For a balanced discussion of the competing arguments, *see* Shapiro, *supra* note 2, at 14–26, 58–63.

26. Farber, *supra* note 6, at 639.

27. *See* Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution* 26 (1990). In contrast, the Constitution itself in places refers to the United States with the plural "them." U.S. Const. Art. III, Sec. 3.

28. U.S. Const. Art. V.

29. *See* Farber, *supra* note 6, at 628–35.

30. *Id.* at 631.

31. Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980).

32. *Id.; see also* Rubin and Feeley, *supra* note 4.

33. *See, e.g.,* Farber, *supra* note 6, at 643.

34. Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

35. *Id.* at 625, 638; *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 803 (1995).

36. Antonin Scalia, "The Two Faces of Federalism," 6 *Harv. J. L. & Pub. Pol.* 19, 22 (1982); Fried, *supra* note 1, at 13; *see also* Steven G. Calabresi, " 'A Government of Limited and Enumerated Powers': In Defense of *United States v. Lopez,*" 94 *Mich. L. Rev.* 752, 780 (1995).

37. *United States v. Lopez,* 514 U.S. 549, 584 (Thomas, J. concurring) (1995); Richard A. Epstein, "The Proper Scope of the Commerce Power," 73 *Va. L. Rev.* 1387 (1987); *see also* Calabresi, *supra* note 36.

38. *See, e.g.,* Rubin and Feeley, *supra* note 4, at 944–52.

39. U.S. Const. Art. I, Sec. 4.

40. *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779 (1995).

41. 514 U.S. at 549.

42. *Id.* at 1642–51. Judge Thomas's concurring opinion is supported by noted scholars. *See* Raoul Berger, *Federalism: The Founders' Design* (1987); Epstein, *supra* note 37.

43. 514 U.S. at 602.

44. Epstein, *supra* note 37, at 1421–32.

45. 517 U.S. 44 (1996).

46. *Ex parte Young,* 209 U.S. 123 (1908).

47. Henry Paul Monaghan, "Comment: The Sovereign Immunity 'Exception,' " 110 *Harv. L. Rev.* 102, 132 (1996).

48. *Alden v. Maine,* 527 U.S. 706 (1999).

49. Gary Lawson, "The Rise and Rise of the Administrative State," 107 *Harv. L. Rev.* 1231, 1231 (1994).

50. *Id.* at 1254.

51. *Id.* at 1232.

52. H. Jefferson Powell, "The Oldest Question of Constitutional Law," 79 *Va. L. Rev.* 633 (1993); *New York v. United States,* 505 U.S. 144 (1992).

53. Powell, *supra* note 52, at 678–81.

54. *Id.* at 677.

55. *Id.* at 687.

56. *Id.* at 689.

57. Deborah J. Merritt, "Three Faces of Federalism: Finding a Formula for the Future," 47 *Vand. L. Rev.* 1563, 1576–77, 1584 (1994); *see also* Robert F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* 76 (1989); Powell, *supra* note 52, at 687.

58. *See, e.g.,* Deborah J. Merritt, "Commerce!" 94 *Mich. L. Rev.* 674 (1995); *cf.* Monaghan, *supra* note 47, at 121; Nagel, *supra* note 57, at 81–83.

59. *See* Epstein, *supra* note 37, and Calabresi, *supra* note 36, for exceptions.

60. Merritt, *supra* note 58, at 750.

61. Lynn A. Baker, "Conditional Federal Spending after *Lopez*," 95 *Colum. L. Rev.* 1911, 1989 (1995).

62. Robert H. Bork, *Slouching towards Gomorrah: Modern Liberalism and American Decline* 117 (1996).

63. John Choon Yoo, "Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts," 84 *Cal. L. Rev.* 1121 (1996).

64. Stephen Gardbaum, "Rethinking Constitutional Federalism," 74 *Tex. L. Rev.* 795, 799 (1996).

65. One scholar does argue that federalism is more important than other values protected by the Court: Calabresi, *supra* note 36, at 756–79. Compare *id.* with Michael W. McConnell, "Federalism: Evaluating the Founders' Design," 54 *U. Chi. L. Rev.* 1484 (1987).

66. Even one of the most forceful modern antifederalists sees this as an advantage because it ensures that national functions will be protected. Calabresi, *supra* note 36, at 800, 806–10.

67. For one such proposal, *see* William J. Quirk and R. Randall Birdwell, *Judicial Dictatorship* 52 (1995).

68. *See* Wayne D. Moore, "Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions," 11 *Const. Comm.* 315 (1994).

69. Larry Kramer, "Understanding Federalism," 47 *Vand. L. Rev.* 1485, 1519 (1994).

70. *See* Nagel, *supra* note 17.

71. John J. Dinan, *Keeping the People's Liberties: Legislators, Citizens, and Judges as Guardians of Rights* (1998).

72. *See* Kramer, *supra* note 69.

73. *See* Wilfred M. McClay, "The Soul of Man under Federalism," *First Things* 12 (June/July 1996).

Chapter Five

1. 514 U.S. 779 (1995).

2. Charles Fried, "Foreward: Revolution?" 109 *Harv. L. Rev.* 13–15 (1995).

3. In *U.S. v. Nixon* the Court referred to executive privilege as "fundamental to the operation of government and inextricably rooted in separation of powers under the Constitution" and evaluated that interest "in light of our historic commitment to the rule of law." 418 U.S. 683, 708 (1974). The plurality opinion in *Planned Parenthood v. Casey* purported to protect "the character of a Nation of people who aspire to live according to the rule of law." 505 U.S. 833, 868 (1992).

4. Professor Sullivan describes the two major opinions as ending in an intellectual standoff. Kathleen M. Sullivan, "Duelling Sovereignties," 109 *Harv. L. Rev.* 78, 80 (1995).

