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THE COURTS, FEDERALISM, AND THE FEDERAL CONSTITUTION, 1920–2000

EDWARD A. PURCELL, JR.

The history of American federalism in the twentieth century falls into three distinct periods. The era of post-Reconstruction federalism, which began in the late nineteenth century, ended in the years after 1929 when a shattering series of domestic and international crises combined with the innovative presidency of Franklin D. Roosevelt to reorient the nation's laws, politics, and institutions. The resulting "New Deal Order" lasted for almost five decades before crumbling in the century's last quarter when massive social, cultural, economic, and political changes combined with the dramatizing presidency of Ronald Reagan to begin reorienting the system once again. At century's end, the nature and course of that emerging era remained unsettled.

I. THE NATURE AND DYNAMICS OF AMERICAN FEDERALISM

With a de facto default rule favoring decentralization, American federalism is a governmental system based on the existence of independent political power at both state and national levels. Its essence lies, first, in the institutional tensions that the Constitution structured between the two levels of government, and second, in the complex processes of decision making that the Constitution established to maintain satisfactory relations between the two levels. Those processes were complex because they involved, on the national side, three distinct and counterpoised branches of government and, on the state side, a growing multitude of equal, independent, and often conflicting governing units. In theory, and sometimes in practice, national power served to foster economic integration and efficiency, facilitate the development and enforcement of desirable uniform standards, enable the people to deal effectively with problems national and international in scope, protect the security and general welfare of the nation as a whole, and safeguard liberty by checking the potential tyranny of local majorities. Conversely, also in theory and sometimes in practice, state power

served to foster economic innovation and efficiency, nourish social and cultural diversity, encourage democratic participation, facilitate the adoption of narrow solutions tailored to special local problems, and safeguard liberty by checking the potential tyranny of national majorities.

As a matter of historical development, American federalism gave rise to a dynamic and fluid political system in which competing groups and coalitions struggled for control of the nation's diverse centers of governmental power and used constitutional arguments to place decision-making authority over contested issues in the level and branch of government that seemed, at any given time, most likely to support their values, interests, and aspirations. The claim of "state sovereignty," for example, which limited or denied the authority of the national government, served a variety of diverse groups over the centuries: Jeffersonian Democrats in the 1790s, New England Federalists during the War of 1812, South Carolina nullifiers in the 1830s, Northern anti-slavery civil libertarians before the Civil War, and then from Reconstruction to the late twentieth century those who defended racial segregation and disenfranchisement. The pressures generated by successive waves of such diverse groups and coalitions – themselves the products of relentless social and economic change – drove the system's evolution. Certain widely shared cultural commitments – to republican government, the common law, religious freedom, private property, and individual liberty – combined with the idea of a written Constitution and the reality of institutionally divided powers to constrain and channel that evolution. But the system's operations and assumptions continued to shift as changing cultural values, social conditions, economic innovations, institutional practices, legal theories, judicial decisions, and constitutional amendments blurred or redrew the lines of state and federal authority.

In that long and complex historical process, one issue repeatedly emerged as pivotal: what institutions or procedures existed to settle disputes over the respective spheres of state and federal authority? Americans debated that issue vigorously for eight decades and then, in the Civil War and its three constitutional amendments, settled it in part. The national government, not the states, held dispositive authority. Neither the war nor its resulting constitutional amendments, however, answered two further questions: which branch or branches of the federal government held that authority? And how was the authority to be exercised? Much of the history of American federalism after the Civil War revolved around the contested answers given to those two questions, as the three federal branches – each responding to the values and interests that dominated it at any given time – adopted diverse and sometimes conflicting policies that led them to defer to state prerogatives on some occasions and trump them on others.

Indeed, as American life became increasingly centralized and homogenized in the late nineteenth and twentieth centuries, many of the distinctive and authentically “local” values and interests that had originally given the federal system its embedded social meaning withered or became suspect. Some blended into emerging and widely shared national values and interests; others grew attenuated or disappeared entirely; a few – most obviously, those involving racial oppression – were explicitly repudiated by new national majorities and constitutional amendments. The result was that the ingrained cultural understandings of the late eighteenth and early nineteenth centuries gradually disintegrated, the lived social meaning of American federalism grew more amorphous and contestable, and the distinctively local values and interests that the system protected increasingly appeared either narrow and parochial or vague and abstract. Over the course of the twentieth century the idea of American federalism as a normative concept – that the Constitution set out clear lines that defined and distinguished state and federal powers – grew ever more amorphous and manipulable.

Thus, the history of American federalism cannot be understood by focusing solely on constitutional provisions or theories of federalism. The Constitution provided a sound framework of government and a shrewd system of institutionalized checks and balances, but it did not draw bright or generally determinative lines of authority between state and federal power nor specify any particular “balance” between them. Similarly, theories of federalism provided a range of normative baselines, but their specific injunctions were invariably construed diversely and contested sharply. Indeed, conflicting views of federalism existed from the nation’s beginning, and the passing years produced a smorgasbord of new variations, each inspired by and suffused with the emerging values, interests, expectations, and preconceptions of its advocates. The federal structure helped sustain the nation’s commitment to limited government, cultural diversity, and individual liberty, but its history can be understood fully only by examining how and why its practical operations evolved, its political significance shifted, its social consequences unfolded, and its ideological contours periodically eroded and reformed.

Since the early decades of the nineteenth century, the prevailing theory held that the Constitution established a system of “dual federalism.” The principles attributed to the system were few. The national government was one of limited and delegated powers only; the states were independent sovereigns with exclusive authority over local matters reserved to them by the Tenth Amendment; and the powers of the two governments were limited to “separate spheres” and intended to serve as checks on one another.

Although the actual practice of American federalism was always more complicated than the theory of dual federalism implied, during the late nineteenth and early twentieth century five accelerating developments substantially reshaped the system. First, spectacular revolutions in transportation and communications together with the ongoing processes of industrialization, urbanization, westward expansion, and economic centralization remade American society. What in 1789 had been a collection of geographically rooted, locally oriented, and culturally diverse island communities had by 1920 become an increasingly mobile, nationally oriented, and economically and culturally integrated nation. Ever widening areas of life were coming to have national significance, and Americans from coast to coast increasingly faced similar problems that flooded beyond the ability of individual states to remedy.

Second, the powerful nineteenth-century belief that the primary function of government was to protect private property and economic freedom was weakening. Since the Civil War governments at all levels had become increasingly active in attempting to deal with the massive social disruptions that came with urbanization and industrialization. Repeatedly the states increased taxes and expanded their activities, legislating over a widening variety of social and economic problems and establishing administrative agencies to regulate railroads, insurance companies, and many other types of business. They raised their funding for local governments, for example, from barely \$50 million in 1902 to almost \$600 million by 1927.

Third, the federal government was growing at an even more accelerated rate. Although the states still employed several times as many workers and spent more than twice as much money as the federal government, the balance of power between the two was shifting. As economic and cultural centralization proceeded, the political consensus that had tilted strongly toward decentralization in the early nineteenth century was moving by century's end toward support of more and broader government action at the national level. In 1887 the federal government began to use its authority over interstate commerce to regulate the new national economy, and by the second decade of the twentieth century it had asserted extensive national control over interstate transportation and communications while subjecting other interstate businesses to an expanding variety of new federal regulations.

Fourth, running against that nationalizing current, a vehement reaction against Reconstruction among white Americans had severely constrained the power of the federal government to protect the rights of African Americans. Notwithstanding the Civil War amendments, an informal national settlement in the century's last decades had successfully redefined most matters involving black civil and political rights as local issues that properly fell within the exclusive authority of the states. Increasingly, the cries of

“states’ rights,” “state sovereignty,” and the “principles of federalism” were identified with the establishment and preservation of racial segregation and disenfranchisement.

Finally, the power of the federal judiciary was growing relative to that of both Congress and the states, and by the early twentieth century the U.S. Supreme Court had emerged as the ultimate – if still sharply contested – authority on the law of both American federalism and the new national economy. The nation’s commitment to law and the ideal of limited constitutional government had led Americans gradually to embrace the Court – “*the Court*” as they came to call it – and its umpiring role, while the structure of the federal judiciary – like that of the executive branch but unlike that of Congress – allowed the Court to act relatively quickly and decisively. The Court determined the extent to which any government could regulate business and property as well as the particular level of government that could regulate them. On the former issue, it held that a narrow range of economic activities “affected with a public interest” were subject to extensive regulation, but that most business and property remained “private” and subject only to minimal regulation. On the latter issue, it held that specific economic activities found to be “closely” or “directly” related to interstate commerce were national in scope and hence subject to federal control under the Commerce Clause but that the bulk of such activities remained local and subject to regulation only by the states. As a general matter, the Court’s rulings gradually extended the powers of the federal government while restricting the power of the states to intrude into the workings of the burgeoning national market. To enforce its mandate, the Court reshaped the jurisdiction of the lower federal courts to make them more effective instruments of national judicial authority, turning them from disputes between private parties over issues of local law to suits that challenged government action or raised issues of national law. Increasingly, too, the Court exercised its burgeoning power. In seventy-one years up to 1860 it had held only 2 federal and 60 state statutes unconstitutional, but in a mere thirty-nine years from 1898 to 1937 it voided 50 federal and 400 state laws.

II. NATIONALIZATION AND THE DECLINE OF POST-RECONSTRUCTION FEDERALISM: FROM WORLD WAR TO THE GREAT DEPRESSION

When 1920 dawned, American federalism seemed on the verge of even more substantial change. Pre-war Progressivism had focused American politics on the national level, and constitutional amendments authorizing a federal income tax and the popular election of senators had expanded federal power

enormously while curtailing the power of state legislatures. Both amendments gave the American people a new and direct involvement in their national government, while the income tax provision allowed the federal government to raise virtually unlimited amounts of money, paving the way for explosive growth in the future. The Supreme Court, too, had seemed willing to approve some widening assertions of national power by stretching the limiting categories of business "affected with a public interest" and activities "closely" related to interstate commerce.

Most dramatic were the changes that followed American entry into World War I. Relying principally on their war powers, Congress and Democratic President Woodrow Wilson exercised unparalleled authority. They established national conscription, took control of the nation's transportation and communications systems, imposed tight restrictions on the distribution of food and fuel, asserted authority over relations between labor and management, and expanded the federal income tax system drastically. In addition, through the Espionage and Sedition Acts they prohibited a variety of activities – including speech critical of the government – that might interfere with the war effort. They criminalized, for example, "disloyal, profane, scurrilous, or abusive language" directed at the Constitution, the armed forces, the government, or the flag.¹ Perhaps most arresting, by statute and then by constitutional amendment Congress and the states prohibited the manufacture, sale, and transportation of alcoholic beverages in the United States. Ratified in 1919, the Eighteenth Amendment conferred on the federal government authority to enforce nationwide Prohibition and expanded its power into areas that had previously been considered both local and private.

The war challenged the structure of post-Reconstruction federalism in other ways as well. Politically, it led to the adoption of yet another nationalizing constitutional amendment, the Nineteenth, which prohibited the states from denying the vote to women and conferred on Congress the power to enforce its mandate. Institutionally, the war induced the Supreme Court to back away from its umpiring role and watch passively as Congress and the president exercised sweeping war powers. Socially, the war's proclaimed goal of making "the world safe for democracy" even hinted at the possibility of change in the nation's racial status quo.

Although post-Reconstruction federalism trembled, it did not crumble. The end of the war brought a series of bitter labor strikes, a brief but virulent Red Scare, repeated outbreaks of anti-black violence, rapidly rising prices followed by a short depression, and spreading resentment at the administration's continued use and abuse of its war powers. Those events destroyed

¹ Act of May 16, 1918, ch. 75, 40 Stat. 553.

wartime unity, fragmented Progressivism, and generated a powerful desire for a return to a more stable and tranquil order. In 1920 the reaction gave the Republicans control of both Congress and the presidency. With the help of returning prosperity, the Republicans maintained that hold for a decade, ensuring a government of order, conservatism, business domination, and minimal economic regulation. Under their rule, Republicans announced, America was entering a “New Era” of sustained economic progress and prosperity. For almost a decade their promise seemed golden.

The national turnaround in 1920 induced the Court to reassert its authority. In cautious dicta it began to suggest judicially enforceable limits on federal war powers, and in 1921 it invalidated on vagueness grounds the statute that had authorized federal control over food during and after the war. Then, within two years, Warren Harding, the new Republican president, appointed four new justices – including ex-President William Howard Taft as Chief Justice – who were more conservative and property conscious than their predecessors. The stage was set for a period of conservative judicial activism.

