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How "Decentralization" Rationalizes Oligarchy: John McGinnis and the Rehnquist Court

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Articles

HOW "DECENTRALIZATION" RATIONALIZES OLIGARCHY: JOHN McGINNIS AND THE REHNQUIST COURT

*Andrew Koppelman**

"Decentralization" sounds wonderfully democratic. It implies that people are becoming masters of their own destinies, freed from the oppression of distant functionaries who neither know nor care about the particulars of their lives. Strangely, however, "decentralization" can sometimes be deployed to disguise oligarchic rule by an unaccountable elite.

The paradox is starkly, if inadvertently, displayed in Professor John McGinnis's explication and defense of the Rehnquist Court's decisions on federalism and free association, "Reviving Tocqueville's America."[1] Professor McGinnis argues that decentralization is a central theme of the Rehnquist Court's jurisprudence. He claims that this idea justifies the court's work, in the same way that John Hart Ely's representation-reinforcement theory justified much of the work of the Warren Court. His attempted justification fails, however, because the idea of decentralization cannot be implemented in the way he contemplates without policy determinations that are essentially legislative.

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1. John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002).

"Decentralization" thus becomes a rationalization for judicial oligarchy.

This failure of justification sheds important light on the Rehnquist Court's work. Professor McGinnis is only the latest, if the most systematic, of many scholars who have defended the federalism and association decisions for promoting decentralization and local control.[2] If Professor McGinnis does not succeed in defending these decisions in these terms, then perhaps the thing cannot be done. Perhaps the Rehnquist Court's work in this area is not defensible at all.

Professor McGinnis's work is a major contribution to constitutional scholarship. It offers the first unified account of the jurisprudence of the Rehnquist Court. Professor McGinnis argues that the central theme of the Rehnquist Court is "decentralization and the private ordering of social norms."[3] The overarching theme (though Professor McGinnis does not often use this term) appears to be the principle of subsidiarity, which holds that "central authority should have a subsidiary function, performing only those tasks which cannot be performed at a more immediate or local level."[4]

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2. The federalism decisions are defended in Ronald D. Rotunda, *The New States' Rights, the New Federalism, the New Commerce Clause, and the Proposed New Abdication*, 25 OKLA. CITY L. REV. 869 (2000); Grant S. Nelson and Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1 (1999); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554 (1995); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674 (1995); and Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995). The association decisions are defended in Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917 (2001); Dale Carpenter, *Expressive Association and Anti-Discrimination Law after* Dale: *A Tripartite Approach*, 85 MINN. L. REV. 1515 (2001); David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 126-27 (2001); and Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119 (2000).

3. McGinnis, *supra* note 1, at 489.

4. 17 OXFORD ENGLISH DICTIONARY 59 (2d ed. 1989) ("subsidiarity"). Professor McGinnis does constantly refer to "decentralization," which he appears to treat as a synonym for subsidiarity: "Decentralization calls for public goods and services to be produced by the smallest jurisdiction that can do so efficiently." McGinnis, *supra* note 1, at 489 n.11. "Decentralization" is a less precise label for the principle that Professor McGinnis describes, since a determination that a small jurisdiction cannot act effectively would require centralization, not decentralization. Subsidiarity requires the center to act when local bodies are incompetent or when this is necessary to restrain "the encroachment of non-government megastructures, the empowerment of mediating structures, and the facilitation of individuals' participation in societal decision-making." Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 142 (2001). Vischer's article is a fine description and critique of recent conservative

Professor McGinnis argues that this idea of decentralization is the basic idea behind the Court's decisions. With respect not only to federalism and freedom of association but also the establishment clause and the jury, the Court's overriding concern is "protecting the conditions of spontaneous order so that norms can be discovered through competition."[5] The Rehnquist Court's jurisprudence, he argues, "sustains a social order constructed from below rather than imposed by the government from above."[6]

Professor McGinnis's ambition is to do for the Rehnquist Court what John Hart Ely famously did for the Warren Court: show that its decisions have a common theme and that this theme is democratically legitimate. Ely argued that the Warren Court's prime concern was not the undemocratic one of declaring the country's fundamental values, but was rather protecting the integrity of the democratic process. Ely was troubled by Alexander Bickel's claim that "judicial review is a countermajoritarian force in our system," so that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."[7] Under the jurisprudence of the Warren Court, Ely argued, "the selection and accommodation of substantive values is left almost entirely to the political process,"[8] and judicial review is concerned solely with "what might capaciously be designated process writ large—with ensuring broad participation in the processes and distributions of government."[9] Ely's answer to Bickel's countermajoritarian difficulty was to assign to the judiciary only that task with which the legislature cannot be trusted: "to keep the machinery of democratic government running as it should."[10] The principal themes of the Warren Court, Ely thought, were preventing in-

efforts to appropriate the idea of subsidiarity.

5. McGinnis, *supra* note 1, at 490.

6. *Id.* at 493. Professor McGinnis frequently invokes Tocqueville as the theorist whose sociology guides the Rehnquist Court, but, as Nancy Rosenblum observes, Tocqueville's "importance for contemporary American political thought is mainly inspirational. *Democracy in America* offers no guidance on the question of government's relation to mediating institutions." NANCY ROSENBLUM, MEMBERSHIP AND MORALS 44 (1998).

7. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (1986).

8. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980).

9. *Id.* (footnote omitted).