5. "The question . . . —whether the states preceded the creation of the union, or vice versa—like the riddle of the chicken and the egg, may be entertaining . . . but, in the end, not especially relevant. The important question is the nature of the federal union that emerged when the Constitution was ratified and that has developed since that time." David L. Shapiro, *Federalism: A Dialogue* 58 (1995).

6. For some of these reasons, *see* Farber, *supra* chapter 4, note 6, at 620. For others *see* chapter 2.

7. *See generally,* Rubin and Feeley, *supra* chapter 4, note 4, at 944–97.

8. *New York v. United States,* 505 U.S. 144 (1992) (immunity); *United States v. Lopez,* 514 U.S. 549 (1995) (commerce power).

9. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104–4, 109 Stat. 48 (1995).

10. For examples of the Court's refusal to extend the doctrine of *National League of Cities v. Usery, see EEOC v. Wyoming,* 460 U.S. 226 (1983); *Federal Energy Regulatory Commission v. Mississippi,* 458 U.S. 742 (1982); *United Transportation Union v. Long Island Railroad,* 455 U.S. 678 (1982). On the limited significance of *New York v. United States, see* chapter 3.

11. *United States Term Limits, Inc. v. Thornton,* 514 U.S. 779, 896–98 (Thomas, J., dissenting).

12. *United States v. Lopez,* 514 U.S. 549, 602 (Thomas, J., concurring) (arguing for abandonment of the substantial effects test).

13. For another, similar assessment, *see* Sullivan, *supra* note 4.

14. Immediately after ratification, a few states imposed qualifications, including a property qualification and several residency qualifications. *United States Term Limits, Inc. v. Thornton,* 514 U.S. at 905 (Thomas, J., dissenting).

15. *Id.* at 837.

16. *Id.* at 841 (Kennedy, J., concurring).

17. *See* Sullivan, *supra* note 4, at 98.

18. 426 U.S. at 858 (Brennan, J., dissenting). *See* Laurence Tribe, "Unraveling *National League of Cities:* The New Federalism and Affirmative Rights to Essential Government Services," 90 *Harv. L. Rev.* 1065 (1977); Frank Michelman, "States' Rights and States' Roles: Permutations of 'Sovereignty' in *National League of Cities v. Usery,*" 86 *Yale L. J.* 1165 (1977).

19. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985).

20. "The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared." *McCulloch v. Maryland,* 17 U.S. 316, 436 (1819).

21. *See, e.g., West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186 (1994) (opinion of the Court by Stevens, which was joined by O'Connor, Kennedy, Souter, and Ginsburg); *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.,* 511 U.S. 383 (1994) (opinion of the Court by Kennedy, joined *inter alia* by Stevens and Ginsburg, with O'Connor concurring). Justice Stevens, the author of the majority opinion in *Term Limits* has had a long history of aggressively enforcing "dormant" commerce clause principles. *See South-Central Timber Development v. Winnicke,* 467 U.S. 82 (1984); *Kassel v. Consolidated Freightways Corp.,* 450 U.S. 662 (1981); *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978).

22. *See, e.g., Kassel v. Consolidated Freightways Corp.,* 450 U.S. 662 (1981).

23. *See* Rubin and Feeley, *supra* chapter 4, note 4, at 929.

24. *See* Amar, *supra* chap. 3, note 2, at 1436; Robert F. Nagel, "Federalism as a Fundamental Value: *National League of Cities* in Perspective," *S. Ct. Rev.* 99–100 (1981).

25. 514 U.S. at 803.

26. *Id.*

27. It is true that Article VI, paragraph 3, requires that senators and representatives take an oath "to support the Constitution." This is no practical limitation; moreover, even conceptually it is a serious limitation only if there is agreement that state interests cannot help define what "the Constitution" means.

28. 514 U.S. at 804.

29. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985).

30. 514 U.S. at 781.

31. Bruce Ackerman, *We the People: Foundations* (1991).

32. Robin West, *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment* 36 (1994).

33. *See* "Constitutional Stupidities: A Symposium," 12 *Const. Comm.* 139 (1995).

34. Jesse Choper, "The Scope of National Power vis-à-vis the States: The Dispensability of Judicial Review," 86 *Yale L. J.* 1552 (1977).

35. Rubin and Feeley, *supra* chapter 4, note 4, at 909.

36. *Id.*

37. 514 U.S. at 924. Felix Morley made the general point that in an unchecked national democracy "the top echelons begin to regard themselves as a managerial elite, entitled to rule the rest of the county. . . ." *Freedom and Federalism* 28 (Liberty Edition, 1981). "The centralizing process," he said, "is difficult to reverse because of the vested interest in power. . . ." *Id.* at 5.

38. Shapiro, *supra* note 5, at 46.

39. That is, it raises the question whether self-described "progressives" are progressive. *See generally,* Robert F. Nagel, "Progress and Constitutionalism," 94 *Mich. L. Rev.* 201 (1996).

40. 514 U.S. at 783.

41. *Id.* at 838.

42. Morley, *supra* note 37, at 42–43.

43. 514 U.S. at 879. It might be added to Thomas's argument that cynicism and withdrawal, which can characterize politics where an elite is entrenched, might ultimately undercut the social conditions that support political participation. *See* Morley, *supra* note 37, at 27 (developing the distinction between social and political democracy). To the extent this is true, term limits can be seen as protecting democracy at both the state and national levels.

44. Rubin and Feeley, *supra* chapter 4, note 4, at 945.

45. 514 U.S. at 788–98.

46. *Id.* at 916–26. The dissent is not explicit on this latter point, but at a minimum it makes clear that Congress could legislate against disqualifications that worked to prevent any elections at all. *Id.* at 897. The majority is entirely certain that the whole issue cannot be decided by legislatures, whether state or national. *Id.* at 837.

47. *See generally* Robert F. Nagel, "Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine," 56 *U. Chi. L. Rev.* 643 (1989).

Chapter Six

1. 521 U.S. 507 (1997).

2. The statute also required demonstration that the government had chosen the least restrictive method of achieving this interest.