The new Taft Court moved quickly to ensure social stability, impose judicial limitations on both state and federal governments, and protect business, property, and the expanding national market. In less than a decade it invalidated legislation – in most cases measures passed by the states – in approximately 140 decisions, a rate far higher than that of any previous Court. Its efforts were unwittingly enhanced by a seemingly technical jurisdictional statute enacted in 1925. The so-called Judges’ Bill made the Court’s appellate jurisdiction almost wholly discretionary, thereby enabling it to decide freely not just how, but when and where, it would assert its authority. After 1925 the Court’s role in American government continued to expand, and its efforts became more purposeful, as shifting coalitions of justices learned to use the Court’s new jurisdictional discretion to set their own agendas.

Three of the Taft Court’s early decisions revealed its determination to impose limits on government. *Pennsylvania Coal Co. v. Mahon* (1922) limited both state and federal power over private property by holding that regulatory actions that went “too far” constituted “takings” that, absent compensation, were invalid under the Fifth and Fourteenth Amendments.² Similarly, *Adkins v. Children’s Hospital* (1923) invalidated a minimum wage law, a type of statute the Court’s conservative justices considered especially obnoxious. *Adkins* proclaimed freedom of contract “the general rule” and government regulation an “exception” confined to a few narrow categories of specially “public” matters.³ As much as the two cases demonstrated the

² 260 U.S. 393, 415.

³ 261 U.S. 525, 546.

Court's determination to limit government regulation, however, they also suggested the difficulty the justices faced in their task. In each, the Court acknowledged that the limiting categories it used were incapable of precise delineation, a confession that highlighted the extent to which the lines it drew were the product, not simply of the Constitution, but of the dominant attitudes of the era and the specific values of the justices themselves.

The third decision, *Bailey v. Drexel Furniture Co.* (1922), was directed solely at the federal government and sought to infuse new life into the idea of dual federalism. Only four years earlier the Court had struck down the first federal Child Labor Law, ruling in *Hammer v. Dagenhart* (1918) that the commerce power did not allow Congress to ban the products of child labor from interstate commerce. Though seemingly inconsistent with prior decisions, *Hammer* voided the child labor statute on the ground that it was not a true effort to regulate interstate commerce, but rather a disguised attempt to intrude into a "local" activity – the production of goods – that the Tenth Amendment reserved to the states. Amid a popular outcry against the decision, Congress responded with the Child Labor Tax Act, relying on the federal taxing power to impose special charges on employers who used child labor. *Drexel Furniture* declared the second federal child labor act another subterfuge, one intended not to raise revenue but to regulate a local matter. Following *Hammer*, it held the act invalid as a violation of the Tenth Amendment. It was "the high duty of this court" to protect "local self-government" from "national power" and to preserve the federal system that, the justices declared, was "the ark of our covenant." If it failed to block the Child Labor Tax Law, *Drexel Furniture* warned, Congress could use its taxing power "to take over to its control any one of the great number of subjects of public interest" that the Constitution reserved to the states.¹

Like earlier Courts, however, the Taft Court shaded its federalism decisions to fit its social values. It ignored *Hammer* when Congress passed a statute prohibiting the movement of stolen vehicles in interstate commerce, avoided *Drexel Furniture* when Congress used its taxing power to control narcotics, and construed the commerce power with exceptional breadth when business invoked the federal antitrust laws to break a small union's boycott of local employers. The Court stretched national power in the first case to protect private property, in the second to allow government to control what the justices viewed as a moral and social evil, and in the third to check a potentially powerful weapon of organized labor.

The particular social values that the Taft Court protected quickly generated political controversy. Provoking strong opposition from Progressives and organized labor, its decisions sparked a variety of proposals for "curbing"

¹ 259 U.S. 20, 37–38.

the Court by restricting its jurisdiction or requiring a supermajority vote of six or seven justices to invalidate legislation. In 1924 Republican Senator Robert M. LaFollette of Wisconsin helped organize a new Progressive Party and ran for president on a platform that indicted the Court as an anti-progressive and pro-business partisan. He proposed a constitutional amendment that would authorize Congress to override any decision invalidating one of its statutes. Rising to the Court's defense, most Republicans and Democrats castigated the proposal as a radical and destructive assault on the foundations of American federalism. In the election LaFollette did well for a third-party candidate, but he was overwhelmed in a Republican landslide. While the election revealed widespread hostility to the Taft Court, it also suggested that the great majority of Americans supported the Court's institutional role, even if many of them disliked some of its individual decisions.

Responding to LaFollette and other critics, Charles Warren, the nation's preeminent historian of the Supreme Court, seemed to speak for most Americans – even many Progressives – when he praised the Court for playing an essential institutional role in the federal system. The “existence of the American form of government – a federal republic with limited national powers – implies and requires for its preservation the existence of a Supreme Court,” he declared. “The retention of such a republic is inseparably bound up with the retention of a Court having authority to enforce the limitation of national powers.” Warren articulated a belief that had been spreading since the mid-nineteenth century and that had become sacred writ among conservatives by the early twentieth: the Supreme Court was the anchor of American government, the paramount bulwark protecting the American people and their liberties from the dangers posed by an otherwise uncontrollable and centralizing national government. “It is, of course, possible to have a republic without a Supreme Court,” Warren explained; “but it will be a republic with a consolidated and autocratic government, a government in which the States and the citizens will possess no right or power save such as Congress, in its absolute discretion, sees fit to leave to them.”⁵

Although Taft and a majority of his Court shared both Warren's suspicions of Congress and his conclusions about the Court's essential role, they nevertheless sought to accommodate what they considered the reasonable demands for more active government that flowed from the continuing centralization of American social and economic life. Cautiously, they continued the process of expanding federal power under the Commerce Clause and, in a more innovative move, approved a broadened use of federal taxing and spending powers. In *Massachusetts v. Mellon* (1923) the Court upheld

⁵ Charles Warren, *Congress, the Constitution, and the Supreme Court* (Boston, 1925), 4, 5.

a statute that provided federal funds for state infant and maternity care programs. The decision in effect sanctioned the federal government's power to offer monetary grants to states conditioned on their acceptance of federal use restrictions, and it thereby allowed Congress to legislate – albeit indirectly – over matters that seemed entirely “local.” In the 1920s such federal grants were few in number and small in scale, but during the next half-century they would expand dramatically.

The Taft Court also extended federal judicial power over the states by expanding the meaning of “liberty” in the Fourteenth Amendment. On one front it voided state statutes that restricted the educational opportunities of children. The Court held that the amendment protected certain personal and familial rights, including the right of parents to rear and educate their children as they wished. On a second front the Court began to consider the claim that the First Amendment right of free speech also constrained the states. Successful prosecutions under the Sedition and Espionage Acts had provoked powerful dissents from Justices Oliver Wendell Holmes, Jr. and Louis D. Brandeis; and, after the postwar hysteria had dissipated, many Americans came to believe that governmental power to punish speech should be limited more tightly. In *Gitlow v. New York* (1925) the Court announced that the right of free speech recognized by the First Amendment was part of the “liberty” protected by the Fourteenth Amendment and, consequently, was binding on the states as well as the federal government. Although the Court's decisions in these areas were few, they created a rich seedbed for the future.

Conversely, considering the rights of African Americans, the Taft Court left post-Reconstruction federalism essentially unchanged. Refusing to question racial segregation and disenfranchisement, it protected African American rights only in the most outrageous and exceptional cases. In one, where it granted habeas corpus relief to an African American sentenced to death in a Southern state court, it could not ignore the fact that the defendant had been convicted on unsubstantiated charges by an all-white jury that had been surrounded and intimidated by an angry white mob. In another, where it invalidated an “all-white” Texas primary election system, it could not deny the explicitly racial nature of the legal discrimination or its negation of the fundamental constitutional right of all citizens to vote. In each case, however, the Court stressed the narrowness of its decision. Federal habeas corpus was rarely available, it declared, and criminal matters were ordinarily local issues for the states alone to resolve. Similarly, the all-white primary was unconstitutional solely because its racially discriminatory nature was explicitly written into state law. Indeed, a decade later the Court unanimously approved a slightly more indirect version of the all-white state primary, one that was equally effective in maintaining

black disenfranchisement but more cleverly designed as a matter of reigning constitutional law.

For their part, the states in the 1920s continued to set policy not only in matters concerning race but also in most other areas that affected daily life, and they continued as well to provide most of the government services that Americans received. During the 1920s the states accounted for almost three-quarters of all public spending and two-thirds of the taxes collected. While a few sought to sustain the tradition of pre-war reform, most conformed to the conservative national mood that underwrote the Republicans' New Era. Largely abandoning efforts to regulate business and enact progressive social legislation, they sought to trim government regulation and concentrated much of their spending on highway construction to meet the exploding demands created by the automobile. Indicative of the political mood, the states raised most of their highway money through regressive gasoline taxes, which by 1929 accounted for 25 percent of their total tax receipts. Indeed, while thirteen states had enacted mildly progressive income tax laws in the decade after 1911, during the New Era only one state, New Hampshire, adopted such a tax. As a general matter, the governments of both states and nation seemed in accord on the basic issues of social and economic policy. Both seemed content, for the most part, to keep a low profile and give business its head.

III. FROM THE GREAT ECONOMIC TO THE GREAT PSYCHOLOGICAL DEPRESSION: NATIONALIZING AND RECONCEPTUALIZING LIBERTY AND EQUALITY, 1930S–1970S

The year 1929 witnessed the onset of the decade-long and world-wide Great Depression. Causing massive disruptions and hardships, the Depression challenged the capacities of democratic governments throughout the world. The resulting turmoil paved the way for Adolph Hitler to seize power in Germany, energized the forces of international Communism, and ultimately helped bring on a second and far more destructive world war. In the United States it gave birth to the New Deal and, together with the war and Cold War that followed, transformed American federalism.

The Great Depression and the Foundations of the New Deal Order

The ravages of unemployment, bankruptcies, foreclosures, bank failures, lost savings, and crushed hopes savaged all classes and regions. Those identified with the roseate New Era of the 1920s – primarily business, the Republican Party, and the federal judiciary – quickly became objects of anger and distrust. Governments at all levels tried to respond to the emergency. State

and local agencies, however, could provide neither the relief nor the structural reforms that seemed necessary. By 1931 their resources were exhausted, and the national and international scope of the ever-deepening crisis was undeniable. The federal government under Republican President Herbert Hoover became increasingly active, but it furnished far too little in the way of either money or leadership. The experience taught Americans two fundamental lessons: that a massive governmental response was necessary and that only national action could possibly be adequate.

From 1930 to 1936 four successive elections repudiated the Republicans, and after 1932 the Democrats firmly controlled both the legislative and executive branches of the federal government. President Franklin D. Roosevelt's New Deal initiated a wide range of efforts to provide emergency relief, restructure and stimulate the economy, and reform the nation's financial institutions. Although the administration worked closely with state and local governments, political power shifted decisively to the federal level. The National Industrial Recovery Act (NIRA) and the Agricultural Adjustment Act (AAA), for example, the New Deal's major initial efforts to reorganize and revive the economy, imposed sweeping federal controls and reached extensively into matters of industrial and agricultural production that hitherto had seemed both local and private.

While the conservative orientation of the federal judiciary clouded the future, it seemed possible that the New Deal might proceed without encountering fatal constitutional obstacles. The Taft Court had been split between six conservatives and three progressives, but that lineup had changed in 1930 when Taft and one of his conservative colleagues died. Charles Evans Hughes, a relatively progressive Republican, became Chief Justice, and the moderate Republican, Owen J. Roberts, filled the second opening. In the early 1930s the two new justices voted with the three progressives in a number of critical cases, and they seemed to have tipped the judicial balance. The Court applied the Fourteenth Amendment to safeguard freedom of speech and provide some protection for African Americans in Southern state courts, and it gave broad constructions to both the commerce power and the category of business "affected with a public interest." Further, in two sharply divided 5-4 decisions – with both Hughes and Roberts joining the Court's three progressives – it recognized the need for both state and federal governments to have emergency powers to combat the depression.

If the Hughes Court was different from the Taft Court, however, it nonetheless remained committed to enforcing limits on economic regulation by both the states and the federal government. In early 1935 it invalidated a part of the NIRA and then began a series of rulings – with Roberts and sometimes Hughes joining the four conservatives – that checked state

and federal regulatory power and, in the process, declared both the AAA and the remainder of the NIRA unconstitutional. Invoking the Tenth Amendment to invalidate another New Deal measure, Roberts and the four conservatives emphasized that “every addition to the national legislative power to some extent detracts from or invades the power of the states.”⁶

While the anti-New Deal majority invoked the idea of federalism, the dissenters often did the same. Illustrating the intrinsically double-edged nature of the concept, Justice Brandeis, the Court’s leading progressive, deployed it to undermine the conservative majority. Excessive centralization could flow not only from Congress, he warned in 1932, but from the federal judiciary as well. In voiding the reasonable social and economic regulations that the states attempted, Brandeis declared, the Court was not exercising “the function of judicial review, but the function of a super-legislature.” Its anti-progressive decisions unwisely restricted the states and improperly centralized American government. Moreover, he charged, the Court’s decisions negated a signal virtue of American federalism. “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory,” Brandeis explained, “and try novel social and economic experiments without risk to the rest of the country.” Confronted by “an emergency more serious than war,” Americans had the right to experiment with a variety of possible remedies, and the nation’s federal system was designed to allow such diverse and creative efforts.⁷ Turning the tables on the conservative majority, Brandeis used his progressive theory of “experimentalist” federalism to indict the Court itself as a centralizing force that was obstructing the federal system’s proper operation.