10. *Id.* at 76.

cumbents from entrenching themselves in power and protecting minorities from prejudice, and both of these could be justified in terms of representation-reinforcement.

Professor McGinnis thinks that the Rehnquist Court, too, generally avoids the countermajoritarian enterprise of declaring substantive values. The Rehnquist Court's jurisprudence, like Ely's, "can be seen as a process jurisprudence, one that seeks to convert the preferences of the people into social norms."[11] The comparison, Professor McGinnis thinks, works to the advantage of the Rehnquist Court:

> In fact, the Rehnquist Court's jurisprudence better filtrates popular sentiment than Ely's because it follows the Constitution in making use of a variety of protected structures such as the states, civic associations, both secular and religious, and juries, when these structures better achieve the goal of government by the people than national democracy.[12]

His aim is primarily to describe rather than to defend the Rehnquist Court, but he writes that "in showing its coherence and substantiality I necessarily suggest that the Rehnquist Court's jurisprudence has greater plausibility than many have thought."[13]

Professor McGinnis's descriptive analysis is penetrating, but its coherence does not give the Court's work plausibility, if that word indicates valid reasoning toward defensible results. It takes more than coherence to make something plausible. Suppose that the police have in their custody Fester, who has just stabbed three strangers on the street. They seek to account for his conduct. When Fester is interviewed, he explains that the CIA has planted a transmitter in his brain, and that the three people who he stabbed were all CIA agents who were operating the transmitter. After he tells us this, his actions will be considerably more coherent to us than they were before, and we will have a

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11. McGinnis, *supra* note 1, at 495.

12. *Id.*

13. *Id.* at 488 n.3. In his response to me, *Decentralizing Constitutional Provisions Versus Judicial Oligrarchy: A Reply to Professor Koppelman*, 20 CONST. COMMENT. 39, 40 (2003) (hereinafter "Reply"), Professor McGinnis denies that he is defending the Court's work. He merely "note[s] some modern support" for the policies the Court is implementing. Reply, *supra*, at 40-41. Both his original article and his reply to me are, however, filled with enthusiasm for those policies. Some of the relevant passages are quoted herein. *See infra* notes 12, 72, 73, 99, 106, 108, and 121 and accompanying text. His "aspirations are similar" to "Ely's defense of the Warren Court." Reply, *supra*, at 59. For other defenses of the "misunderstandings and misstatements" of which I stand accused, see *infra* notes 32, 74, and 101.

pretty good idea of the reason for the attacks. We will not, however, conclude that his reasons were plausible ones.

In this article, I will argue that, while the judges of the Rehnquist Court may possibly believe that they are facilitating democratic self-governance, this notion has about as much plausibility as Fester's belief that the CIA has put a transmitter in his brain.

Part I will explain why subsidiarity is not a justiciable principle. Part II will explore the doctrinal pathologies produced by the Rehnquist Court's efforts to promote this principle. Part III will show that Professor McGinnis's defense of the Court's work relies on dubious empirical assumptions. The conclusion argues that a true jurisprudence of subsidiarity would look very different from the work of the Rehnquist Court.

I. THE NONJUSTICIABILITY OF SUBSIDIARITY

The basic problem is that subsidiarity, which Professor McGinnis shows is the animating principle of the Rehnquist Court's jurisprudence, is a principle that the judiciary is ill suited to enforce in any but the weakest fashion. Deciding which topics are apt for decentralization is an inescapably political judgment, and judges cannot adjudicate such questions without imposing their own political views on the rest of us.

It is impossible to disentangle the question of an institution's capacities from that of what we want the institution to do. The fact that an institution tends to make good decisions is good reason to judge it competent. The fact that an institution tends to make bad decisions is good reason to judge it incompetent. (Of course, in both cases we must be able and authorized to distinguish good decisions from bad ones.) We have institutions for reasons, and we judge the institutions by how well they serve our reasons for having them.[14]

This entanglement of institutional capacity with goodness entails three reasons why the enforcement of subsidiarity requires inescapably political judgments.

First, and most importantly, no legal authority can help judges to determine which collective ends are worth pursuing.

14. Professor McGinnis accurately observes that I "offer[] no framework for assessing circumstances in which centralization of norm creation is better than decentralization." Reply, *supra* note 13, at 41. My claim is that no such general framework, separate from particular judgments about good decisions, can exist.

That is an ultimate value judgment about which the Constitution is largely silent, and so is an appropriate object of democratic deliberation. Critics of Ely have correctly noted that representation-reinforcement depends on substantive value judgments.[15] But the value judgments that underlie Ely's theory—that it is important for citizens to have an effective vote, that minorities should not suffer because of prejudice against them—are a good deal less controversial than the ones that enforcement of subsidiarity would need to rely on. Who decides whether the federal government has a more legitimate interest in economic than in noneconomic matters? Whether federal law should address endangered species, or the draining of wetlands, or cloning human beings? Which kinds of discrimination should be prohibited? Which kinds of association are so valuable as to be worthy of protection? The answers to these questions are not procedural. They are the stuff of substantive politics. As Robert Dahl observes, control over the agenda is one of the central criteria for determining whether a decisionmaking process is democratic.[16]

Second, even if judges know what ends ought to be pursued, they have a very limited ability to compare the capacities of institutions to pursue those ends. They do not have comparative data, nor have they any way to obtain such data. If they try to decide such matters, their political biases inevitably rush to fill the vacuum. This problem has led courts in Europe to be wary of deciding subsidiarity questions even when they were given much clearer constitutional authorization than the Supreme Court has gotten. In the face of a clear textual mandate, the German Constitutional Court has often declined to consider whether federal

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15. *See, e.g.*, Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

16. ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 112-14 (1989). Rehnquist himself once articulated this concern well:

> How is this Court to divine what objectives are important? . . . I would have thought that if this Court were to leave anything to decision by the popularly elected branches of the Government, where no constitutional claim other than that of equal protection is invoked, it would be the decision as to what governmental objectives to be achieved by law are "important," and which are not.