3. 494 U.S. 872 (1990).

4. 521 U.S. at 515.

5. *Id.* at 536.

6. *Id.* at 535.

7. *See, e.g., Powell v. McCormack,* 395 U.S. 486 (1969) (political questions); *United States v. Lopez,* 514 U.S. 549 (1995) (commerce clause); *INS v. Chadha,* 462

U.S. 919 (1983) (separation of powers); *New York v. United States,* 505 U.S. 144 (1992) (Tenth Amendment).

8. *Cooper v. Aaron* 358 U.S. 1 (1958); *Planned Parenthood v. Casey* 505 U.S. 833 (1992).

9. *See, e.g., Dickerson v. United States,* 530 U.S. 428 (2000); *United States v. Morrison,* 529 U.S. 598 (2000); *Kimel v. Florida Bd. of Regents,* 528 U.S. 62 (2000); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,* 527 U.S. 666 (1999).

10. Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation," 110 *Harv. L. Rev.* 1359, 1362 (1997).

11. *Id.* at 1369.

12. *Id.* at 1370.

13. 521 U.S. at 535–36.

14. Alexander and Schauer, *supra* note 10, at 1370.

15. *Id.* at 1371.

16. *Id.* at 1377.

17. *Id.*

18. *Id.* at 1379.

19. *Id.* Areas affected have included voting rights, equal protection, state sovereignty, the commerce power, and separation of powers. For some useful background material, *see* Louis Fisher and Neal Devins, *Political Dynamics of Constitutional Law* (2d ed., 1996).

20. The classic study is Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as National Policy-Maker," 6 *J. Pub. L.* 279 (1957).

21. Alexander and Schauer, *supra* note 10, at 1377, n. 80.

22. *Id.* at 1380. *See also id.* at 1376, 1377, n. 80.

23. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993).

24. Alexander and Schauer, *supra* note 10, at 1377, n. 80 (claiming that adherence to precedent makes courts relatively unlikely to alter interpretations) and at 1386 (characterizing judicial alterations as corrections).

25. *See* Robert F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* 7–12 (1989) chap. 2.

26. *See* chapter 3, *supra.*

27. *See* chapter 2, *supra.*

28. *See* Steven D. Smith, "Free Exercise Doctrine and the Discourse of Disrespect," 65 *U. Colo. L. Rev.* 519, 529–34 (1994).

29. *See, e.g.,* Steven D. Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," 140 *U. Pa. L. Rev.* 149, 150 (1991).

30. *See* Robert F. Nagel, *Judicial Power and American Character: Censoring Ourselves in an Anxious Age* 62–64, 71–80 (1994).

31. In *Casey,* three justices said that the Court's task in *Roe v. Wade* had been to call "the contending sides of a national controversy to end their national division." 505 U.S. 833, 867. Alexander and Schauer say they are opposed to disagreement about opinions that "are plainly 'good law,' in the sense of an overwhelming professional consensus. . . ." Alexander and Schauer, *supra* note 10, at 1386. *See also id.* at 1379, 1382–83.

32. *E.g., Katzenbach v. Morgan,* 384 U.S. 641 (1966).

33. Indeed, the logic of *Flores* bears an uncanny resemblance to the logic of *Romer v. Evans,* 517 U.S. 620 (1996), where the Court found that the public's purpose in enacting the anti–gay rights initiative called Amendment 2 was illegitimate animosity. In *Romer* the Court inferred this motivation from what it viewed as the otherwise inexplicable scope of the amendment; similarly, in *Flores* the Court found RFRA to be so out of proportion to remedial objects that it could only be explained as "an attempt [at creating] a substantive change in constitutional protections." 521 U.S. at 509. In each case, the Court inferred from over-breadth a conclusion about impermissible motivation: animosity toward gays (in one) and disagreement with the Court (in the other). Subsequent cases emphasizing proportionality as a test of congressional power under section 5 include *United States v. Morrison,* 120 S. Ct. 1740 (2000); *Kimel v. Florida Bd. of Regents,* 528 U.S. 62 (2000); and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,* 527 U.S. 666 (1999). Litigators must now ponder what other civil rights statutes might have been intended to or designed to impose "substantive changes" in the level of constitutional protections established by the Court.

34. 521 U.S. at 532.

35. *Id. See* Nagel, *supra* note 30, at 71–77.

36. *See* Nagel, *supra* note 30, at 79–80.

37. *See* Nagel, *supra* note 25, at 17–26.

Chapter Seven

1. I am referring in this chapter to those sections authored by Justices O'Connor, Kennedy, and Souter, and joined by Justices Blackmun and Stevens. 505 U.S. 833, 843–902 (1992).

2. Emphasis added.

3. 505 U.S. at 868.

4. For an especially elegant example, *see* James Boyd White, *Acts of Hope: Creating Authority in Literature, Law, and Politics,* 153–83 (1994).

5. 505 U.S. at 998–1000 (Scalia, J., concurring in the judgment in part and dissenting in part).

6. For a full account, *see* Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 3, *et seq.* (Richard Sterner and Arnold Rose eds., 1944).

7. 505 U.S. at 868.

8. *See, e.g.,* White, *supra* note 4; and John Hart Ely, *On Constitutional Ground* 304–6 (1996).

9. *See, e.g.*, Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* 305–6 (1996); Robert H. Wiebe, *The Segmented Society: An Introduction to the Meaning of America* 149–50 (1975); Myrdal, *supra* note 6, at 3.

10. In the legislative debates over the statute at issue in *Casey,* proponents repeatedly argued that their bill was consistent with judicial precedent and would be upheld by the Court. *See, e.g., 77 Legislative Journal, Commonwealth of Pennsylvania* 2274 (December 8, 1981).

11. Robert A. Burt, "Constitutional Law and the Teaching of the Parables," 93 *Yale L. J.* 455, 456 (1984).

12. *Id.* at 465.

13. *Id.* at 465, 469.

14. *Id.* at 486, 487.