Not surprisingly, the double-edged nature of American federalism provided the Court’s anti-progressive majority with a ready response. The states could “indulge in experimental legislation,” Justice George Sutherland replied for the conservative majority, but they could not “transcend the limitations imposed upon them by the federal Constitution.” National limits existed and controlled, and the Court itself was the institution that identified and applied those limits. “The principle is embedded in our constitutional system,” he declared, “that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments.”⁸ Thus, the Supreme Court – the ostensible bulwark of federalism – once

⁶ *Carter v. Carter Coal Co.*, 298 U.S. 238, 294–95 (1936).

⁷ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280, 300, 306, 311 (1932) (Brandeis, J., dissenting, joined by Stone, J.). Justice Cardozo, the third “progressive,” did not participate in the decision.

⁸ *New State Ice Co.*, 279, 280 (1932) (Sutherland, J.).

again served not as the defender of state autonomy but as an agent of national power.

The Court's anti-New Deal decisions set up one of the most famous episodes in its history, the "Constitutional Revolution of 1937." The standard tale is familiar and the storyline dramatic. Overwhelmingly reelected with crushing Democratic majorities in both Houses of Congress, Roosevelt stunned the nation with his proposal to "pack" the Supreme Court by adding one new justice, up to a total of six, for every member of the Court over the age of seventy. Then, while Congress and the nation debated the plan, the Court suddenly seemed to change its position. In a series of 5-4 decisions – Hughes and Roberts joining the three progressives – it discarded the doctrine of liberty of contract and drastically broadened federal power. Over the next few years the Court's four conservatives resigned, and the president replaced them with loyal New Dealers who extended the changes the Court had begun in the spring of 1937.

The traditional story over-inflates the role of the Court-packing plan and oversimplifies the processes of constitutional change. The label "revolution," moreover, obscures complexities. There was continuity as well as change in the Court's decisions, and many of the innovations that occurred had roots in earlier periods and witnessed their full flowering only in later ones. In spite of the qualifications necessary, however, the traditional story highlights a fundamental fact: the New Deal years brought fundamental and far-reaching changes to the federal system.

First, the New Deal altered the way the system functioned. Centralizing many areas of American life, a dozen path-breaking measures asserted new or expanded federal authority over the nation's economy and financial system. The National Labor Relations Act, for example, which the Court upheld under a broadened commerce power, extended federal regulatory authority to the employment relationship and guaranteed labor the right to organize and bargain collectively. The result was the centralization of government labor policy, the preemption of many state laws considered hostile to workers, and the transformation of organized labor into a newly powerful and nationalizing force in American politics. Similarly, the Social Security Act, which the Court upheld under a broad construction of the spending and taxing powers, established the institutional foundations for a limited national welfare state. The act placed special taxes on workers and employers, created a variety of federal social support programs, and used conditional grants to enlist state participation and impose federal standards on their operation.

In addition, the New Deal moved the federal government into a widening range of previously local areas. It established agencies to insure individual home mortgages and private bank accounts, for example, and it

funded a series of massive projects to construct local public facilities and provide employment for millions. Using its power to tax and spend, it provided grants to states for a variety of new programs and raised the amounts involved into the billions of dollars. The grants extended federal involvement into such previously local areas as employment counseling, health care, public housing, conservation, slum clearance, social welfare, and child care programs.

Numbers told much of the story. In 1913 state and local governments had spent more than twice as much as the federal government, but by 1942 their spending amounted to barely a quarter of the national total. Federal expenditures skyrocketed from less than 30 percent to almost 80 percent of total government spending in the United States. Similarly, in 1929 federal grants to state and local agencies had stood at less than \$100 million, but after 1935 they averaged more than a billion dollars a year.

Further, the New Deal altered the functioning relationship between federal and state governments. As growing federal financing made national direction seem increasingly appropriate, the federal government began to expand its administrative capacities and enforce tighter and more detailed controls over its grants. Some of the conditions it imposed began to regulate not just spending but also the operations of the state and local government agencies that administered the grant programs. Further, the rapid expansion of federal-state grant programs began to alter the politics of intergovernmental relations. It nourished larger bureaucracies at all levels of government; intermixed the operations and interests of the federal, state, and local officials who administered them; and began to create new interest groups made up of program beneficiaries and their varied political supporters. Still embryonic in the late 1930s, those institutional changes would accelerate in the coming decades and increasingly reshape the de facto operations of American federalism.

The New Deal, moreover, tipped the balance of the federal system even more by expanding the institutional authority of the national executive. Roosevelt broadened the power of the presidency by providing a charismatic image of national leadership, assuming a major role in initiating and securing passage of legislation, and by boldly exercising his authority to issue executive orders. He also strengthened the institutional resources of the presidency. Although Congress refused to adopt his sweeping plan to reorganize the executive branch, in 1939 it established the Executive Office of the President, providing an expanded staff and other resources that allowed the president to exert greater control over the executive branch and to project his policy decisions more effectively.

The second major change that the New Deal brought was to inspire substantial changes in constitutional law that allowed governments at all levels

to assert expanded regulatory powers. Most obvious, the post-1937 Court stretched federal legislative power far beyond its prior limits. In *United States v. Darby* (1941) it overruled *Hammer v. Dagenhart* and renounced the idea that the Tenth Amendment created a substantive barrier against national power. The Tenth Amendment, it declared, could never block an action that was otherwise within the constitutional powers of the national government. Further, the Court broadened the commerce power to allow far-reaching regulation of economic activities. In the late nineteenth century it had held that the "production" of goods was not "commerce" but a local activity immune from Congressional reach, and in the early decades of the twentieth century it had maintained that distinction while expanding the types of local activities that were sufficiently "close" to interstate commerce to come within Congressional power. After 1937 it found an ever wider range of activities falling within that power, and in 1942 it discarded both the close relationship test and the distinction between "production" and "commerce." In *Wickard v. Filburn* (1942) the Court held that Congress could regulate any activity that – as part of the aggregate of all such activity – was likely to have some practical effect on interstate commerce. Under that construction the commerce power seemed capable of reaching almost anything. Finally, going beyond *Massachusetts v. Mellon*, the Court construed the Taxing, Spending, and General Welfare Clauses with exceptional breadth. It held that they constituted independent grants of power, authorized taxing and spending for the broadest purposes of national welfare, and allowed the federal government to make grants to the states contingent on the states' acceptance of federal conditions and limitations. Such restrictions, the Court ruled, neither coerced the states nor invaded any of their reserved rights.

Similarly, as the international situation grew ominous in the late 1930s and Roosevelt moved toward a more activist foreign policy, the Court enhanced the powers of the president over the nation's foreign affairs. It ruled that the nation's "powers of external sovereignty"⁹ lay in the executive branch, existed independent of the Constitution, and operated free of restriction from any reserved rights of the states. In a striking decision in 1937 it held that the president had authority to make "executive agreements" without Senate approval and that such agreements trumped otherwise valid state laws. Thus, as foreign policy emerged as a newly dominant concern in the late 1930s, the expansion of presidential power accelerated even more rapidly, bringing larger areas of American life under federal authority and, in an increasingly vital area of national concern, edging the states toward the periphery.

⁹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

While constitutional changes during the New Deal years substantially expanded federal power, they also broadened state regulatory authority. The Court narrowed its use of both federal preemption and the negative Commerce Clause to allow states an expanded role in regulating economic activities, made state rather than federal common law controlling in the national courts on issues of state-created rights, and in a variety of cases instructed the lower federal courts to defer to the proceedings of state courts and administrative agencies. Further, when it abolished the doctrines of substantive due process and liberty of contract, the Court freed state as well as federal legislative power. In *West Coast Hotel Co. v. Parrish* (1937) it overruled *Adkins v. Children's Hospital* and upheld the authority of states to enact minimum wage statutes for women, substantially enlarging their general police powers. The states were not shy about using their new powers, moreover, extending their regulatory, service, and welfare activities substantially. In 1913 state and local governments had raised and spent approximately \$1.8 billion, but by the early 1940s the comparable number was five times that amount. In addition, one of the most striking, if indirect, results of the New Deal was the adoption in 1933 of the Twenty-First Amendment, which repealed the Prohibition amendment, thereby eliminating a major grant of federal authority and restoring power to the states.

The third major change that the New Deal brought was the transformation of the federal judiciary. Roosevelt restaffed the lower courts with appointees sympathetic to his policies, and between 1937 and 1943 he reoriented the Supreme Court by filling seven of its seats with administration loyalists. The new judges, in turn, began to reshape federal law in line with the goals and values of the New Deal. Some maintained that they were merely casting off crabbed doctrinal accretions from the late nineteenth century and restoring the expansive constitutional principles that the Founders had originally intended. Others began to articulate a new attitude toward constitutional law. They advanced the idea that the Constitution was a flexible, practical, and even "living" instrument. The Founders had used broad and adaptive terms, they argued, so that Americans would be able to respond effectively to future problems as the changing demands of their well-being required.

Drawing on those ideas and their New Deal sympathies, federal judges began to infuse new meanings into the constitutional ideals of liberty and equality. They began to give increased protection to the kinds of "personal" liberties that they believed all individuals should enjoy in a democratic society while downgrading the economic liberties that accrued, as a practical matter, primarily to the benefit of large corporations and the economically powerful. Further, they sought to move beyond mere formal legal equality and nourish a greater practical equality by showing, often though surely

not invariably, a special solicitude to individuals and groups that were weak or disadvantaged – African Americans, workers, consumers, labor unions, political dissenters, victims of industrial injury, and unpopular ethnic and religious minorities.

Haltingly and somewhat erratically, the post-1937 Court floated a variety of constitutional theories to justify its shifting social orientation, including the idea that the Constitution required it to provide special protection for rights that were “vital to the maintenance of democratic institutions” or that were so “fundamental” as to be “implicit in the concept of ordered liberty.”¹⁰ Although the Court did not consistently apply any single theory, one of those it suggested would – decades later and in the wake of the Warren Court – become particularly influential. When normal democratic political processes were working and citizens had fair opportunities to influence their governments, five justices declared in *United States v. Carolene Products Co.* (1938), the Court should defer to decisions of the political branches. Conversely, when normal democratic processes were blocked or when they led to systemic abuses against helpless minorities, the Court should intervene to remedy the situation. Translating theory into doctrine, *Carolene Products* suggested that judicial review should operate on two tracks. When the Court reviewed ordinary economic regulations that resulted from normal political competition and compromise, it would apply a “rational basis” test, upholding government action if the action bore a reasonable relation to some legitimate government end. When, however, it reviewed cases involving the denial of fundamental non-economic rights or discrimination against “discrete and insular minorities” – situations in which ordinary democratic processes had failed to work properly – the Court would apply a “stricter scrutiny,” an inquiry that would validate government actions only on a showing that the actions were narrowly tailored and essential to achieve a compelling governmental goal.¹¹

Regardless of its varied justifications and sometimes contradictory rulings, the post-1937 Court was proposing itself as the protector of abused individuals and minorities, and, in so doing, it was also turning away from its earlier role as umpire of the federal system. On the ground that fair democratic politics should ordinarily prevail and that the legislative branch represented the states as well as the people, it accepted the principle that Congress was ordinarily the proper institution to determine whether and to what extent federal power should be exercised. Similarly, on the ground that the president had vast authority and discretion in the conduct of foreign

¹⁰ *Schneider v. Irvington*, 308 U.S. 147, 161 (1939); *Palko v. Connecticut*, 302 U.S. 319, 325 (1938).

¹¹ 304 U.S. 144, 152 n.4, at 152–53.

relations, it increasingly deferred to executive decisions that implicated foreign policy concerns. The altered role the Court sketched would help define the triple tracks of governmental centralization that marked the years after 1937. In economic matters Congress would exercise sweeping national legislative authority; in foreign policy matters the president would exercise an ever-growing and often unchecked executive discretion; and in certain areas involving non-economic social and political rights the Court would come to assert an expanding national judicial authority.