Craig v. Boren, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting). Similarly, Justice Antonin Scalia writes that subsidiarity is not a "principle of law" in the United States, but only "a desideratum of policy." Even as an "aspiration rather than a legal rule," subsidiarity "deserve[s] a place alongside such other unquestionably true and indubitably unhelpful propositions as 'do good and avoid evil' and 'buy low and sell high.'" Antonin Scalia, *Subsidiarity à l'Américaine: C'est à Dire Preemption*, *in* MAASTRICHT, SUBSIDIARITY AND ITALIAN-EC RELATIONS 4, 4 (1992), *quoted in* George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 447 n.464 (1994).

legislation is "necessary," holding that "necessity" is a matter for legislative discretion.[17] Similarly in the European Union, where the principle of subsidiarity is expressly relied on by the Maastricht Treaty, the principle is enforced in only the most general terms.[18] To date the European Court of Justice has resisted suggestions that the principle is non-justiciable, but has "showed a certain lack of enthusiasm for examining whether it had in fact been respected," leading commentators to conclude that "the Court is likely to allow the Community legislature a wide discretion in areas which involve policy choices."[19]

Chief Justice Rehnquist understands this problem. A quarter century ago, dissenting in *Craig v. Boren*,[20] he opposed the requirement that a sex-based classification be substantially related to important government objectives, arguing that this test "requires courts to make subjective judgments as to operational effects, for which neither their expertise nor their access to data fits them."[21] But judgments about operational effects is precisely what the principle of subsidiarity calls for.

Finally, judges can't assess when a local level that is quite capable of doing the right thing nonetheless lacks the political will to do it properly. Subsidiarity reserves decisionmaking to the lowest level that can act *effectively*. There is no reason in principle why the Southern states could not have acted to prevent lynchings during the Jim Crow period. Nonetheless, the principle of subsidiarity did not require the federal government to stand by and permit those lynchings to continue.[22]

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17. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 43-46 (1994). "The Basic Law was recently amended to make clear that the question was justiciable, but it remains to be seen whether the horse can be made to drink." David P. Currie, *Subsidiarity*, 1 GREEN BAG 2d 359, 364 n.35 (1998) (citation omitted).

18. The difficulty of judicial enforcement is exacerbated by the fact that the treaty's two mentions of the principle seem to point in opposite directions, with one emphasizing devolution and the other aiming at efficiency. *See* John Peterson, *Subsidiarity: A Definition to Suit Any Vision?*, 47 PARL. AFF. 116, 120 (1994).

19. ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE 551 (1999); for similar views see ANTHONY ARNULL, ET AL., WYATT AND DASHWOOD'S EUROPEAN UNION LAW 162 (4th ed. 2000); TREVOR C. HARTLEY, CONSTITUTIONAL PROBLEMS OF THE EUROPEAN UNION 86-88 (1999); Paul D. Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 FORDHAM INT'L L.J. 616, 630 (1994).

20. 429 U.S. 190 (1976).

21. *Id.* at 221 (Rehnquist, J., dissenting).

22. David Currie, however, thinks that the Civil War Amendments represent "an exception" to the principle of subsidiarity, "a decision to override state autonomy in the interest of a moral imperative that the states could have effectuated had they wished." Currie, *Subsidiarity, supra* note 17, at 360 n.4. Our disagreement is perhaps simply a semantic one, since Currie would doubtless agree that, if subsidiarity is construed to pre-

These concerns about judicial overreaching that troubled Rehnquist so much when he was younger have evaporated without explanation now that he and his like-minded colleagues are running the Court.[23]

II. THE PATHOLOGIES OF DECENTRALIZATION

The central cases upon which Professor McGinnis relies are the Court's decisions concerning federalism and freedom of association.[24] With respect to each of them, the Court's decisions have not been decentralizing at all. They have concentrated discretionary political power in the Court itself.

A. FEDERALISM

Begin with federalism. The principle of subsidiarity, as Currie observes, "is the guiding principle of federalism in the United States"[25] and has been so from the beginning.[26] At Philadelphia, the Convention nearly paraphrased the subsidiarity principle when it resolved that Congress could "legislate in all cases to which the separate States are incompetent, or in which the har-

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clude federal intervention against lynching, it is to that extent an unattractive principle. On either interpretation, since the principle is either bounded or redefined by the Civil War Amendments, it is a fundamental mistake to interpret those amendments narrowly in the name of subsidiarity, as the Supreme Court has done.

23. "Lord Acton did not say, 'Power tends to purify.'" Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 981 (1992) (Scalia, J., dissenting).