15. 358 U.S. 1, 4 (1958).

16. *Id.* at 18–20.

17. For an account, *see* Taylor Branch, *Parting the Waters: America in the King Years, 1954–63* 224 (1988).

18. *See, e.g.,* the symposium "The End of Democracy? The Judicial Usurpation of Politics," *First Things* 18–42 (November 1996).

19. *See, e.g.,* Alexander and Schauer, *supra* chapter 6, note 10, at 1362 (arguing for judicial supremacy "without qualification" on the basis of the need to stabilize constitutional meaning and labeling the chief alternative "anarchy").

20. How odd it is that in a free society Justice Scalia thought it necessary to describe abortion protestors on both sides of the issue as "good people, not lawless ones. . . ." 505 U.S. at 999.

Chapter Eight

1. 517 U.S. 620, 632 (1996).

2. *Id.*

3. *Id.*

4. *Id.* at 633.

5. *Id.* at 634, 635.

6. *Id.* at 635.

7. *See* Lee C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* 11 (1986).

8. *Id.* at 186.

9. 517 U.S. at 635.

10. The Court identified two purposes as worth discussion: protecting freedom of association and conserving resources "to fight discrimination against other groups." *Id.* It ignored the state's claim that Amendment 2 would deter factionalism and support "stability and respect for government. . . ." Brief for Petitioners at n. 34 (quoting Harvey Mansfield).

11. *Bowers v. Hardwick,* 478 U.S. 186 (1986).

12. Richard John Neuhaus, "A Strange New Regime: The Naked Public Square and the Passing of the American Constitutional Order," 572 *Heritage Lectures* 3 (1996).

13. *See* Steven Smith, "Rationalizing the Constitution," 67 *U. Colo. L. Rev.* 597 (1996).

14. Jane S. Schacter, "*Romer v. Evans* and Democracy's Domain," 50 *Vand. L. Rev.* 361, 402–3 (1997).

15. William N. Eskridge, Jr., "Democracy and Kulturkampf," 50 *Vand. L. Rev.* 419, 435 (1997).

16. Daniel Farber and Suzanna Sherry, "The Pariah Principle," 13 *Const. Comm.* 257 (1996).

17. Cass R. Sunstein, "Foreword: Leaving Things Undecided," 110 *Harv. L. Rev.* 4, 62–63 (1996).

18. Akhil Reed Amar, "Attainder and Amendment 2: *Romer*'s Rightness," 95 *Mich. L. Rev.* 203 (1996).

19. For an exception, *see* Andrew Koppelman, "*Romer v. Evans* and Invidious Intent," 6 *W. & M. Bill of Rights J.* 89 (1997).

20. For a fuller account, *see* Nagel, *supra* chapter 6, note 30, at 125–26.

21. Respondents' Brief, U.S. S.Ct. *See also* Plaintiff-Appellees' Answer Brief, Colorado S.Ct., 5, 5 n.3, 43.

22. 517 U.S. at 631.

23. For an insider's account, *see* Stephen Bransford, *Gay Politics versus Colorado and America: The Inside Story of Amendment 2* (1994).

24. *Id.* at 145.

25. CFV "tabloid" at 6–8.

26. On the tendency of leader-activists to take more extreme positions than their followers, *see* James Davison Hunter, *Culture Wars: The Struggle to Define America* 160–61 (1991).

27. By way of contrast, consider the claim that it was legitimate for voters to intend to seize "the expressive machinery of the state from gays" in order to propound the view that homosexual conduct "is intrinsically evil and corrupting. . . ." Koppelman, *supra* note 19, at 116.

28. *See, e.g., Davis v. Beason,* 133 U.S. 333 (1890); *Korematon v. United States,* 323 U.S. 214 (1944); *Plessy v. Ferguson,* 163 U.S. 537 (1896).

29. They acknowledged this as part of their argument that Amendment 2 actually contradicted "the moral views of the people of Colorado." Plaintiff-Appellees' Brief, *supra* note 21, at 46–47.

30. *See* Paul F. Campos, *Jurismania: The Madness of American Law* (1998).

31. *See* Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (1991).

32. 384 U.S. 436, 465 (1966).

33. 376 U.S. 254, 270 (1964).

34. *Planned Parenthood v. Casey*, 505 U.S. 833, 852, 867 (1992) (plurality opinion).

35. Ruth Bader Ginsburg, "Sexual Equality under the Fourteenth and Equal Rights Amendments," *Wash. U. L. Q.* 161, 161–65 (1979) (commenting on *Reed v. Reed,* 404 U.S. 71 [1971]).

36. Jane G. Schacter argues that although *Romer* does not mandate inclusion of homosexuals into civic life, it does implicate larger ideas "about caste and antigay animus" that, in turn, have implications for shaping "social norms and cultural meanings." Schacter, *supra* note 14, at 382–83, 403. She concludes that "*Romer* can powerfully enable, but cannot itself deliver, meaningful democratic equality for gay men and lesbians." *Id.* at 410. William N. Eskridge, Jr., sees in *Romer* some potential for the Court to discourage "the political process from focusing on sexual orientation as an obsessional classification." Eskridge, *supra* note 15, at 443. Cass R. Sunstein sees the possibility that courts will build from *Romer* to strike down on a case-by-case basis a variety of "irrational" discriminations against gays, and he even acknowledges that the decision could serve as

a basis for an attack on prohibitions against same-sex marriage laws. Sunstein, *supra* note 17, at 96–98.