War, Cold War, and Civil Rights: The High Years of the New Deal Order

World War II and the dominating events that followed – the birth of the nuclear age, the onset of the Cold War, and the emergence of the United States as the undisputed leader of “the free world” – reinforced the nationalizing trend that the Depression, the New Deal, and the nation’s long-accelerating economic and cultural centralization had forged. The war led to massive expansions in the federal bureaucracy, sweeping national controls over the domestic economy, and the induction of more than 16 million men and women into the armed forces. The Cold War that followed sustained the national mobilization, generated a pervasive anti-Communism that further homogenized and centralized political debate, and provided a national security justification for growing federal intrusions into areas previously left to the states. Turning the nation from its traditional and relatively aloof foreign policy, the war and Cold War transformed the United States into a global military and economic superpower at least potentially interested in even the smallest and most distant regions of the world. The power and activities of the federal government grew apace, and the role of the presidency, in particular, continued to swell. The National Security Act of 1947 established both the National Security Council and the Central Intelligence Agency as powerful and well-funded agencies of the executive branch, and the White House staff, which numbered 64 people at the end of World War II, jumped to 399 by 1957 and then to 485 only six year later. All extended the president’s ability to control and enforce national policy and to shape the contours of the nation’s domestic political debates. The escalating foreign policy challenges, moreover, induced the Court to adopt a highly deferential attitude toward both Congress and the president, temporarily checking its proclaimed new commitment to protect civil liberties. During the war the Court refused to challenge the army’s decision to place more than a hundred thousand Japanese-Americans in concentration camps, and into the 1950s it failed to protect the civil liberties of many of those who ran afoul of the second Red Scare that erupted in the early years of the Cold War.

Although postwar politics grew more conservative, the major achievements of the New Deal remained largely in place. Harsh memories of the Great Depression, the unprecedented efforts of the Roosevelt administration to alleviate the nation's ills, and the stunning and sustained economic boom that followed wartime mobilization combined to inspire a broad new consensus. Americans had come to believe that many of the pressing difficulties they faced were "social" in nature, not "individual," and that government could and should take a more active role in resolving them. Indeed, their acceptance of the idea that a newly muscular federal government was necessary to protect national security in the Cold War strengthened their belief that the same national government could also act as an effective instrument of rational, democratic problem solving at home. Increasingly, they looked to government at all levels for an expanding variety of services. Most immediately, they had come to believe that anything affecting the American economy was properly a national issue for which the federal government should take responsibility. Sustaining economic growth and ensuring full employment became domestic goals of the highest priority, and Americans assumed that one of the primary duties of the federal government was to underwrite the nation's continuing economic welfare. Accordingly, government at all levels grew, and the federal government expanded most rapidly. With its unparalleled capacity for raising funds through the national income tax, and the distinct advantages its members realized from dispensing public money, Congress proved increasingly ready to finance new programs and expand old ones. Funds allocated to regular domestic grant programs, for example, doubled in only the first two years after the war.

Although the Republicans controlled one or both Houses of Congress as well as the presidency for much of the period from 1946 to 1960, they gradually acceded to most New Deal reforms and even joined in expanding the activities of the federal government. Congress passed new public housing, urban redevelopment, and minimum wage legislation, and it expanded federal spending programs to enlarge Social Security, guarantee opportunities for returning veterans, and provide funding for education, conservation, hospital construction, scientific research, and rural electrification. During the presidency of Republican Dwight D. Eisenhower from 1953 to 1961, federal aid to states on a per capita basis more than doubled. The system of "dual federalism" had passed away, replaced by one of "cooperative federalism" in which governments at all levels participated in a widening variety of joint programs and dealt with national problems by blending federal funding and direction with state and local administration. Illustrating both the spread of cooperative federalism and the ways in which Cold War national defense concerns fostered the expansion of the national government, Republicans and Democrats joined forces in 1956 to pass the

Interstate Highway Act. The measure provided massive federal funding for the construction of a 40,000-mile interstate highway system that promised to benefit a wide range of groups and interests across the nation. The states supported it enthusiastically, and Congress easily justified it as necessary for national defense.

Indeed, the extent to which the federal system, and normative theories about it, had evolved became apparent rather quickly. Between 1947 and 1959 Republicans and other supporters of states'-rights ideas initiated four major efforts to study the federal system and find ways to check and reverse the trend toward centralization. None had a noticeable impact. During his presidency, Eisenhower sponsored two such efforts. In 1957, for example, he urged the creation of a special government task force designed "to designate functions which the States are ready and willing to assume and finance that are now performed or financed wholly or in part by the Federal Government."¹² To accomplish that end, he cooperated with the National Governors Conference in establishing a Joint Federal-State Action Committee composed of officials from the highest ranks of state and federal government. After an elaborate and well-financed study, the committee was able to identify only two programs – vocational education and municipal waste treatment – that should be transferred from federal to state control. Together, the two programs accounted for a barely noticeable 2 percent of total federal grants to state and local governments. While a variety of political and economic factors conspired to trivialize the committee's conclusions, its much-heralded effort revealed one overpowering fact. By the 1950s a complex system of nationally directed and funded cooperative federalism had been firmly established and was becoming widely accepted in both theory and practice.

While some conservatives still hoped to restore a more decentralized system, liberals worked to shape the operations of the new order to their purposes. If national power had been drastically expanded and federalism transformed into a "cooperative" system, they reasoned, then the Supreme Court required a new institutional role adapted to those new conditions. The horrifying brutalities of Nazi and Soviet totalitarianism inspired an intensified commitment to the idea of the rule of law, and the tumultuous Cold War campaigns against Communism heightened their belief that the nation needed a strong judiciary to protect individual liberties. Further, the growing conservatism of the states in economic matters, their enthusiasm for fighting Communism by restricting civil liberties, and – most

¹² Dwight D. Eisenhower, "Excessive Concentration of Power in Government Is Dangerous: Power and Responsibilities of State Government Must Be Preserved," *Vital Speeches of the Day* 23 (July 15, 1957), 578, 580.

crucially – the adamant determination of those in the South to preserve racial segregation combined to cast a new and unflattering light on the idea that the states were democratic laboratories that should be free to conduct social experiments. Indeed, in the postwar years the very term “social experiment” raised images not of beneficent progressive reforms but of Nazi death chambers and Stalinist labor camps. Increasingly, Democrats and liberals turned to the reoriented post-New Deal federal judiciary as the government institution most likely to enforce national rules that would serve their new values, interests, and aspirations.

One of the most thoughtful, and eventually influential, formulations of those liberal attitudes came from Herbert Wechsler, a prominent legal scholar and old New Dealer. The normative constitutional problem that postwar liberals faced, Wechsler explained, was to find a principled way to “defend a judicial veto” when used to protect “personal freedom,” but to “condemn it” when used to block government actions “necessary for the decent humanization of American capitalism.”¹³ In 1954 Wechsler suggested an elegant solution. The Constitution itself guaranteed state sovereignty by providing the states “a role of great importance in the composition and selection of the central government.” Those “political safeguards of federalism” included equal state representation in the Senate, control over many aspects of voting and districting for the House, and a key role in electing the president through the system of electoral votes. Thus, the very structure of the Constitution meant that Congress and the president would “be responsive to local values that have large support within the states.” Consequently, there was no need for the Court to protect the states or to serve as the umpire of federalism. Instead, the constitutional structure suggested that the Court should focus its efforts elsewhere. First, because the federal government had no part in composing the state governments, it was the federal government, not the states, that needed the Court’s protection. Thus, the Court should ensure “the maintenance of national supremacy against nullification or usurpation by the individual states.” Second, because the Constitution’s majoritarian “political processes” would not remedy popular and democratic abuses against disfavored minorities, the Court should enforce “those constitutional restraints on Congress or the states that are designed to safeguard individuals.”¹⁴ Thus, post-New Deal liberalism began to develop the idea that *Carolene Products* had voiced:

¹³ Norman Silber and Geoffrey Miller, “Toward ‘Neutral Principles’ in the Law: Selections from the Oral History of Herbert Wechsler,” *Columbia Law Review* 93 (1993), 854, 924.

¹⁴ Herbert Wechsler, “The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,” *Columbia Law Review* 51 (1954), 543, 554, 559, 560, n. 59.

the Constitution underwrote the principle that the Court should protect abused individuals and helpless minorities, not the already powerful states or the well-entrenched federal system.

In the postwar years the most systematically disadvantaged minority in the United States was African Americans, and a variety of factors pushed the Court to take action on their behalf. Some were internal: a few useful precedents, the spread of post-New Deal liberal values, the justification provided by the *Carolene Products* idea, and key changes in the Court's personnel – especially the appointment in 1953 of Earl Warren as Chief Justice. Others were external. The African American community had been leaving the South, developing a strong middle class, increasing in organization and militancy, and gaining political influence in the North. Further, the atrocities of Nazi Germany had discredited racist ideas, and the Cold War made repudiation of racism necessary to counter Soviet efforts to undermine American influence in the Third World. The Democratic Party, too, had been transformed since the New Deal. Increasingly urban, northern, liberal, and reliant on African American votes, it was ready to support meaningful efforts to end racial oppression. Finally, the National Association for the Advancement of Colored People was pressing a methodical legal campaign against racial segregation, and its efforts presented a series of well-designed constitutional challenges that allowed the Court to chip away at legalized racial segregation. Together, the changes highlighted the discordant nature of Southern racial practices, led increasing numbers of Americans to reject them, and helped install in the federal courts judges sympathetic to the cause of racial equality.

The judicial turning point came in 1954 when the Court ruled in *Brown v. Board of Education* (1954) that racial segregation in the public schools violated the Equal Protection Clause and then, over the next few years, extended its ruling to a variety of other public institutions and facilities. Exemplifying and dramatizing the idea of the federal judiciary as the protector of both fundamental non-economic rights and “discrete and insular minorities,” the decisions asserted national authority over the states in a crucial area of social policy, one that had been labeled “local” since the end of Reconstruction. When Southern state governments and private citizens' groups pledged massive resistance to *Brown*, the Court responded in 1958 with an extraordinary assertion of national judicial supremacy signed by all nine justices. “[T]he federal judiciary is supreme in the exposition of the law of the Constitution,” they proclaimed in *Cooper v. Aaron*, and “the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land.”¹⁵ The decisions strengthened

¹⁵ *Cooper v. Aaron*, 358 U.S. 1, 18.

a galvanizing civil rights movement, but they also provoked bitter and sometimes violent opposition. By themselves they were unable to end racial segregation in the South. That had to await events of the following decade.

Brown and the civil rights struggle helped fire the tumultuous era known as “the sixties,” a politico-cultural phenomenon that began sometime after 1957, became self-conscious in the early 1960s, peaked between 1965 and 1972, and expired rapidly after 1974. Underlying social developments – a sustained economic boom, rapid expansion and luxurious federal support of higher education, the emergence of experimental “youth cultures” and radical “liberation” movements, and the popularization of social theories that challenged traditional ideas across the board – combined to spur major changes in American attitudes and values. Melding with escalating and disruptive protests against an ever widening and seemingly futile war in Vietnam, the changes generated a volatile era of turmoil and transformation, of vaulting hopes and intensifying hates.

With respect to the federal system, the sixties initially accelerated the trend toward centralization. Democratic President John F. Kennedy inspired a new enthusiasm for liberal activism after his election in 1960, and his successor Lyndon B. Johnson strove to build a “Great Society,” one in which the federal government would achieve the social and economic goals of the New Deal and ensure that all Americans shared in their benefits. The Supreme Court became increasingly active in imposing liberal national standards on the states, and after an overwhelming Democratic victory in 1964, Congress responded with a series of major domestic reforms. Further, between 1961 to 1971 the nation ratified four constitutional amendments, three of which protected the right of Americans to vote, limiting state authority and giving Congress power to enforce their mandates.

Of most enduring importance, the federal government as a whole finally committed itself to the cause of black civil rights. Kennedy and Johnson increasingly embraced the issue, and between 1964 and 1968 Congress passed three monumental civil rights acts. Two broadly prohibited racial and other types of discrimination in housing, education, employment, and “public accommodations.” The third negated a wide range of legal and practical obstacles that Southern states deployed to deny African Americans the franchise. Equally important, the statutes created effective remedies for violations and made the federal government an active and continuous agent of enforcement. Illustrating the relatively consistent purpose that animated the entire federal government in the late 1960s, the executive branch immediately initiated or expanded a variety of programs to enforce the new civil rights statutes, while the Supreme Court quickly upheld their constitutionality. It approved the sharply challenged public accommodations provision

by applying the sweeping interpretation of the Commerce Clause advanced in *Wickard v. Filburn*, and it validated federal control over voting rights on the ground that Section 5 of the Fourteenth Amendment gave Congress the broadest possible power necessary to enforce the amendment's rights. By the end of the 1960s legalized segregation was crumbling, and the constitutional pillar of post-Reconstruction federalism that had survived the New Deal – the principle that racial matters were local – had been obliterated.