24. Professor McGinnis also discusses the Court's decisions concerning religion and the jury, but these are less important here, because they are less related to the judicial enforcement of subsidiarity. It should be noted, though, that in its religion jurisprudence, the Rehnquist majority has been statist rather than libertarian. *see* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992), and seems tempted to relax establishment clause restrictions in a way that could facilitate a religious triumphalism that would be the opposite of decentralization. *See* Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 93, 159-60 (2002). Moreover, the vagueness of the idea of subsidiarity, *see infra* text accompanying notes 28-41, suggests that one could make a "subsidiarity" claim on behalf of almost any rule that the Court adopted in this area. If the Court had stopped enforcing Establishment Clause principles altogether, this result could have been defended by arguing that civil peace is best served by allowing Louisiana and Massachusetts to have broadly differing approaches to religious issues. *See* Steven D. Smith, *Unprincipled Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 497, 500-01 (1996). The jury may be a wonderfully democratic institution, but the Rehnquist Court has done nothing to slow its practical disappearance. Almost all criminal cases are disposed of by plea bargaining in which the jury plays no role. Fewer than four percent of adjudicated felony defendants are tried by a jury. Stephanos Bibas, *How* Apprendi *Affects Institutional Allocations of Power*, 87 IOWA L. REV. 465, 465 (2002).

25. Currie, *Subsidiarity*, *supra* note 17, at 359.

26. This is true even though, as George Bermann has emphasized, there is no institutional mechanism for enforcing subsidiarity, or even for making sure that subsidiarity is considered in policymaking. Bermann, *supra* note 16, at 403-448.

mony of the United States may be interrupted by the exercise of individual Legislation."[27] This was then translated by the Committee of Detail into the present enumeration of powers in Article I, § 8, which was accepted as a functional equivalent by the Convention without much discussion.[28] The text of the Constitution thus appears to reflect the idea of subsidiarity, but does not directly impose it as an enforceable constraint on the federal government.

The limits of federal power were not much tested until the late nineteenth century, when the federal government for the first time attempted to regulate the national economy. For some decades thereafter, the Court laid down stringent limitations on the more open-ended grants of power to Congress, notably the power "to regulate Commerce . . . among the several States."[29] This effort collapsed during the New Deal, however, when the pressure of economic catastrophe empowered President Roosevelt to undertake unprecedented national regulation. The Court resisted at first, but capitulated after Roosevelt was reelected by a landslide in 1936.[30] For more than half a century thereafter, the Court made no attempt to enforce limitations on congressional power. By the time I took the bar in 1991, my bar review lecturer[31] advised us that the operative rule was easy to remember: Congress can do anything it wants to under the commerce clause.[32]

This state of affairs may seem to be in considerable tension with the Constitution's structure. The federal government is one of limited and enumerated powers, and as Chief Justice John Marshall observed, "[t]he enumeration presupposes something not enumerated."[33]

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27. *Quoted in* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 177 (1996).

28. "Though it has been argued that this action marked a crucial, even subversive shift in the deliberations, the fact that it went unchallenged suggests that the committee was only complying with the general expectations of the Convention." *Id.* at 178.

29. U.S. CONST. art. I, § 8, cl. 3. For an overview of the limitations, see PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 355-69 (4th ed. 2000).

30. *See generally* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 255-382 (1998).

31. John Jeffries, now the dean of the University of Virginia School of Law.

32. McGinnis, Reply, *supra* note 13, at 48, misunderstands the point of this illustration. I am not claiming that these expectations were the law. The point is rather that, even with this facially absurd rule, the Constitution's purpose of limiting federal power was not frustrated. Renewed judicial activity was not necessary.

33. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).

Yet federalism has somehow survived the revolution of 1936.[34] The Court has repeatedly insisted that Congress could not displace state tort law, contract law, criminal law, or family law,[35] but these pronouncements were dictum because Congress never tried to take over these areas. "Congress may have had authority to regulate pretty nearly everything, but it did not do so."[36] Moreover, some of the areas in which Congress has intervened—antitrust, labor law, campaign finance, environmental law—are ones in which the principle of subsidiarity demands intervention from the center in order to empower local mediating institutions.[37] Subsidiarity is not merely a principle of devolution, and the claim that it is silently discards the principle and substitutes for it a far cruder and less attractive one. The idea is to empower individuals, not just to weaken the center.[38] From the standpoint of subsidiarity, the New Deal settlement doesn't look all that bad.[39] State and local officials have complained about the burden of federal regulation, but, George Bermann notes, they typically seek, not a broad curtailment of that regulation, but "specific operational remedies" such as "greater flexibility in the administration of federal programs, less 'red tape,' fewer conditions on federal grants in aid, few if any 'unfunded mandates,' and much more generous federal financial support to state and local governments."[40]

Nonetheless, the Court has now decided that there must be judicially enforceable limits to Congressional power. In 1995 in *United States v. Lopez*,[41] the Court for the first time since the

34. Professor McGinnis may be correct that "the system of enumerated powers that sustained constitutional federalism was dead," McGinnis, *supra* note 1, at 511, but federalism itself was not.

35. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 913-14 (3d ed. 2000).

36. Currie, *Subsidiarity*, *supra* note 17, at 361. Currie notes that there is no federal code "even of corporations or commercial law, although there never could have been any doubt of Congress's authority to regulate commerce among the states." *Id.*

37. Vischer, *supra* note 4, at 127-42.

38. *See id.*, *passim*.

39. It doesn't look so bad from the standpoint of economics, either. McGinnis, *supra* note 1, at 509, suggests that the original design facilitated the emergence of the United States as an economic superpower by the beginning of the twentieth century. He does not try to explain why, after the judiciary stopped enforcing limitations on Congress in the 1930s, the American economy did not collapse.