37. Sunstein, *supra* note 17, at 96–98.

38. Schacter, *supra* note 14, at 410, 402–03.

39. Patricia A. Cain, "Litigating for Lesbian and Gay Rights: A Legal History," 79 *Va. L. Rev.* 1511, 1640 (1993).

40. Eskridge, *supra* note 15, at 488.

41. William N. Eskridge, Jr., "A Social Constructionist Critique of Posner's Sex and Reason: Steps toward a Gaylegal Agenda," 102 *Yale L. J.* 333, 385 (1992). In the course of a later argument for "reconstructing" marriage in the United States, Eskridge relies on institutions and practices found in ancient Egypt, Mesopotamia, classical Greece, pre-Christian Rome, China during the Zhou dynasty (1122–256 B.C.), and Latin America in the 1500s—not to mention Africa, Vietnam, India, Burma, Korea, and Nepal. William N. Eskridge, Jr., "A History of Same-Sex Marriage," 79 *Va. L. Rev.* 1419 (1993). Whatever else all this exotic erudition might accomplish, it would not, I suspect, reassure voters anxious at the possibility that gay rights "militants" might have in mind radical changes for their way of life.

42. Eskridge, *supra* note 41 (102 *Yale*), at 378–80, 384.

43. Cain, *supra* note 39, at 1587.

44. Cathy A. Harris, "Outing Privacy Litigation: Toward a Contextual Strategy for Lesbian and Gay Rights," 65 *Geo. Wash. L. Rev.* 248 (1997); Odeana R. Neal, "The Limits of Legal Discourse: Learning from the Civil Rights Movement," 40 *N.Y. L. Sch. L. Rev.* 679 (1996).

45. Eskridge, *supra* note 41 (102 *Yale*), at 384.

46. *Id.* at 385.

47. The Court said that the state's claim that Amendment 2 was intended only to deny homosexuals special rights was "implausible." 517 U.S. at 626. It also doubted the Colorado Supreme Court's conclusion that the amendment was not intended to affect antidiscrimination laws protecting nonsuspect classes. 517 U.S. at 630–31.

48. *See* Hunter, *supra* note 26.

49. For an account of the NAACP's strategic "*Plessy*-doesn't-matter argument," *see* Richard Kluger, *Simple Justice: The History of "Brown v. Board of Education" and Black America's Struggle for Equality* 564–69 (1976).

50. For an account of Justice Ginsburg's unapologetic argument for indirection or, perhaps, disingenuousness in the sex discrimination cases, *see* Robert F. Nagel, "Is 'Rationality Review' Rational?" 116 *Public Interest* 75, 82–85 (1994).

51. *See* note 36 *supra.*

52. Eskridge, *supra* note 41 (102 *Yale*), at 386.

53. Alexander M. Bickel went as far as to trace excesses of the Nixon presidency to the heedless moralism of the Warren Court. Alexander M. Bickel, *The Morality of Consent* 120–23 (1975).

54. *United Steel Workers of America v. Weber,* 443 U.S. 193 (1979).

55. *E.g.,* Eskridge, *supra* note 41 (102 *Yale*), at 386 (urging that a radical gay/lesbian agenda aim at having its concerns addressed "now"); Eskridge, *supra* note

41 (79 *Va. L. Rev.*), at 1504 (urging that the exclusion of homosexuals from marriage be ended "abruptly").

56. Christopher Lasch, *The True and Only Heaven: Progress and Its Critics* 37, 447–67 (1991).

57. On insatiability, *see id.* at 52; Emile Durkheim, *Suicide,* chapter 5 (1897).

58. *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997).

Chapter Nine

1. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 *Harv. L. Rev.* 193, 198 (1890). For more recent, related themes, *see* Ruth Gavison, "Privacy and the Limits of Law," 89 *Yale L. J.* 421 (1980); Charles Fried, "Privacy," 77 *Yale L. J.* 475 (1968).

2. *See, e.g., Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997); *Hustler Magazine v. Falwell,* 485 U.S. 46 (1988); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975); *Time, Inc. v. Hill,* 385 U.S. 374 (1967). The occasional small effort to confine the wild race for publication serves mainly to emphasize how far we have gone as a society in favoring disclosure over privacy. How, for example, did it become an accepted practice for police to invite along private television crews to record forced entries and arrests? *See Wilson v. Layne,* 526 U.S. 603 (1999). (For an account of how in general the Fourth Amendment has come to stand as a bureaucratic process that authorizes invasions of privacy with insufficient regard for the nature of the information at issue, *see* Akhil Reed Amar, "Fourth Amendment First Principles," 107 *Harv. L. Rev.* 757, 761–63, 800–807 [1994].) Or how did it become constitutionally problematic for states to protect those seeking medical treatment from annoyance and distress outside medical facilities? *See Hill v. Colorado,* 530 U.S. 703 (2000).

3. On privacy as liberty, *see generally,* Jed Rubenfeld, "The Right to Privacy," 102 *Harv. L. Rev.* 737 (1989); Joel Feinberg, "Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution," 58 *Notre Dame L. Rev.* 445 (1983). On the difficulty of mustering political support for privacy as insulation, *see* Priscilla M. Regan, *Legislating Privacy* 182–83 (1995).

4. Bruce Ackerman, *We the People* 152 (1991).

5. *Id.* at 155.

6. Rubenfeld, *supra* note 3, at 806.

7. *See* Thomas I. Emerson, *The System of Freedom of Expression* (1970).

8. Needless to say, the history of sexual repression and regimented family life that is alluded to in this paragraph is complicated. General accounts of the modern drift toward personal liberation can be found in Richard A. Posner, *Sex and Reason* 55–61, 291–92 (1992), and in Mary Ann Glendon, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* 36, 50, 277, 291–304 (1989). The relationship between the welfare state and the liberalization of family life is examined in Christopher Lasch, *Haven in a Heartless World: The Family Besieged* 111 and *passim* (1977).

9. The Defense of Marriage Act is discussed in Andrew Koppelman, "Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional," 83 *Iowa L.*

Rev. 1 (1997). Bills to prohibit employment and housing discrimination on the basis of sexual orientation have been introduced several times in recent years only to languish in committee. *E.g., Employment Non-discrimination Act of 1997,* H.R. 1858, 143 *Cong. Rec.* E1176, H3659 (1997); *Civil Rights Amendments Act of 1998,* H.R. 365, 143 *Cong. Rec.* H151 (1997).