Congress expanded federal authority in other areas as well. Johnson's Great Society reached into the backwaters of American life, identifying the very existence of poverty and inequality as problems of national importance. Like the theory of *Carolene Products* and the concerted attack on racial discrimination, his War on Poverty sought to assist the nation's poorest groups and remedy fundamental structural inequalities. Congress authorized ever more generous grants to state and local governments for a seemingly limitless variety of "categorical" purposes, including welfare, housing, child care, mass transit, job training, education, urban renewal, medical insurance, and legal services for the poor. Similarly, the federal government began a concerted effort to deal with issues of environmental pollution and the conservation of natural resources. Increasingly, moreover, the new programs were intended not merely to help state and local governments deal with their problems but to implement national policies designed to achieve national objectives.

A report of the federal Advisory Commission on Intergovernmental Relations published in 1967 charted the steady and accelerating expansion of federal funding programs. Before 1930 the national government offered funding to state and local governments in only ten areas of activity. The New Deal brought federal funding to seventeen more areas, and the early postwar years added another twenty-nine to the list. The period from 1961 to 1966, however, witnessed the most explosive growth. New programs extended federal funding to another thirty-nine areas of state and local government activity – an increase of almost 70 percent in only six years. Thus, by 1967 the federal government was funding state and local government activities in 95 areas and doing so through 379 separate categorical grant programs. In a decade, total federal aid to state and local governments tripled, rising from \$4.9 billion in 1958 to \$15.2 billion in 1967.

The political momentum carried into the next decade. Even under Republican President Richard M. Nixon, who talked about a "new federalism" that would return power to the states, national activism continued. Indeed, in the first two years of his administration federal funding to state and local governments jumped by more than a third, reaching \$25 billion in 1970. Through a variety of changes within the executive branch, Nixon enhanced presidential power to manage both the federal bureaucracy and

the distribution of funds to the states. He sought not so much to limit federal power and government activism as to make all government agencies more streamlined and efficient. Moreover, stressing the problem of "crime in the streets" and the need for "law and order," he accelerated the use of the national government to fight crime, particularly "organized" crime and narcotics trafficking. New legislation expanded the scope of the federal criminal law, turned a multiplying number of state-law crimes into federal violations, and in the Racketeer Influenced and Corrupt Organizations Act (1970) gave the national government muscular new tools to investigate and prosecute transgressors. Similarly, the decade brought major federal initiatives aimed at protecting the environment and expanding government welfare services. Although some social programs, particularly those involving Johnson's War on Poverty, were crimped or terminated, many others took their place. During the decade total federal spending on welfare programs more than doubled. By 1979 Congress had established more than five hundred grant programs that accounted for a third of the federal budget and furnished state and local governments with approximately 30 percent of their total revenue. Moreover, although Republicans criticized many aspects of the civil rights movement, especially school busing, affirmative action, and some aspects of anti-discrimination law, the party – or at least its Northern wing – accepted many of the changes the movement had brought.

As federal funding gushed forth, the national government's control over its programs continued to tighten. Although Nixon sought to minimize federal restrictions through unconditional "revenue sharing" and less restrictive "block grants," his efforts were only minimally successful. Federal agencies swelled in number and responsibilities, while the scope and complexity of their regulations multiplied geometrically. Expanding and reorganizing the federal bureaucracy, for example, Congress established the Departments of Housing and Urban Development (1965), Transportation (1966), Energy (1977), and Education (1979), as well as the Environmental Protection Agency (1970), to help administer some of its new programs. The agencies spawned a growing body of regulations that ranged from detailed rules controlling individual categorical programs to broad across-the-board rules covering many or all grant programs. Increasingly, moreover, federal regulations sought to serve a variety of national policies – ending discrimination, protecting the environment, expanding opportunities for the disadvantaged – unrelated to specific grant programs themselves. During the 1970s the total number of federal regulations more than doubled, and Congress and the federal bureaucracy were increasingly regulating not just the distribution of funds but the policies and operations of state and local governments themselves.

The continued growth of federal activism was driven in large part by three fundamental changes in the political system. One was the increasing centralization that marked all areas of American public life and transformed ever larger numbers of issues into matters of national concern. The accelerating nationalization and internationalization of economic enterprise, the dramatic and unifying power of ever more pervasive mass media, the growing ease and speed of travel, and the frequency with which Americans moved their homes from state to state and region to region combined to homogenize American life and culture, and the attitudinal changes that resulted increasingly made most problems seem national in scope and resolvable only with national solutions. Moreover, the ever-tightening tyranny of money in the political process magnified the influence of those private organizations – almost always national in operation and concern – that were capable of providing the huge campaign donations that the political parties required. Those organizations – corporations, labor unions, industrial and professional associations, and swelling varieties of ideological advocacy groups – almost invariably sought, in return for their support, national policy decisions that would provide them with advantages national in scope.

The second change lay in the new and stronger sets of interlocking local, state, and national interests that resulted from the massive federal spending programs of the prior decades. The programs were attractive to members of Congress who found them ideal ways to shape policy while assisting their favored interest groups, funneling money to their districts, and improving their chances of reelection. Further, the programs developed their own powerful constituencies: grant recipients and the interest groups who supported them; professionals who designed and administered the programs; and innumerable officials at all levels of government who for reasons of public policy, bureaucratic influence, and personal advancement found the programs highly desirable. As federal spending grew, so did the power of those interlocking interests, and they continued to drive expanded federal spending in the 1970s even as the animating values of post-New Deal liberalism were withering.

The third change was rooted in the altered role of the presidency in an age of mass communications and cultural centralization. Dominating national politics and the public agenda, presidents – and all serious candidates for the office – found it essential to propose national solutions for almost every problem that drew national attention. By the late twentieth century American presidents were expected to act not only as chief executives and commanders-in-chief but also as legislative leaders and all-purpose national problem solvers. The nation's seemingly limitless demands on the office magnified its irresistibly centripetal force.

While Congress, the executive, and concentrating social pressures were extending federal power, the Supreme Court was doing the same. Beginning in the early 1960s, the Warren Court launched a new and broader phase of liberal activism. Shifted leftward by the retirement of two conservatives – including Justice Felix Frankfurter, the Court’s leading advocate of “judicial restraint” and deference to the states – and galvanized by the reformist nationalism of Warren and Justice William J. Brennan, a new majority coalesced in almost perfect harmony with the decade’s vibrant liberal politics. Between 1962 and 1969 the Court expanded its efforts far beyond civil rights and announced a breathtaking series of decisions that imposed federal limitations on the states in a variety of areas. Perhaps of greatest institutional importance, the Court asserted national authority over the districting and apportionment of state and local legislative bodies. Rejecting earlier decisions, it ruled that the Equal Protection Clause required that electoral districts have closely comparable populations based on the egalitarian standard of “one person, one vote.”¹⁶

Similarly, the Court substantially expanded the reach of the First Amendment. Construing the amendment’s religion clauses, it prohibited a variety of government-sponsored religious practices, ruling that states could not require officeholders to declare their belief in God, sponsor Bible reading as part of the public school curriculum, or compel schoolchildren to recite compulsory prayers. Construing the Free Speech Clause, it ruled that the states could punish advocacy only if a person’s words were specifically calculated to incite imminent unlawful actions, and it held that the right of free speech created a qualified privilege against state defamation suits, a decision that not only limited state law but opened the way for particularly vigorous criticism of state and local officials. Perhaps most innovative, in *Griswold v. Connecticut* (1965) it held that the First Amendment, in conjunction with other amendments, created a constitutional right of privacy that barred states from prohibiting residents from using or conveying information about contraceptives.

Equally controversial, the Warren Court applied most of the rest of the Bill of Rights to the states. Again reversing prior doctrine, it held that the central provisions of the Fourth, Fifth, Sixth, and Eighth Amendments were “incorporated” in the Due Process Clause of the Fourteenth Amendment. Moreover, it repeatedly broadened the protections that the clauses offered. In what was probably its most controversial decision in the area, *Miranda v. Arizona* (1966), it required law enforcement agents to inform arrestees about their constitutional rights and to respect their decision to exercise those rights. To enforce its rulings, the Court expanded the availability of

¹⁶ *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

federal habeas corpus for state prisoners, enabling the lower federal judiciary to review state court criminal convictions more frequently. The decisions created, in effect, an expanding federal code of criminal procedure that bound the states, restrained police behavior across the nation, and provoked bitter and widespread criticism.

As Congressional activism continued into the 1970s, so did the Court's. Although Chief Justice Warren resigned in 1969 and Nixon appointed four new justices, including the new chief justice, Warren E. Burger, the Court changed less than many expected. Indeed, in several areas it continued to extend federal power, making the early Burger Court seem almost a third, if somewhat ambivalent, phase of the Warren Court. During the 1970s the Burger Court gave constitutional sanction to some types of affirmative action, confirmed the broad power of Congress under the Fourteenth Amendment, and upheld a substantial, if limited, remedial authority in the federal courts to order local officials to integrate previously segregated public school districts. In addition, it provided due process protections for welfare recipients faced with termination of benefits and continued the Warren Court's efforts to expand the relief that injured individuals could obtain under a variety of federal regulatory statutes.

In three areas the Burger Court's decisions seemed particularly liberal, activist, and nationalist. First, it held that the Equal Protection Clause applied to gender classifications. Congress had begun to address gender inequality in the 1960s, and in 1971 the Court ruled in *Reed v. Reed* that a state statute disfavoring women violated the Constitution. Second, reaffirming and broadening the constitutional right of privacy that the Warren Court had pioneered in *Griswold*, it held that the right barred states from prohibiting the sale of contraceptives to unmarried persons and, far more innovative and controversial, announced in *Roe v. Wade* (1973) that it guaranteed women the right to an abortion. The Burger Court thus confirmed that a new and vibrant "public/private" distinction had entered American constitutional law. Unlike the pre-New Deal Court, which had used the distinction to protect property and economic liberty from government regulation, however, the Warren and Burger Courts infused new meaning into the dichotomy, using it to protect intimate matters involving sex and procreation from such interference. Finally, the Burger Court extended the reach of the Eighth Amendment, mandating minimum federal standards on both capital punishment and prison conditions. Its rulings prevented the states from executing hundreds of condemned prisoners, forced them to make substantial revisions in their criminal laws, and compelled them to institute a variety of reforms in the administration of their corrections systems. By the 1980s more than 200 state prisons and 450 local jails in forty-three states were operating under federal court orders.

The growing control that the federal courts exercised over the nation's prisons was only one of the more visible areas in which federal judicial supervision cabined the power of state and local officials. After *Brown* the federal courts had gradually taken over hundreds of schools in their efforts to ensure that the Court's mandate was enforced. Inspired by their role in combating racial segregation and energized by a burgeoning faith in the judiciary's power to redress social wrongs, the federal courts grew increasingly willing to take on broader and more complex social problems. Moreover, the explosion of Congressional legislation compelled them in the same direction. Numerous statutes created new and sometimes vague rights under many of the cooperative programs that the federal government funded, and those provisions spurred a rapidly expanding range of suits in the national courts against state and local governments. Increasingly, federal judges became active managers of ongoing litigations that sought to reform the structures and procedures of those governments, and they often issued detailed orders establishing federal rules over many areas that Congressional funding had brought within the indirect, but nevertheless effective, control of the national government.

Although national law and national standards had become pervasive by the 1970s, the states nevertheless remained vital centers of power. For the most part, their laws still controlled many of the most basic areas of American life: marriage, family, education, criminal justice, commercial transactions, zoning and land usage, estate planning and inheritance, the use of automobiles and the highways, and most of the broad common law fields of tort, contract, and property. Indeed, in lawsuits where state law properly controlled, federal constitutional law continued to bind the national courts to follow and apply it. State and local governments, moreover, were heavily involved in providing most services in such basic areas as education, transportation, social welfare, police and public protection, housing and developmental planning, natural resource conservation and usage, and labor relations and employment practices. While from 1950 to 1975 the number of federal civilian employees edged up from 2.1 to 2.9 million, the number of state and local government employees jumped from 4.2 to 12 million, almost 60 percent of whom were concentrated in the fields of education and health services.

Further, stimulated by the federal government's expanded activism, local reformers pushed to modernize state governments and enhance their administrative capacities. Liberals sought to strengthen their ability to provide greater ranges of social services, while many conservatives hoped that stronger state governments would help check the increasing nationalization that marked the post-New Deal decades. From the 1940s through the 1970s the states increased their use of professional administrators and

drafted expert commissions to frame constitutional amendments and other structural reforms that would strengthen the institutions of state government. In 1962 only twenty states held annual legislative sessions, for example, but by the mid 1970s forty-two did so. Influenced by the growing emphasis on executive leadership that marked the national model, sixteen states extended gubernatorial terms to four years, and a dozen eliminated long-established restrictions to allow their governors to serve a second successive term. Further, nineteen states restructured their entire executive branches, expanding gubernatorial powers over a variety of budgetary matters and giving their governors greater administrative control over a wide range of state and local agencies. Moreover, state employment, revenues, and expenditures generally expanded relative to those of local government entities, and most states centralized their administrations by imposing a growing number of requirements and restrictions on local government institutions.