40. Bermann, *supra* note 16 at 433. The last item on this list shows how far the states are from wanting a mere shrinkage of the federal government. States will cheerfully pass on to the federal government the task of raising revenues, which when shared with states allows them to provide a higher level of public services than they could if they had to compete with each other by lowering taxes.

41. United States v. Lopez, 514 U.S. 549 (1995).

New Deal held that a statute exceeded Congress's powers. The statute in *Lopez* was a pretty easy one from the standpoint of subsidiarity, criminalizing possession of handguns near schools—an issue that there was no reason to think that the states couldn't deal with perfectly well.[42] The law in *Lopez* appears to have been an attempt to score cheap political points by appearing tough on a pressing and difficult problem without contributing anything substantial to its solution.

The *Lopez* Court did not however say that it was relying on the principle of subsidiarity. For the reasons already outlined, that principle is not directly enforceable. The same objection could perhaps be made about any substantive theory of constitutional law, stated at a very high level of generality.[43] Ely's "representation-reinforcement" model, for example, was not directly enforced by the Warren Court, which relied on legal rules that served as proxies for the underlying theory, such as "one person one vote" or the doctrine of suspect classifications. The Rehnquist Court has similarly found some proxies for subsidiarity, such as the limitations it has crafted under the Tenth Amendment,[44] the Eleventh Amendment,[45] and its rule of avoidance based on the commerce clause.[46] The large and unrepairable gap in this enterprise is, however, the commerce power itself. None of the doctrinal limits that it has been toying with is workable.

The field of constitutional interpretation is a contentious one, and disagreement about fundamentals is a familiar phenomenon. Nonetheless, all of the various schools share the following minimal presumption:

> *Any legal rule that the Court devises must provide a basis for decisionmaking that is narrower than determining what is, all things considered, the best thing for government to do.*

Unless this constraint is respected, the judicial function becomes indistinguishable from the legislative one. There is no evidence that the Court will devise a rule for restraining the commerce power that does not violate this constraint.

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42. *See* Regan, *supra* note 2, at 569.

43. Thanks to Tom Merrill for raising this objection.

44. *See* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

45. *See* Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

46. *See* Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001); United States v. Jones, 529 U.S. 848 (2000).

The *Lopez* Court noted that Congress had made no findings on the regulated activity's impact on the national economy.[47] Later cases however made clear that the "findings" prong was makeweight, since it would be ridiculously easy for Congress to enhance its power by reciting appropriate findings.[48]

The Court also thought it important that the activity involved was traditionally subject to state regulation.[49] The trouble with this as a test is that the "traditional state concern" test was already tried by the Court when it sought to immunize states from federal law in *National League of Cities v. Usery*,[50] and eventually collapsed under the weight of tradition's indeterminacy as a basis for rules of decision.[51] There is no reason to think it will be more coherent here.

Finally, the *Lopez* Court thought it relevant that Congress was trying to regulate noneconomic activity,[52] and more recently the Court suggested that this was the crucial distinction.[53] But this test would deprive Congress of all authority over such nontrivial matters as the spoliation of the environment. The Court has already suggested on this basis that Congress may not have the power to regulate wetlands that are wholly within a single state.[54]

The most far-reaching test now contemplated by any of the justices is Justice Thomas's proposal that "commerce" be understood to include only "selling, buying, and bartering, as well as

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47. *See Lopez*, 514 U.S. at 562-63.

48. *See especially* United States v. Morrison, 529 U.S. 598, 614-15 (2000).

49. *See Lopez*, 514 U.S. at 564. Justice Kennedy's concurrence, which provided the crucial fifth vote for the majority, suggested that tradition was the crucial factor. Kennedy was reluctant to compromise "the stability of our Commerce Clause jurisprudence as it has evolved to this point," *Id.* at 574 (Kennedy, J., concurring), and he was particularly troubled by this law because it "seeks to intrude upon an area of traditional state concern." *Id.* at 580.

50. National League of Cities v. Usery, 426 U.S. 833 (1976).

51. Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 194-206; Regan, *supra* note 2, at 566. Some of the judges on the present Court seem unpersuaded that tradition is indeterminate, *see, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J., joined by Rehnquist, C.J.); but these same judges have not attempted to revive the *National League of Cities* test, instead using other means to immunize the states. *See* Alden v. Maine, 527 U.S. 706 (1999).

52. *See Lopez*, 514 U.S. at 561.

53. "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613.

54. Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001).

transporting for these purposes,"[55] and that Congress should therefore be understood to have no power over productive activities such as manufacturing and agriculture.[56] Thomas's approach suffers from all the difficulties of indeterminacy and perverse results that bedevil almost any form of originalism.[57] It is possible that Thomas is correct about the framers' intent, but this is only because because most of the framers envisioned a far smaller central government than the one we (along with every other modern industrialized nation) now have.[58] A judicial decision attempting to dismantle the modern administrative state would be a constitutional revolution that the framers never imagined, and which most of the justices are unwilling to impose. That revolution would go considerably beyond subsidiarity, because it would disable the Federal government from undertaking even some tasks that the states are obviously incapable of undertaking separately.

The Rehnquist Court's commerce power decisions, a leading treatise observes, "invite challenges to countless federal laws."[59] What is Congress's power to, say, protect the environ-

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55. *See Lopez*, 514 U.S. at 585 (Thomas, J., concurring).