10. One commentator revealingly compared the concept of autonomy in the privacy cases with the idea of sovereignty or nationhood. Feinberg, *supra* note 3, at 446–57. In this scheme, each individual is "a domain or territory in which the self is sovereign." *Id.* at 452. This area includes not only the body itself but an area of control around the body "analogous perhaps to offshore fishing rights. . . ." *Id.* at 453. Thus, individuals are conceived of as small sovereign countries that are separated from one another, not by armies, but by a legal right to privacy.

11. *Bowers v. Hardwick,* 478 U.S. 186, 205 (Blackmun, J., dissenting, quoting *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 63 [1973]).

12. *Planned Parenthood v. Casey,* 505 U.S. 833, 851 (1992).

13. Alexis de Tocqueville, *Memoir on Pauperism* 48–50 (Seymour Drescher trans., 1997).

14. *See generally* James L. Nolan, Jr., *The Therapeutic State: Justifying Government at Century's End* (1998).

15. Celebrity is discussed as an aspect of nationalization in C. Wright Mills, *The Power Elite* 71–84 (1956) and more recently in Richard Schickel, *Intimate Strangers: The Culture of Celebrity* 183, 265–75 (1985).

16. Daniel J. Boorstin, *The Image: A Guide to Pseudo-events in America* (1975). On the inherent falseness of celebrity culture, *see also* Schickel, *supra* note 15, at 7, 9, 18, 25, *passim*; and P. David Marshall, *Celebrity and Power: Fame in Contemporary Culture* 219–40 (1997).

17. *See* Marshall, *supra* note 16, at 17.

18. Boorstin, *supra* note 16, at 37. The sacrifice of autonomous intellectual judgment characterizes mass society when attention is fixated on nationalized issues that are distant from daily life and that must be evaluated without either personal experience or the moderating influence of intermediate groups. *See* William Kornhauser, *The Politics of Mass Society* 43–46, 75 (1959).

19. It is now commonly recognized that at the extreme the urge to relate to public personalities and the closely related need to achieve personal exposure can lead to horrific crimes. An early insight into the possible connection between celebrity culture and criminal acts can be found in Schickel, *supra* note 15, at 3–9.

20. *Id.* at 141, 265, 275.

21. Richard Sennett, *The Fall of Public Man* 12, 31, 194–96 (1976). *Cf.* Boorstin, *supra* note 16, at 14.

22. "By the time the 1920's ended, our world had not so much changed as it had bifurcated. Or had begun to bifurcate. Our immediate, physical surroundings had not changed, and our immediate personal concerns had not changed—not radically at any rate. We were even still permitted public life of a sort in our communities. But there was this trouble with it: it seemed to be very small potatoes. Its rewards and recognitions seemed paltry compared to what was going on elsewhere, where the images were made, where the truly glamorous made work

seem like play and fame was the spur." Schickel, *supra* note 15, at 63. *See also id.* at 183.

23. *Cf.* Kornhauser, *supra* note 18, at 32, 109. Like public opinion polls, celebrities create the appearance of understanding when people have become so undifferentiated and disconnected that they have only a weak sense of themselves. Marshall, *supra* note 16, at 210.

24. The "perfection" that celebrity holds out is not a perfection of condition but a perfection of excitement and choice—the same ideal of endless psychic potential that underlies the rhetoric of the therapeutic state. *Cf.* Nolan, Jr., *supra* note 14, at 20, Boorstin, *supra* note 16, at 4, 5, 118.

25. *See generally* Kornhauser, *supra* note 18, on the relationship between mass society and totalitarianism.

26. Celebrities do, of course, influence politics to a degree. *See* David S. Meyer, "The Challenge of Cultural Elites: Celebrities and Social Movements," 65 *Sociological Inquiry* 181 (1995). And it is also true that the line between politician and celebrity is increasingly blurred. *See* Marshall, *supra* note 16, at 203–40; Suzanne Keller, "Celebrities and Politics: A New Alliance," 2 *Research in Political Sociology* 145 (1986). Still, the celebrity's main attraction has to do with private pleasure-seeking, not national identity and public power.

27. Mathew Coles, "The Meaning of *Romer,*" 48 *Hastings L. J.* 1343, 1357–61 (1997).

28. Contributors to the famous symposium "The End of Democracy? The Judicial Usurpation of Politics" reacted to *Romer* by saying that the Court had "[made] what used to be its most loyal citizens—religious believers—enemies of the common good . . ." (Russell Hittinger); "[pronounced] the traditional moral teaching of Judaism and Christianity as empty, irrational, and unjustified" (Hadley Arkes); and "[branded as] a bigot any citizen who considers homosexuality immoral" (Charles W. Colson). *First Things* 32, 34 (November 1996).

29. Or so the Court itself seemed to say. *Planned Parenthood v. Casey,* 505 U.S. 833, 855–56 (1992).

30. Quoted in Kristin Luker, *Abortion and the Politics of Motherhood* 137–38 (1984). Luker quotes another woman as follows: "While I was pregnant, somebody said something about abortions [being performed] at five months, and I was about four and a half months pregnant at the time, and I thought, '*Five months*! I can feel this baby kicking and moving inside of me and I just heard the heart begin to beat, what do you mean they're performing abortions at five months!' " *Id.* at 148 (emphasis in original).

31. Nina Burleigh, formerly of *Time Magazine,* made the statement to Howard Kurtz, as reported in Media Notes, "A Reporter with Lust in Her Heart," *Washington Post,* July 6, 1998, at CO1.

32. *See generally,* Joanne Morreale, *The Presidential Campaign Film: A Critical History* (1993).

33. 505 U.S. at 851.

34. *Id.*

35. *Id.* at 852.

36. *Id.* at 867.

37. *Id.* 867–68.