Finally, states and localities were able to protect their positions in the federal system by exerting persistent and effective pressures on the national government. They marshaled their power by establishing a variety of organizations – including the National Governors' Association, the National Conference of State Legislatures, the National League of Cities, the U.S. Conference of Mayors, and the National Association of Counties – to influence federal policy and ensure that national programs were tailored to local needs and interests. Further, by administering many cooperative state-federal programs, they were able to help shape their operations and impact. The states, too, retained substantial independence in their actions because their officials continued to be elected directly by their citizens and derived neither office nor authority from the national government. While the states helped elect federal officials, the federal government had no such role in state electoral processes.

IV. RESHAPING FEDERALISM IN AN AGE OF FRAGMENTATION AND REALIGNMENT: VECTORS OF AN UNFOLDING ERA, 1970s–2000

The 1960s ended badly for post-New Deal liberalism. Escalating militancy in the civil rights and antiwar movements brought mass protests and civil disobedience to the center of American politics, while the appearance of communes, youth cultures, feminism, sexual freedom, gay liberation, black nationalism, and varieties of political radicalism fueled a growing backlash among older and more conservative Americans. Three stunning political assassinations – President Kennedy; his brother, Robert, a senator and Democratic presidential candidate; and Dr. Martin Luther King, Jr.,

the revered and despised leader of the civil rights movement – compounded a growing sense of turmoil, division, and crisis.

The events fragmented post-New Deal liberalism. On the level of ideas, the fundamental assumptions that underwrote the regulatory state – faith in science, expertise, and administrative neutrality – seemed increasingly dubious and misconceived. On the level of politics, the war in Vietnam pitted Johnson's Great Society against a rising tide of antiwar sentiment that increasingly enlisted the support of women, students, liberals, intellectuals, and racial minorities. Those core elements of the Democratic coalition came to view the war as a political betrayal, and an outspoken radical minority transformed the very word "liberal" into a term of derision. At the same time, other key elements of the coalition veered off in the opposite direction. Many white Americans, including urban workers and ethnic Catholics, grew increasingly angry at civil rights advances, antiwar activism, and what they regarded as the social and cultural outrages that exploded in the decade's second half. To make matters worse, organized labor, a central pillar of the Democratic coalition, began shrinking in both membership and influence.

The result was rupture and defeat. In 1968 the anti-war movement drove Johnson from office, and disaffected Democrats – some by voting Republican and others by abstaining in protest – helped elect Nixon president. Campaigning against crime, radicalism, affirmative action, and the Warren Court itself, Nixon joined leftist radicals in blaming liberalism for the nation's problems. Although the election was close, it marked the beginning of the end of the New Deal order.

If the 1960s had been strife-torn but optimistic, the 1970s were strife-torn and pessimistic. Dominated by the party's left wing, the Democrats lost disastrously in 1972, and the Republicans suffered an equally humiliating blow two years later when the Watergate scandal forced Nixon into the first presidential resignation in the nation's history. The civil rights movement fragmented over both goals and tactics, while white resentments stoked a burning opposition that focused on school busing and affirmative action. The war in Vietnam, moreover, came to an excruciating end when the United States withdrew its forces in 1973 and then watched as the Communist North conquered the South, the fanatic Khmer Rouge seized control of neighboring Cambodia, and literally millions of Southeast Asians – many of whom had loyally supported the United States during the war – were murdered, starved to death, or drowned trying to escape. Further, *Roe v. Wade* began to unite moral traditionalists, Evangelical Protestants, and the Catholic Church in a passionate anti-abortion movement that widened what seemed an unbridgeable moral divide among Americans. At the same time the Yom Kippur War in the Mideast triggered an Arab oil embargo and

drastic price increases that created a severe energy crisis. The result was a steep recession and a debilitating inflation that lingered into the 1980s. Fundamental economic problems – severe inflation, sharply rising interest rates, high levels of unemployment, and persistent economic stagnation – compounded the national downswing. Increasingly, American industry lost out to foreign competition, and in 1971 the nation witnessed its first trade deficit in almost a century, a deficit that multiplied more than tenfold by 1981. Finally, a grisly national humiliation capped the decade. Iran, a critical Cold War ally, fell to a violently anti-American Islamic movement that seized the United States embassy and held seventy-six Americans as hostages. Daily television coverage carried anti-American denunciations across the world; and, when a rescue mission failed in early 1980, the nation watched in horror as Iranian radicals gloated over the burnt remains of dead American soldiers and their crashed helicopters.

Those events combined to destroy the New Deal order, but they failed to generate a successor regime that was equally stable and well defined. The economic depression of the 1930s had confronted the nation with a single and overwhelming challenge, one that focused attention and interests on a national effort to revive and reform the economy. In contrast, the psychological depression of the 1970s enveloped the nation in a web of amorphous anxieties and multi-cornered conflicts. If the earlier depression had pitted business and the wealthy against the unemployed and the middle class, the later one tended to divide Americans into a splintered multitude of groups identified not only by economic and class position but also by race, age, region, gender, religion, ethnicity, sexual orientation, and political ideology. The *Carolene Products* idea of “discrete and insular minorities” seemed to have become the “big bang” of a new and fragmenting politico-cultural universe.

One result was that both liberals and conservatives showed a chastened sense of limits. Liberals enjoyed their major successes in opposing the war and cultivating a growing concern with the environment. The former was premised on the limits of American power and the latter on the limits of industrial society. Conservatives enjoyed their greatest triumphs in bringing traditional religious ideas and neo-classic economic thinking into the political mainstream. The former was based on the mandate of a transcendent God and the latter on the iron laws of the market. All reflected a declining faith in the power of reason, science, and government to bend the future to the nation’s wishes.

While the psychological depression deepened, other forces were beginning to nudge Americans in new directions. One was a complex but profound set of attitudinal changes: escalating distrust of government, resentment against minorities, hostility toward welfare programs, rejection of

“liberalism” and its regulatory tradition, and a festering anger directed against challenges to traditional religious and moral ideas – particularly feminism, abortion rights, and gay liberation. A second factor was a long-brewing revitalization of market economics. Together with the general assault on government and scientific expertise, the spreading market ideology helped turn the nation toward deregulation, privatization, and a renewed faith in the power of private enterprise and the virtue of becoming rich. A third factor was the formation of what appeared to be a new Republican majority based on the merger of the party’s traditional supporters – especially business, the well-to-do, rural America, and the old Anglo-Saxon middle class – with new social groups, such as Catholics, ethnic whites, disaffected members of the working class, the culturally conservative “solid South,” and the growing forces of Evangelical Protestantism.

Drawing the new Republican coalition together was a cultural synthesis that implicitly reversed the values of *Carolene Products* and post-New Deal liberalism. Disillusioned intellectuals began to articulate a new conservative ideology that called for a return to “authority” and to a social order build solely on “merit.” Market theorists developed the idea that politicians responded only to organized interest groups that sought to use government to gain special favors contrary to the common good – “rent seeking,” as they called it. Traditional conservatives and Evangelical groups maintained that secular liberalism and the welfare state were undermining the nation’s moral fiber, family values, and religious foundations. Business interests sought to minimize their legal liabilities and avoid regulatory requirements by claiming that their productivity was at the mercy of “frivolous” lawsuits brought by dishonest or deluded claimants seeking undeserved windfalls. Property owners and other groups, squeezed by recession and angered at government spending on social welfare programs, organized “taxpayer revolts” designed to secure substantial reductions in local, state, and national taxation. Finally, those who harbored resentments against racial and ethnic minorities were angered by the “preferential treatment” that the civil rights laws gave to those whom they considered unable to succeed on their own. Subtly and only half-consciously, those varied attitudes blended into a new social persuasion, one that saw the weak, disadvantaged, non-conformist, and ill treated as morally unworthy and judged their attempts to secure governmental assistance as trickery and exploitation. Simply put, the ideology of the new Republican coalition transmuted “discrete and insular minorities” into “rent-seeking interest groups,” the systemically disadvantaged into the morally unworthy. Conversely, the ideology elevated business and the economically successful into exemplars of merit and paladins of the common good. Those groups were not special interests but pillars of economic growth, national might, and moral rectitude. Thus, it was appropriate for

government to foster business with deregulation and favor the prosperous with tax cuts.

As New Deal liberalism had done, the new conservatism generated and popularized its own supporting constitutional theories. Rejecting what they considered unlimited Congressional power over the economy and improper judicial activism by the Warren Court, conservative thinkers sought to discredit the former with revived ideas of state sovereignty and the latter with restrictive ideas about separation of powers. Although they advanced a variety of arguments, often supported by reasoning drawn from market economics, they rallied around the unifying claim that post-New Deal liberalism had distorted the Constitution and abandoned its “original” meaning. Rejecting the idea of a “living” Constitution, they maintained that the document’s meaning was fixed and unchanging. Those not biased by liberal nationalism, they charged, could identify the Constitution’s authentic meaning by focusing on its text, the “original intent” or “understanding” of its drafters and ratifiers, and the social and moral context that surrounded its adoption.

Edwin Meese III, who served as attorney general under Republican President Ronald Reagan in the 1980s, emerged as the most prominent national proponent of the new conservative constitutional theory. The federal judiciary was designed to protect federalism and limited government, Meese insisted, and “the literal provisions of the Constitution” and “the original intentions of those who framed it” provided the clear and correct “judicial standard” for interpreting its meaning. Castigating the “radical egalitarianism and expansive civil libertarianism of the Warren Court,” he charged that liberal judicial decisions were “ad hoc” and even “bizarre,” often “more policy choices than articulations of constitutional principle.” To preserve limited constitutional government and construe the Constitution properly, the Court must return to the original intentions of the Founders, “the only reliable guide for judgment.” Such a return, Meese promised, “would produce defensible principles of government that would not be tainted by ideological predilection.” Thus, he announced, it “has been and will continue to be the policy of this administration to press for a Jurisprudence of Original Intention.”¹⁷

Although the idea of “original intent” was an old one and, like the theory of *Carolene Products*, had some merit, it suddenly began to command attention and inspire devotion because it was – again like *Carolene Products* – a highly serviceable tool of constitutional politics. For the new conservatives,

¹⁷ Edwin Meese III, address to the American Bar Association, July 9, 1985, reprinted in The Federalist Society, *The Great Debate: Interpreting Our Written Constitution* (Washington, DC, 1986), 1, 9, 10.

the idea of original intent provided theoretical grounds for discrediting much of the constitutional law of the preceding half-century, and it justified both attacks on the Warren Court and the demand for justices who would overturn its decisions and restore the “authentic” Constitution. Indeed, the concept of a normative original intent was inherently an instrument of doctrinal disruption and change. Asserting the existence of a “true” constitutional meaning established in a distant past, the idea provided theoretical justification for casting off constitutional interpretations that had evolved over the subsequent centuries and for rejecting judicial decisions rendered in more recent periods. Equally important, by making eighteenth- and nineteenth-century attitudes the touchstone of constitutional meaning, the idea promised to strengthen the legal and historical arguments that conservatives advanced against the political adversaries they opposed most intensely – those supporting gay rights, abortion, gun control, affirmative action, restrictions on the death penalty, more expansive tort liability, rigid separation of church and state, institutional reform litigation, and broad federal anti-discrimination laws.

Influenced by Nixon’s four appointees, the Burger Court began to reflect those spreading attitudes. Trumpeting a new concern with what it called “Our Federalism,” it increasingly sought to counter liberal nationalism by limiting the reach of federal law into the operations of state and local government. It expanded the immunity of government officials from civil rights suits, curtailed remedies for those injured by violations of federal statutes, and narrowed the scope of the Fourteenth Amendment. Similarly, it cabined many of the Warren Court’s criminal law decisions, narrowing both the Fourth Amendment exclusionary rule and the Fifth Amendment right to counsel. Although it did not overrule *Miranda v. Arizona*, it repeatedly found ways to shrink its reach. Most commonly, the Court targeted the institutional power of the lower federal courts, developing a variety of procedural restrictions to limit their opportunities for liberal activism. It required them to abstain more frequently in favor of state forums, limited their power to issue writs of habeas corpus to state officials and to order remedies in school desegregation suits, and used the Eleventh Amendment to deny them jurisdiction over suits against states for money damages.

Although it employed the rhetoric of federalism, the Burger Court seemed increasingly committed to a substantively conservative political agenda, especially after the appointment of Justice Sandra Day O’Connor in 1981. Its decisions, for example, commonly deployed the rhetoric of federalism to close the federal courts to groups that the new Republican coalition had targeted – tort plaintiffs, civil rights claimants, and state criminal defendants. Indeed, when deference to the states led to unpalatable results,

the Court often balked. In *Michigan v. Long* (1983), for example, deference to state decision making would have meant upholding the constitutional claim of a criminal defendant. The Court's majority would allow no such result. Instead, it broadened its own jurisdiction to review decisions of state courts and thereby extended the reach of federal authority to overturn state court rulings.