56. *See id.* at 584-602; *Morrison*, 529 U.S. at 627-28 (Thomas, J., concurring). It is not clear what one should call Thomas's willingness to tear down long-established institutions on the basis of an abstract and untested theory, but "conservatism" seems the wrong label. *See* Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J. L. & PUB. POL'Y 509 (1996). Professor McGinnis appears to think that this kind of revolution from above would be consistent with decentralization. *See* McGinnis, *supra* note 1, at 517. In his reply, his emphasis shifts from decentralization to textualism and originalism, and he takes me to task for not developing my own theory of interpretation. Reply, *supra* note 13, at 40. I cannot develop one here, but can easily identify our broader disagreement: I think that not only text, original intent, and precedent, but also settled practice and prudence, are sources of constitutional meaning. These claims have been well developed by others. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE (1982); David Strauss, *Commmon Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996). Professor McGinnis's professed indifference to consequences would be more convincing were he not so obviously pleased by the anticipated consequences of the Rehnquist Court's innovations.

57. *See generally* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 13-25 (2001); *see also* H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987). (Professor McGinnis complains that I "make[] no serious attempt to show" originalism's indeterminacy, Reply, *supra* note 13, at 48 n.45, but this has already been done by Fallon and Powell.) Thomas's originalism is constrained somewhat by his reliance on precedent, *see Lopez* at 601 n.8, but this carries us right back into the realm of unconstrained discretion, since his originalism cannot determine where he should rely on precedent and where he should ignore it.

58. *See* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1 (1999). Nelson and Pushaw, it should be noted, find this ancient straitjacket more comfortable than I do.

59. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 267 (2d ed. 2002).

ment? What is to be the fate of the Endangered Species Act, or the federal regulation of wetlands? The doctrine the Court has contemplated is either indeterminate or dictates politically impossible results.

The Court might resolve the problem in the way that the European Court has: by enforcing the principle of subsidiarity only when the contested act "has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion."[60] But this way of reading the law leaves to the legislature most of the work of looking after the principle.[61] The Rehnquist Court has shown little inclination to go down that road. As Larry Kramer has shown, the Rehnquist Court has sometimes been willing to craft new constraints on federal power, unsupported by text or precedent, solely in order to maintain its own monopoly on constitutional interpretation.[62]

The Court's interventions into Congress's exercise of the commerce power have so far been fairly modest, involving only a couple of fairly minor statutes. But if the Court goes no further, then the program of decentralization that Professor McGinnis describes will not be substantially advanced.

The basic dilemma for the Court, assuming it understands its mission in the way Professor McGinnis describes, is that if it applies a deferential standard of review, then it will only invalidate trivial grandstanding legislation like that at issue in *Lopez*, and thus it will not play any significant rule in determining the balance of power between the federal government and the states. On the other hand, if it takes an aggressive role, then the constitutionality of any federal statute will depend on whether the judges regard it as a good idea that ought to have been enacted.

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60. ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE, *supra* note 19, at 551 (quoting United Kingdom v. Council, Case C-84/94 [1996] ECR I-5755, ¶ 58). Another possibility would be to police the legislative process to make sure that Congress thinks seriously about the merits of disrupting the existing federal-state balance. *See* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996). No Justice has indicated any interest in moving doctrine in this direction.

61. Donald Regan, perhaps the most prominent defender of subsidiarity as a principle for determining the scope of federal power, acknowledges this. Regan, *supra* note 2, at 559.

62. *See* Larry Kramer, *The Supreme Court, 2000 Term—Foreword: We the Judges*, 115 HARV. L. REV. 4, 143 (2001).

B. SECTION 5 OF THE FOURTEENTH AMENDMENT

The clearest evidence that the Court means to be aggressive, even if this means that it must effectively act as a third house of Congress, is its recent decisions interpreting section 5 of the Fourteenth Amendment, which have repeatedly invalidated recently enacted federal laws. The original purpose of the Amendment was to authorize Congress to act against discrimination, and the framers would have been surprised to learn that the Amendment meant to affirm that "this Court has had primary authority to interpret [the Constitution]."[63] The Court now comes close to holding that any attempt by Congress to exercise its section 5 power will be subject to strict scrutiny.[64] The Rehnquist Court evidently does not like the section 5 power and regards its exercise with deep suspicion. Professor McGinnis's theory, that the Court is enforcing subsidiarity, offers a helpful explanation for this suspicion: the principle of equal citizenship is not a principle of subsidiarity, and is deeply in tension with it.[65] But if this is correct, then to read the Fourteenth Amendment through the lens of subsidiarity is to eviscerate it. In so doing, the Court is seizing the power to revise the Constitution itself,[66] de-

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63. City of Boerne v. Flores, 521 U.S. 507, 524 (1997); *see* Michael McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 181-85 (1997). In light of Professor McGinnis's professed originalism, it is surprising that he ignores this devastating originalist objection in both his California article and his reply. Originalism is often indeterminate, *see supra* note 57, but it is clear enough to exclude the Court's claims of exclusive interpretive authority.