38. *Id.*

39. *Id.*

40. *See* David M. Timmerman, "1992 Presidential Candidate Films: The Contrasting Narratives of George Bush and Bill Clinton," 26 *Presidential Studies Quarterly* 365, 366, 368 (1996).

41. 505 U.S. at 864.

42. Emphasis added.

43. Emphasis added.

44. James Davison Hunter describes and attempts to explain "the eclipse of the middle" in *Culture Wars: The Struggle to Define America* 160–70 (1991).

45. *Freedom of Choice Act of 1992,* S. 25, 102d Cong. (1992).

46. *Partial-Birth Abortion Ban Act of 1995,* H.R. 1833, 104th Cong. (1996).

47. *See* Feinberg, *supra* note 3.

Chapter Ten

1. *See* Thomas L. Friedman, "The Grand Bargain," *New York Times,* January 22, 1999, at A25.

2. *See New York Times,* December 21, 1998, at A1 (photograph and caption).

3. Governor Fob James, *State of the State Address, January 13, 1998,* Al. Gov. Press Secretary Subject File, AL Dept. of Archives and History, Montgomery.

4. Pennsylvania House of Representatives, *173d Sess. 1989 Legislative Journal of the House of Representatives* 1755 (1989) (statement of Mr. Freind).

5. *Id.* at 1756 (statement of Mr. Freind).

6. *Id.* (statement of Mr. Itkin).

7. *Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings before the Senate Committee on the Judiciary,* 103d Cong. 160 (1994) (statement of Judge Stephen G. Breyer).

8. *Nomination of David H. Souter to Be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Committee on the Judiciary,* 101st Cong. 115 (1990) (statement of Judge David H. Souter).

9. *Partial-Birth Abortion: The Truth: Joint Hearing on S. 6 and H.R. 929 before the Senate Committee on the Judiciary and the Subcommittee on the Constitution of the House Committee on the Judiciary,* 105th Cong. 39 (1997) (statement of Douglas Johnson).

10. 138 *Cong. Rec.* S3734-01 (daily ed. March 17, 1992) (statement of Mr. Cranston).

11. *Miller v. Civil, City of South Bend,* 904 Fed.2d 1081 (Posner, Circuit Judge, concurring) (1990).

12. *Id.* at 1091.

13. *Id.*

14. *Friedman v. Comm'r of Public Safety,* 473 N.W. 2nd 828 (Minn. 1991), discussed in Robert F. Nagel (ed.), *Intellect and Craft, The Contributions of Justice Hans Linde to American Constitutionalism* 92 (1995).

15. The scholarship that sharply questions the Court's establishment clause jurisprudence is, of course, voluminous. For a specific effort to evaluate Governor James's constitutional claims, *see* Jonathan P. Brose, "In Birmingham They Love

the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause," 24 *Ohio N.U. L. Rev.* 1 (1998).

16. Especially egregious in this regard was the confirmation testimony of Ruth Bader Ginsburg. Asked what in her own experience led her to devote so much of her career to breaking down the legal barriers "to the advancement of the women in our society," she replied with a series of personal stories. There was a story about when Ginsburg as a female law student was denied access to a room in the law library. Her account was made more vivid by this detail: "[I]t was quite late at night, and I wanted to make sure I got home by midnight. My daughter, the professor [now], was then 14 months old—no, that was my second year, so she was a few months over 2 years old. And I wanted to look up the citation, report back, and return home." There followed stories about the exclusion of her mother-in-law from a *Harvard Law Review* banquet, about dormitory rules at Cornell and Harvard, and about a conversation with a waitress about a "most adorable steward" encountered on a trans-Pacific flight. *Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Committee on the Judiciary,* 103d Cong. 134–35 (1993) (statement of Judge Ruth Bader Ginsburg).

17. During the congressional debate over the Partial-Birth Abortion Ban Act, Douglas Johnson asserted that opponents of the bill had lied on a number of issues, including when Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers, said that the procedure was used fewer than 500 times a year. According to Johnson, Fitzsimmons later admitted that this was a lie and explained, "I just went out there [before various media outlets] and spouted the party line." *See supra* note 9, at 2–3. (Johnson claimed that the correct number was 2,000. *Id.* at 11.) For other alleged falsehoods, *see id.* at 3–16.

18. Nagel, *supra* note 14.

19. This phrase and much of the ensuing analysis are adapted from Robert H. Frank and Philip J. Cook, *The Winner-Take-All Society: Why the Few at the Top Get So Much More than the Rest of Us* (1995).

20. *Id.* at 38.

21. Quoted in Frank and Cook, *supra* note 19, at 3.

22. *Id.* at 11–15.

23. *Id.* at 192–93.

24. *Id.* at 127, 195–96.

25. *Id.* at 196.

26. *Id.* at 24.

Chapter Eleven

1. 144 *Cong. Rec.* H11774–01, *H11797 to *11798 (daily ed. December 19, 1998) (statement of Ms. Waters). Consider other congressional speeches: "The Republican right wing . . . does not like it when we say coup d'etat, so I will make it easier for them, golpe de estado. That is Spanish for overthrowing the government. From day one they wanted to get rid of Bill Clinton. From day one they stood on him and tried to make him out to be the number one villain in this country. They have been blinded by hate. . . ." *Id.,* H11968–03, *H11970 (statement

of Mr. Serrano). ". . . I am witnessing the most tragic event of my career in the Congress, in effect a republican coup d'etat, in process. . . . We are about to inflict permanent damage on our Constitution, on our President, on the Nation and ourselves." *Id.,* H11774–01, H11782 to *H11783 (statement of Mr. Conyers).

2. Anthony Lewis, "Nearly a Coup," *New York Review of Books,* April 13, 2000, at 22.

3. *See* Michael J. Klarman, "Constitutional Fetishism and the Clinton Impeachment Debate," 85 *Va. L. Rev.* 631 (1999).

4. For an argument that legal scholars misrepresented their expertise for political reasons, *see* Neal Devins, "Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom," 148 *U. Pa. L. Rev.* 165 (1999).