Most fundamental to the federal system, in a 5–4 decision in *National League of Cities v. Usery* (1976) the Burger Court sought to strike directly at the New Deal legacy by reviving the Tenth Amendment. Overruling a decision of the Warren Court, it held that the Fair Labor Standards Act of 1938 (FLSA) could not be applied to state employees and, for the first time since 1937, voided a Congressional statute enacted under the commerce power. Citing the Tenth Amendment, *National League* declared that there were “definite limits upon the authority of Congress to regulate the activities of the States as States by means of the commerce power.”¹⁸ The Court, *National League* reasserted, was responsible for protecting the states from national legislative power. For three liberal dissenters, Brennan rejected the majority's holding and invoked the post-New Deal theory of the “political safeguards of federalism.” The “fundamental tenet of our federalism,” he insisted, is “that the extent of federal intervention into the States' affairs” was properly determined not by the Court but “by the States' exercise of political power through their representatives in Congress.”¹⁹

Indicative of its transitional nature as both a third Warren Court and the ur-Rehnquist Court, the Burger Court – actually, a single justice – changed its mind nine years later. Overruling *National League* in another 5–4 decision, *Garcia v. San Antonio Metropolitan Transit Authority* (1985), it upheld an application of the FLSA to a municipal transit system on two closely related constitutional grounds. One was that the Constitution offered “no guidance about where the frontier between state and federal power lies” and, hence, gave the justices “no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.” The other ground was a liberal version of original intent, a broad theory of the Framers' design: “the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal government itself.”²⁰ In explicit terms the Court adopted the reigning liberal theory that the federal system was properly protected not by the Court but by the “political safeguards” that the Framers had built into the constitutional system.

¹⁸ 426 U.S. 833, 852.

¹⁹ 426 U.S. at 876–77 (Brennan, J., dissenting).

²⁰ 469 U.S. 528, 550.

Reviving the pre-New Deal views of William Howard Taft and Charles Warren, four Republican appointees dissented vigorously. Justice Lewis F. Powell rejected the “political safeguards” theory as both functionally inadequate and constitutionally unfounded, and he insisted that “judicial enforcement of the Tenth Amendment is essential to maintaining the federal system.” Casting a hopeful eye to the future, Justice William H. Rehnquist, Nixon’s last appointee and the author of *National League*, agreed. The principle of state sovereignty, he declared defiantly, “will, I am confident, in time again command the support of a majority of this Court.”²¹ Little more than a year later Ronald Reagan appointed Rehnquist Chief Justice.

Elected president in 1980, Reagan did far more than that. He helped reorient American politics, lead the nation out of the psychological depression of the 1970s, and inspire a crystallizing Republican majority in its drive for national dominance. That coalition reelected Reagan in 1984, put two other Republicans – George Bush in 1988 and George W. Bush in 2000 – in the presidency, and forced Democrat Bill Clinton to move his party substantially to the right in order to scratch together two presidential victories in the 1990s. Equally important, the new Republican coalition steadily increased the party’s strength in Congress, which the Democrats had dominated since the Great Depression. After 1980 the Republicans frequently controlled the Senate, and in 1994 they won control of the House, a position they retained to century’s end.

Reagan established both the rhetoric and direction of the new era. “[G]overnment is not the solution to our problem,” he announced. “Government *is* the problem.”²² His greatest success came in reshaping the parameters of public debate and establishing the values of the new Republican coalition – religious traditionalism, suspicion of government, faith in business and the free market, and opposition to welfare, abortion, homosexuality, and affirmative action – at the center of American politics. His administration pursued four principal policies: business deregulation, tax cuts weighed in favor of the wealthy, heavy increases in military spending, and a balanced budget. In large part it delivered on the first three and, likely by design, failed on the fourth – a result that led to skyrocketing federal deficits and, consequently, to intensifying pressures to cut federal domestic spending on welfare and other social programs. Further, Reagan, who had opposed both the Civil Rights Act of 1964 and the Voting Rights Act of 1965, altered the position of the federal government on civil rights issues. His administration opposed affirmative action and school busing, and it

²¹ 469 U.S. 570 (Powell, J., dissenting); id. at 580 (Rehnquist, J., dissenting).

²² Ronald Reagan, “Inaugural Address,” Jan. 20, 1981, in *Public Papers of the Presidents of the United States, 1981* (Washington, DC, 1982), 1.

slackened substantially federal efforts to enforce the national civil rights laws.

Proclaiming another “New Federalism,” Reagan sought to restructure the system far more substantially than Nixon had attempted. Nixon’s “new federalism” had embraced the idea of active government. Accepting the need for massive federal spending it had attempted to make government more responsive and efficient by decentralizing management. Its primary method was to abandon highly restrictive categorical grants in favor of block grants and general revenue sharing, thereby maintaining the flow of funds to state and local governments but with far fewer federal use restrictions. In contrast, Reagan rejected revenue sharing and, more important, sought to minimize or terminate federal financing and supervision in as many areas as possible. His goal was to shrink government at all levels. Although his most ambitious federalism proposals failed, he succeeded in ending revenue sharing and reducing federal grants to state and local governments. During the 1980s funding for welfare programs fell, and federal grants to state and local government dropped by 25 percent. Along similar lines, Reagan substantially reduced federal supervision over state and local governments. His administration adopted administrative procedures to slow the growth of federal rule making and altered many existing regulations to allow the states greater discretion and to relieve them of costly reporting requirements. It consolidated seventy-seven categorical programs into nine broad block grants, for example, condensing and simplifying a wide range of rules and restrictions. In social terms, the weak and disadvantaged, both the working and non-working poor, bore the hardships and deprivations of his federalism reforms.

In spite of its commitment to decentralization, however, the Reagan administration readily embraced federal power when necessary to advance its political objectives. While in most cases – welfare spending and civil rights enforcement, for example – curtailing federal activism served its social purposes, there were exceptions. When business interests advocated both uniform national standards to open more miles of highway to larger trucks and a national product liability law restricting consumer rights, Reagan supported the proposals in spite of the fact that they required federal preemption of state laws in areas of traditional state control. Similarly, his administration readily advocated national standards in its effort to impose workfare requirements on state welfare programs, extend federal criminal law to fight a variety of social evils, and defeat the affirmative action programs that dozens of state and local governments had established.

Indeed, although Republican administrations from Nixon to the second George Bush formally upheld the banner of federalism, all contributed to the further centralization of American government. In domestic matters

they joined Democrats in expanding national involvement in such traditional state areas as education and family relations, and they pushed – against determined Democratic opposition – to nationalize elements of tort law in order to restrict suits against business and government. Further, they helped federalize ever larger realms of the criminal law. Indeed, by 1996 more than 40 percent of all federal criminal statutes had been enacted since Nixon's election in 1968. Similarly, the Republicans steadily reinforced the expansion of presidential power and the prioritization of military and foreign policy concerns. That persistent emphasis impinged on the states by centralizing issues of paramount public concern, expanding the de facto scope of federal authority, and diverting resources from domestic programs that the states helped control to the military and national security institutions that operated under exclusive federal authority. Ironically, the end of the Cold War between 1989 and 1991 seemed to lead only to rapid international destabilization, further magnification of foreign policy anxieties, and an ever greater concentration of power and discretion in the federal executive.

By the end of the 1980s the successive achievements of post-New Deal liberalism and the decentralization efforts that began after 1969 had combined to alter and in some ways strengthen the nation's federal system. The former accomplished three critical results. First, compelling the states to redistrict their legislatures, post-New Deal liberalism increased urban representation in many states and helped create new legislative coalitions that began to address the pressing problems that earlier rural-dominated legislatures had ignored. Second, it brought the franchise to African Americans in the South and forced broad non-discrimination policies on all states. The result was to ensure fairer treatment for minority groups and to begin mitigating abuses that had long tarnished the claim of states' rights. Third, federal matching grants stimulated new social programs and spurred many states to modernize and professionalize their governmental structures. Between 1965 and 1980, for example, twenty-two states redesigned their executive branches; the number of state employees who worked under merit systems rose from 50 to 75 percent. Similarly, thirty-four states reorganized and expanded their court systems, and all fifty established offices of court administration to address caseload burdens and increase judicial efficiency.

Those achievements substantially enhanced the ability of the states to handle the consequences of the new decentralization that began in the 1970s. On one level, the decentralization effort made the national government more responsive to state complaints about bureaucratic waste and unnecessary administrative burdens. The result was the elimination or simplification of many federal regulatory procedures and a greater flexibility at the state and local levels in shaping government programs. On a second

level, decentralization allowed states to take greater control over the programs they administered and encouraged them to modernize their administrative structures and use their enhanced capacities to initiate new programs and approaches of their own. Beginning in the 1970s the states embarked on a range of new initiatives to expand social services, improve financial capabilities, attract outside investment, develop energy and conservation programs, and reform their public education and criminal justice systems. On a third level, the decentralization movement revived the idea of the states as laboratories that could attempt valuable social experiments. The states began to look to one another – rather than to the federal government – for new ideas and techniques, and with increasing frequency they borrowed from the approaches that their sister states had tried and found effective.

Wisconsin exemplified both the era's new state activism and its growing social conservatism. In the century's early decades Wisconsin had pioneered many progressive social measures, and in the 1990s it emerged once more as an innovative force, this time in developing restrictive "workfare" programs designed to reduce taxes, curtail welfare coverage and benefits, and compel recipients quickly to find private employment. Its approach encouraged conservative attacks on the federal welfare system and not only influenced other states but also had an impact at the national level. In 1996 Wisconsin again stood as a paragon of laboratory federalism when the federal government invoked its experience in substantially revamping the nation's welfare law. A monumental federal welfare reform act encouraged the wider use of workfare requirements, eliminated some national programs, expanded the use of block grants, and allowed the states greater leeway in shaping their own systems.

In spite of the decentralization efforts, however, governmental power at the national level remained decisive. That fact was nowhere more apparent than in the movement to replace welfare with workfare. Although Wisconsin illustrated a renewed vitality in state governments, the welfare reform law that Congress enacted in 1996 demonstrated that the federal government remained the paramount force in establishing national welfare policy. The act not only required the adoption of workfare policies, but it also compelled the states to comply with a number of other rigorous federal mandates, including the imposition of time limits on eligibility, reduction or withholding of benefits for certain classes of recipients, reporting procedures involving the paternity and immigration status of underage beneficiaries, and the development of various centralized procedures for administering key elements of state welfare programs.

Contemporaneous developments in the state courts suggested similar conclusions about the continuing dominance of national standards. Those courts had authority to construe their own state constitutions, and they were

free in most cases to establish broader individual rights and liberties than the U.S. Supreme Court recognized under the Federal Constitution. Not surprisingly, then, in the 1970s liberals reacted to the narrowing constitutional decisions of the Burger Court by urging the state courts to use their independent authority to counteract its decisions by expanding individual rights under their separate state constitutions. Some responded, and a number of state judges invoked their authority to establish rights broader than those recognized in federal law. The liberal appeal to state judicial power, however, brought only limited and scattered results. For the most part state courts spurned their opportunities and in the overwhelming majority of relevant cases chose either to rely on federal constitutional law directly or to conform state constitutional law to the contours of federal law. Indeed, when the courts of California and Florida refused to follow decisions of the Burger Court, they were abruptly reigned in. Both states responded with constitutional amendments that required their state courts to bring their interpretations of certain state constitutional provisions into conformity with the decisions of the U.S. Supreme Court.

The relatively conformist behavior of the state courts suggested several interrelated conclusions about American federalism in the late twentieth century. One was that underlying social, cultural, and economic forces were continuing relentlessly to centralize national affairs. In spite of the swelling pacans to federalism, Americans were ever more commonly advancing their values and policies as properly "national" in scope. Although they frequently and sometimes bitterly disputed the nature of the values that were proper, they nevertheless insisted ever more stridently that their own values – whatever they were – be given national recognition. The second conclusion was that the U.S. Supreme Court was playing an ever more prominent and important role in public affairs. To a growing number of Americans it was the truly "supreme" authority that could and should rule on all major issues that faced the nation. Americans were beginning to view the Court, in other words, as they had come to view the presidency – as an institution that should address not only problems that were properly "national" in some antecedent and technical constitutional sense but also all issues that had become, as a practical fact of everyday life, important to the nation as a whole. A third conclusion was that the concept of "federalism" had lost most of its substantive meaning as an independent normative guide to the distribution of governmental powers. While theories of federalism continued to proliferate and activists of all stripes persisted in invoking the concept's authority, little remained of the idea that could not readily be turned to partisan use by able and designing hands. The fourth and last conclusion was that a politically conservative and socially ungenerous mood had come to pervade political attitudes across the nation. The state courts properly

followed the U.S. Supreme Court, many Americans seemed to believe, not just because it was the authoritative voice of the national Constitution but also because it was – with a few glaring exceptions – moving that law, for the time at least, in the general directions they considered desirable.