64. Robert Post & Reva Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 477 (2000); *see also* 1 TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 35, at 959 ("Laws enacted by Congress pursuant to § 5 [have] suddenly been saddled with something between intermediate and strict scrutiny. . . ."). Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003), which upheld the Family and Medical Leave Act of 1993, is anomalous. "Although *Hibbs* refers time and again to the pervasive harms of sex stereotyping, it never demonstrates a pattern of violations that a court would find violates Section 1 of the Fourteenth Amendment." Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 17-18 (2003). A contrary decision would have jeopardized the very popular Title VII of the Civil Rights Act of 1964 (made applicable to state governments by the Equal Employment Opportunity Act of 1972). *See id.* at 19-24. Chief Justice Rehnquist, who wrote *Hibbs*, also had personally encountered the problem the FMLA addressed. His daughter "is a single mother who until recently held a high-pressure job and sometimes had child-care problems. Several times this term, the 78-year-old Chief Justice of the United States left work early to pick up his granddaughters from school." Linda Greenhouse, *Evolving Opinions, Heartfelt Words from the Rehnquist Court*, N.Y. TIMES, July 6, 2003, sec. 4, p. 3.

65. This point was emphasized by Jack Balkin. *But see supra* note 22 and accompanying text.

66. At one point, Professor McGinnis also succumbs to this temptation, suggesting that the Sixteenth and Seventeenth Amendments were mistakes. McGinnis *supra* note 1, at 511. If the centralizing tendencies that he deplores have been written into the Consti-

leting those provisions that are inconsistent with its own vision of the appropriate role of the federal government.

The breadth of the discretion that the Court has assumed is clearest in *Board of Trustees of University of Alabama v. Garrett*,[67] which invalidated the Americans With Disabilities Act's authorization of suits against the states. The Court held that discrimination on the basis of disability could never be a constitutional violation, because the Court had previously held that, when challenged in court, such disability would be subject to minimal scrutiny. Since the Court had declined to intervene on behalf of the disabled, the states "could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled."[68] Justice Breyer, dissenting, observed that the earlier refusal to subject disability discrimination to heightened scrutiny was based on the Court's recognition that "addressing the problems of the 'large and diversified group' of persons with disabilities 'is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.'"[69] These institutional limitations are obviously not shared by Congress. "To apply a rule designed to restrict courts as if it restricted Congress' legislative power is to stand the underlying principle—a principle of judicial restraint—on its head."[70] The holding implies that the list of suspect classifications the Court has declared—and it has not declared a new one in nearly thirty years—is exhaustive.[71] There is no unjust discrimination in the world that has not been found and remedied by the Court—or more precisely, if any new wrong is to be remedied, that may only be done when it is a wrong that troubles the Court.[72] Professor McGinnis observes

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tution, then to that extent he is proposing to revise rather than to interpret the document.

67. 531 U.S. 356 (2001).

68. *Id.* at 367-68.

69. *Id.* at 384 (Breyer, J., dissenting) (quoting City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 442-43 (1985)).

70. *Id.* at 385 (Breyer, J., dissenting).

71. On the trajectory of modern equal protection doctrine toward a closed system in which no additional forms of discrimination can receive heightened scrutiny, see EVAN GERSTMANN, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION 1-56 (1999).

72. Professor McGinnis cites with approval the Court's refusal to protect "classes that are not suspect classifications under the Fourteenth Amendment," McGinnis, *supra* note 1, at 514 n.143 and Reply, *supra* note 13, at 52, 53, but does not seem to notice that suspect classes are neither a natural kind nor enumerated in the Constitution. Somebody has to decide what they are. The Court's section 5 jurisprudence is predicated on the assumption, which Professor McGinnis does not defend, that it is the ultimate repository of

that "the Court has moved decisively to create a sphere of private noneconomic activity untouchable by national regulations,"[73] but he does not pause to notice that the "private noneconomic activity" that is "untouchable by national regulations" includes rape and lynching.[74]

C. FREEDOM OF ASSOCIATION

Finally, there is freedom of association. The leading case is now *Dale v. Boy Scouts of America*,[75] which held that the Boy Scouts of America had a constitutional right to exclude a gay scoutmaster. Professor McGinnis defends this decision, but he does not attempt to state the rule of law that the opinion lays down.[76] Nor could he do so without embarrassment, for the rules that the opinion relies on are absurd ones that the Court cannot possibly mean. According to the *Dale* majority, "[a]n association must merely engage in expressive activity that could be impaired in order to be entitled to [First Amendment] protection."[77] The Court must give deference to an organization's assertions regarding the nature of its expression, and "we must also give deference to an association's view of what would impair its expres-

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wisdom on this question.

73. *Id.* at 515.

74. Professor McGinnis contends that "this sentence does no work other than to cast innuendoes on both the Court and my theory of the Court," Reply, *supra* note 13, at 51 n.58, and presumably it is one of my "misstatements." But these were the local activities that the Court protected from federal interference in *Morrison* and the post-Reconstruction cases. I did not make it up. Professor McGinnis now writes that if states are failing to prevent these crimes, of course the federal government should have the power to intervene. *Id.* at 51. But that is just what Congress was trying to do, and was prevented from doing, in these cases. Here as elsewhere, Professor McGinnis is more admirable than the Court he is defending. *Morrison* goes considerably beyond the post-Reconstruction cases it cites (which were themselves egregious enough) by implying that even if (as the post-Reconstruction Court pretended not to know) the Southern states were tolerating lynchings of blacks, Congress still had no power to criminalize lynching, because the murderers were not state actors. Post & Siegel, *supra* note 64, at 474-77.

75. 530 U.S. 640 (2000).