5. *See generally,* James Bennet, "Packaging This President As Sinner but Not Perjurer," *New York Times,* September 15, 1998, at A-22; Alison Mitchell, "Top Democrats Call for Speedy Decisions and Warn Clinton against Splitting Hairs," *New York Times,* September 15, 1998, at A24; John M. Broder, "Testing of a President: The Overview; Clinton Responds to Hyde's Queries; Yields No Ground," *New York Times,* November 28, 1998, at A1; Eric Schmitt, "G. O. P. Vote Counter in House Predicts Impeachment of Clinton," *New York Times,* November 30, 1998, at A19; Alison Mitchell and Lizette Alvarez, "Testing of a President: The Overview; Republicans Tell Leaders to Aim for Quick Vote on Impeachment," *New York Times,* December 3, 1998, at A1.

6. I was educated there, too, at about the same time.

7. For an interesting argument that the key case in this line is *Eisenstadt v. Baird,* 405 U.S. 438 (1972), *see* H. Jefferson Powell, *The Moral Tradition of American Constitutionalism: A Theological Interpretation* 174–79 (1993).

8. *Planned Parenthood v. Casey,* 505 U. S. 833, 851 (1992).

9. This has, of course, been a pervasive theme in Ronald Dworkin's work; it appears fairly recently in Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* 118–47 (1993).

10. *Elrod v. Burns,* 427 U.S. 347 (1976).

11. *Bowers v. Hardwick,* 478 U.S. 186, 194 (1986) (upholding the constitutionality of a Georgia law criminalizing sodomy).

12. 17 U.S. (4 Wheat.) 316, 413–14 (1819), discussed as an obliteration of text in Robert F. Nagel, "The Formulaic Constitution," 84 *Mich. L. Rev.* 165, 185–86 (1985).

13. In a typical passage, for instance, Dworkin asserts, "Read in the most natural way, the words of the Bill of Rights . . . command nothing less than that government treat everyone subject to its dominion with equal concern and respect. . . ." Dworkin, *supra* note 9, at 128. Tribe once went so far as to argue that the Tenth Amendment should be understood as requiring a right to some level of essential government services. *See* Laurence H. Tribe, "Unraveling *National League of Cities:* The New Federalism and Affirmative Rights to Essential Government Services," 980 *Harv. L. Rev.* 1065 (1977). Both editions of his treatise *American Constitutional Law* (1978, 1988) are fully stocked with imaginative, surprising interpretations.

14. *Elrod v. Burns,* 427 U.S. at 354. Although the Court at one point denied that the decline of patronage was relevant to the question of constitutionality, it

quickly added that "the actual operation of a practice viewed in retrospect may help to assess its workings with respect to constitutional limitations." *Id.* Later in the opinion, the Court relied on the growth of merit systems to support its conclusion that patronage was not the least drastic means for achieving political accountability or protecting political parties. *See id.* at 366, 369.

15. On abortion, *see Roe v. Wade,* 410 U.S. 113, 129, 140 (1972). On unmarried parenthood, *see Michael H. v. Gerald D.,* 491 U.S. 110, 141–49 (Brennan, J., dissenting) (1989).

16. 17 U.S. (4 Wheat.) at 419.

17. Dworkin, *supra* note 9, at xi.

18. *Id.*

19. As chapter 7 indicates, the Court's discussion of *stare decisis* is considerably more elaborate than this, but the foot-stamping insistence on authority is unmistakable. *See* 505 U.S. at 867–68.

20. Dworkin, *supra* note 9, at 39–50.

21. *See* Nagel, *supra* note 12, at 177–82.

22. *See* Robert F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* 114–18, 116–18 (1989).

23. *Id.*

24. Smith, *supra* chapter 3, note 36, at 218. For a defense of duplicity, *see* Scott Altman, "Beyond Candor," 89 *Mich. L. Rev.* 296 (1990).

25. Sissela Bok, *Lying: Moral Choice in Public and Private Life* 50, 80–81, 166 (2d ed., 1989).

26. *See* Steven D. Smith, "Idolatry in Constitutional Interpretation," 79 *Va. L. Rev.* 583 (1993).

27. The persistence of this deception is only emphasized by the Court's recent effort to distinguish assisted suicide from abortion. In *Washington v. Glucksberg,* a majority of the justices, after insisting that its interpretive method in due process cases requires a careful and specific description of the protected liberty, depicted the right to abortion as having been derived from "those personal activities and decisions that this Court has identified as deeply rooted in our history and traditions." 521 U.S. 702, 720–28 (1997).

28. "The President's Testimony: Part Six of Eight," *New York Times,* September 22, 1998, at B6.

29. *Id.*

30. That is, as a consequence of confusing belief with reality. *See, e.g.,* Marshall Blonsky and Edmundo Desnoes, "The Relativist-in-Chief," *New York Times,* September 29, 1998, at A25; George Will, "Sorry Only for Getting Caught," *Chicago Sun-Times,* September 19, 1998, at 19.

31. Bok, *supra* note 25, at 15–16.

32. For an arresting account of how boundless expectations produce an appetite for deception, *see* Boorstin, *supra* chapter 9, note 16, at 4–5, 37, 76, 118, 260.

33. *See* Nagel, *supra* chapter 6, note 30, at 151.

34. For an insightful analysis focusing on criminal law, *see* William T. Pizzi, *Trials without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It* (1999).

35. Polls taken after the broadcast of President Clinton's grand jury testimony indicate that most people did not see his use of language as normal or convincing but did not seem to think much the worse of him as a consequence. *See* Marjorie Connelly, "The Testing of a President: Public Opinion; Clinton Holds Mostly Steady in the Polls," *New York Times,* September 23, 1998, at A24. It is possible to see "legal hairsplitting" as an acceptable form of lying, just as it is commonplace to regard lawyers as socially useful even if they are paid to deceive.

36. Bok, *supra* note 25, at 25, 52, 119–21, 173–74.

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