Although the Court increasingly reflected the values of the new Republican coalition, Reagan and his successors failed to transform the Supreme Court as quickly or completely as the New Deal had done. Between 1933 and 1969 the Democrats had controlled the presidency for twenty-eight of thirty-six years, the Senate for all but four of those years, and both together for twenty-four years. Conversely, in the decades after 1968 the Republicans controlled both the presidency and the Senate simultaneously for only six years, 1981 through 1987, a period in which only two vacancies occurred. Thus, Republican nominations were commonly subject to Democratic check. Then, further diluting their drive for control, during the 1990s Clinton was able to add two moderate liberals to the Court.

Even though Republican presidents were responsible for ten of the twelve justices placed on the Court after 1968, their new appointees failed to form a consistently united bloc. Indeed, only three of them pushed aggressively and relentlessly to implement the values of the new Republican coalition. In contrast, three others edged into the Court's moderate-to-liberal wing, and the remaining four were often cautious and respectful of precedent, rather than ideological and ardent for change. As both conservatives and opponents of judicial activism, the moderate four may have felt themselves bound to honor the principle of *stare decisis* and to remain for the most part within existing constitutional channels. Thus, a combination of external checks, internal barriers of role and doctrine, and differing jurisprudential orientations prevented abrupt change in many areas.

Although a variety of obstacles slowed Republican efforts to remake the federal judiciary, the party's determined drive nevertheless began to bring increasingly substantial results by the late 1980s. Methodically appointing ideologically sympathetic judges, Reagan and Bush increasingly turned the lower federal judiciary toward the values of the new Republican coalition. Far more visibly, they did the same to the Supreme Court. Reagan markedly changed its direction when he elevated Rehnquist to the center chair in 1986 and then added conservative Justices Antonin Scalia and Anthony Kennedy to the bench. Then, when Bush replaced liberal Justice Thurgood Marshall, the last survivor of the Warren Court, with the rigidly conservative Justice Clarence Thomas in 1991, he established a relatively firm five-justice conservative bloc that began to act with increasing boldness.

In the name of federalism the new majority took particular aim at the powers of Congress, and in the century's last eight years it voided at least ten Congressional statutes on federalism grounds. In *United States v. Lopez*

(1995), the five-justice bloc voided the Gun-Free School Zones Act, which made it a crime knowingly to possess a gun near a school. The decision seemed to limit the Commerce Clause to formally “economic” activities that Congress could show were directly related to interstate commerce. Five years later in *United States v. Morrison* (2000) the same five justices relied on *Lopez* to void a provision of the Violence Against Women Act that created a federal remedy for victims of gender-motivated violence. Such violence, the Court explained, was “not, in any sense of the phrase, economic activity.”²³ Similarly, the Court deployed the judicially created doctrine of standing to trump Congressional power to enforce federal environmental laws through private lawsuits, and it even suggested doctrinal grounds for possible future use in enforcing limits on the spending power.

More pointedly, reacting against national regulation of state and local governments, the Court severely constrained federal power over the states themselves. First, in 1996 it held that the Eleventh Amendment barred Congress from using its commerce power to create claims against states, and three years later it extended that holding to all of Congress’s Article I powers. Second, it narrowed the Fourteenth Amendment for the same purpose. Although the Court did not challenge the principle that Congress could abrogate state sovereign immunity when legislating under Section 5 of the Fourteenth Amendment, it created severe limitations on the power and invalidated a series of Congressional statutes that imposed liabilities on states for violating federal civil rights statutes. Finally, the Court further insulated the states from federal power by developing an “anti-commandeering” principle that forbade Congress from requiring states or their officials to assist in implementing federal regulatory programs.

Although the Rehnquist Court revived the Tenth Amendment, it did not use it to remove a broad category of “local” activities from federal authority as the Taft Court had done in *Drexel Furniture*. Rather, in the spirit of *National League*, it employed the amendment more narrowly and seemed primarily interested in protecting the operations and institutions of the state governments themselves. Its decisions restricting the lower federal judiciary paralleled its decisions limiting Congressional power. The Rehnquist Court curtailed federal habeas corpus, shrank remedial authority over institutional reform suits, and narrowed substantive liabilities under federal statutory and constitutional provisions in order to minimize federal judicial intervention in the operations of state and local governments.

Beyond insulating state governments, the Rehnquist Court’s decisions limiting Congressional power seemed targeted primarily at civil rights legislation. Its Commerce Clause decisions limited Congressional authority

²³ 529 U.S. 598, 613.

to activities that were primarily “economic;” its Section 5 decisions struck directly at the principal Congressional power specifically designed to protect disadvantaged social groups. Politically, then, the Court’s efforts to constrain Congress seemed to reflect the social and cultural strains of the new Republican coalition more than its free market and business-oriented aspects.

The Rehnquist Court’s lack of sympathy with the federal civil rights laws was apparent. Immediately after the last Reagan appointee took his seat in 1988, it issued a stunning series of decisions that methodically narrowed the civil rights laws and restricted the remedies available for their violation. Its decisions struck most ruthlessly at affirmative action programs and employment discrimination law. Revealingly, when the Court dealt with affirmative action, it readily set aside its goal of insulating the states and imposed federal constitutional restrictions on their power to establish such programs.

The political significance of the Court’s civil rights decisions was clear. Since 1968 Republicans had deployed the language of federalism to shape a “Southern strategy” that sought white votes by opposing civil rights activism and, in particular, affirmative action programs. The Reagan administration had followed the same course, intensifying the rhetoric, limiting enforcement of the civil rights laws, and – for the first time since *Brown* – bringing the federal government into court to oppose civil rights claims. Then, in 1988 Reagan’s vice president, George Bush, was elected president after a campaign that promised “law and order” and featured a notorious television advertisement that was widely perceived to be racist. When the Democratic Congress attempted to pass legislation to counter the Rehnquist Court’s civil rights decisions, Bush vetoed one bill and then compelled Congress to weaken another before signing it. The Rehnquist Court’s civil rights decisions fit snugly with the Republican program.

Not surprisingly, the Rehnquist Court also followed the Reagan and Bush administrations in asserting national authority to enforce other values of the Republican coalition. Joining the effort to restrict tort claims against business, it readily displaced state law when federal rules served the purpose. Similarly, it expanded federal power under the Due Process and Takings Clauses, limited state power to enforce environmental regulations, and applied a broad First Amendment right of association to allow large private organizations to exclude homosexuals. Indeed, in decisions protecting private property, it again set state authority aside by imposing a federal constitutional duty on states to provide tax refunds in certain cases and, further, suggested that the Takings Clause might override state sovereign immunity and allow federal courts to order states to pay just compensation for certain regulatory actions.

Equally revealing, however, the Rehnquist Court also asserted federal authority for other purposes as well. It enforced First Amendment limits on governments at all levels, and it used the negative Commerce Clause and the doctrine of implied preemption to displace state law and expand the reach of much federal legislation. Indeed, during the last decade of the twentieth century the Rehnquist Court voided actions taken by states in 54.7 percent of the relevant cases it decided (111 of 203), an invalidation rate that was slightly higher than the Warren Court's rate of 53.6 percent in such cases during its sixteen years of existence (128 of 239). Most arresting, on occasion it even asserted national power in ways that conflicted with the values of the Republican coalition – though only over scathing dissents from the justices most fervently committed to those values. A slim, moderate majority, for example, preserved the federal constitutional right to an abortion and used the Fourteenth Amendment on occasion to protect both women and homosexuals.

Thus, in spite of its rhetoric, the Rehnquist Court did not simply defer to the states or check national power in all areas. Nor, of course, did it invariably honor the values of the Republican coalition. Rather, it did what its predecessors had done: it enforced its own peculiar version of federalism as determined by shifting coalitions among its justices, each of whom sought to meet the new and unexpected challenges that were generated by a changing and dynamic society. Like the liberal Courts that followed the New Deal, it reflected the variations and inconsistencies of its nine justices as well as the characteristic values that marked the shared jurisprudential ideas of its generally dominant majority. Indeed, as its frequent willingness to assert a muscular federal judicial power evidenced, the Rehnquist Court seemed driven as much by three substantive social goals as by any principled concern for the states. It sought to limit government regulatory authority, particularly in the areas of civil rights and environmental protection; it sought to restrict lawsuits against both business and governments; and it sought to shrink the rights of criminal defendants and prison inmates.

Beyond the specific social policies it served, the Rehnquist Court stood at century's end on three fundamental propositions about American federalism. One was that the power of Congress had become all encompassing and that limited constitutional government required the imposition of some kind of effective limits. The second was that the power of the national government over the states themselves had to be circumscribed severely. The last was that the "political safeguards" of federalism, whatever their efficacy in prior times, were no longer adequate to check federal power and protect state independence. All three propositions pointed to the same conclusion: the Court itself must enforce limits on national power.

However sound the Court's premises and conclusion, at century's end the fundamental – and operational – questions remained as they had been ever since 1789: What specific vision of federalism should be adopted? What specific limits should be enforced? Which governments – and which branches of government – should be subject to federalism's limitations? For what purposes, and in whose interests?

CONCLUSION: AMERICAN FEDERALISM AT CENTURY'S END

The twentieth century ended, almost literally, with *Bush v. Gore* (2000). There, the five-justice Rehnquist majority asserted a questionable jurisdiction to determine who would win the presidential election of 2000 and then, on sharply contested grounds, ruled in favor of Republican George W. Bush.

In the most dramatic manner possible the decision revealed two fundamental characteristics of American federalism. First, it demonstrated the extent to which the Supreme Court had moved to a position of institutional centrality in American government. In troubled elections in 1800 and 1824 the House of Representatives had followed constitutional provisions in determining who would be the next president. In the bitterly disputed election of 1876 a special extra-constitutional commission composed of five representatives each from the Senate, House, and Supreme Court had convened to resolve the same issue. Notwithstanding prior practice, constitutional clauses, and statutory provisions that suggested Congress or the state legislature as the authoritative institution, the Court stepped into the disputed election of 2000 and decided the outcome. Alone. No branch of Congress sought to intervene or participate, and no branch of state government moved to oppose. Deeply and closely divided, the nation accepted the Court's decisive role as practically necessary and constitutionally proper.

Bush v. Gore capped the Rehnquist Court's basic institutional achievement: confirming the evolution of the role and authority of the federal judiciary – and, particularly, the Supreme Court itself – that had occurred over the previous century or longer. That evolution had elevated the Court, with the lower judiciary as its wide-reaching arms, to a position of sweeping institutional authority. Repeatedly, the Rehnquist Court insisted that it was the final arbiter of the Constitution, and it brought new vitality to the Warren Court's pronouncement of judicial authority in *Cooper v. Aaron*. "It is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees,"²⁴ it declared in shrinking Congressional power

²⁴ *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 365 (2001).

and asserting its own primacy under the Fourteenth Amendment. Not surprisingly, the Rehnquist Court exceeded the Warren Court in the rate at which it held federal as well as state actions unconstitutional.

Second, *Bush v. Gore* exemplified the shifting, contested, and instrumentalist nature of American federalism. Although some of the legal issues were novel, the decisive constitutional issue was stark: did authority to settle the matter reside at the state or national level? Unlike the many cases in which the ideology of the new Republican coalition coincided with deference to the states, in *Bush v. Gore* the two conflicted. The five-justice majority bloc rushed to trump state sovereignty with national power. “[T]he federal government is not bad but good,” one of the majority justices had told a conservative audience some two decades earlier before ascending to the Court. “The trick is to use it wisely.”²⁵ As the twentieth century ended, *Bush v. Gore* stood as a monument to the dynamics of American federalism, the system’s paradigmatic case.

Thus, in spite of the many changes that reshaped the system and restructured its operations, American federalism closed the twentieth century much as it had begun it, as a somewhat disjointed and malleable, but nevertheless stable and democratic, system of government with the capacity to confront new problems and adapt to new conditions. A variety of social and cultural factors sustained its working order: a strikingly diverse population that enjoyed prosperity, education, and freedom; a variety of formal and informal checks that helped counter concentrated power; the ingrained social values, cultural habits, and institutional practices that constituted the nation’s vital, if inherently human, rule of law; and a sustaining popular faith that the nation was committed, ultimately if quite imperfectly, to the lofty ideals it formally proclaimed. American federalism maintained itself in the twentieth century not because the Constitution set forth bright lines that defined state and federal power or because the Court articulated its own consistent and unchanging rules but because the system’s complex operations were shaped and constrained by that social, cultural, and institutional base.

²⁵ Antonin Scalia, “The Two Faces of Federalism,” *Harvard Journal of Law and Public Policy* 6 (1982), 19, 22.