76. The closest he comes to doing so is to note that the Court "tested the constitutionality of the statute by inquiring not into the state's interest in preventing discrimination against homosexuals, but into the burden on BSA's expressive rights. . ." That is to say, it purported to engage in a balancing test without inquiring at all into what was on the other side of the scales. McGinnis, *supra* note 1, at 536. Professor McGinnis correctly observes that I do not engage his own theory of freedom of association. Reply, *supra* note 13, at 51-53. But *Dale* does not rely on anything like that theory. It also does not mention the limitations that he offers. The Court's opinion is simply an ipse dixit. Professor McGinnis is correct that I ought to address his theoretical claims, and I do so elsewhere. *See* Andrew Koppelman, *Should Noncommercial Associations Have an Absolute Right to Discriminate?*, L. & CONTEMP. PROBS. (forthcoming 2004).

77. *Dale*, 530 U.S. at 655.

sion."[78] This reasoning implies that all antidiscrimination laws are unconstitutional in all their applications, since any discriminator might claim that its expression is impaired by the application of the law. Other parts of the opinion, which argue that admitting an unwanted member is compelled speech that would require the Scouts to endorse a message with which they disagree,[79] imply that citizens are allowed to disobey laws whenever obedience would be perceived as endorsing some message.[80]

Obviously, the Court does not really intend to establish either of these rules of law.[81] What really seems to be driving the decision is the Court's implicit judgment that the Boy Scouts of America is especially worthy of judicial protection, or that gay people are especially unworthy of legislative protection, or both.[82] How is the Court to decide in future cases which groups are particularly worthy or which kinds of discrimination are inadequate to justify legislation? Apparently on the basis of its own political views. There is nothing else that it could possibly rely on.[83]

The decision has little to do with empowering small, local associations.[84] The Boy Scouts of America is a colossus, with an

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78. *Id.* at 653.

79. "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.*

80. The analysis offered in this paragraph is developed in detail in Andrew Koppelman, *Signs of the Times:* Dale v. Boy Scouts of America *and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819 (2002). At one point, Professor McGinnis acknowledges the potential breadth of *Dale*, suggesting that it implies the correctness of Wisconsin v. Yoder, 406 U.S. 205 (1972), since "[s]chooling is an expressive activity." McGinnis, *supra* note 1, at 557 n.383. This principle would entail that parents have a right not to educate their children at all, and to prevent anyone else from educating them.

81. Richard Epstein, who would love to be able to say that all antidiscrimination laws are unconstitutional, cannot bring himself to claim that *Dale* so held. *See* Richard Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119 (2000).

82. Both judgments are dubious. On the worthiness of the Boy Scouts, see Andrew Koppelman, *Are the Boy Scouts Being as Bad as Racists? Judging the Scouts' Antigay Policy*, PUB. AFF. Q. (forthcoming 2004). On the appropriateness of protecting gays from discrimination, see ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 6-34 (2002); ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 146-76 (1996).

83. The Court's *Lochner*-like arrogation to itself of the power to review the needfulness of state antidiscrimination legislation sheds unflattering light on its decisions interpreting section 5 of the Fourteenth Amendment, which purport to hold that the power to define impermissible discriminatory conduct is reserved to the states. *See* Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002).

84. Berger and Neuhaus, who originated the concept of mediating structures, have warned against the kind of misuse to which it is put here:

> On the Right, the concept was understood as including all institutions out-

endowment of $2.2 billion,[85] $155 million in revenues in 1998 and an operating surplus of $17.1 million,[86] and three million members.[87] The *Dale* decision has been used by the BSA to crush local dissenters (who would have been protected by antidiscrimination statutes of the kind the Court invalidated) by expelling troops that refuse to discriminate against gays.[88] This is not decentralization.[89]

D. A MUTED TRUMPET?

Now it is possible that both Professor McGinnis and I are exaggerating the Court's ambitions. The commerce clause cases have thus far struck down two very minor statutes that had little effect. The section 5 cases primarily involve the somewhat abstruse Eleventh Amendment issue of whether Congress can provide for suits by private parties against state governments. Most antidiscrimination legislation involves economic transactions, and so can be sustained under the present understanding of the commerce power. The rule of constitutional avoidance based on the commerce clause leaves open the possibility of Congressional reenactment with clear intent. And with respect to other federalism questions, such as preemption or the dormant commerce clause, the Court has not shown any increased deference to state prerogatives.[90] In short, it is possible to regard the

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side government, which, of course, stretches the concept beyond any usefulness. Neither General Motors nor the United Methodist Church is a mediating structure, though a workshop within a GM plant might be, as might a local Methodist congregation. As a matter of fact, even a local government agency might have a meaningful relationship with the values of the people it serves. Not every nongovernmental organization is a mediating structure.

Peter L. Berger & Richard John Neuhaus, *Peter Berger and Richard John Neuhaus Respond*, *in* TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY 145, 149 (Michael Novak ed., 2d. ed. 1996).

85. This includes cash and deferred gifts. *See* <http://www.scouting.org/nav/enter.jsp?s=mc>.

86. Chuck Sudetic, *The Struggle for the Soul of the Boy Scouts*, ROLLING STONE, July 6-20, 2000, at 101, 106.

87. The 2000 Annual Report of the Boy Scouts of America reported a total membership of 3,351,969. The 2001 Annual Report (reflecting, perhaps, negative publicity in the wake of *Dale*) does not state the total membership, but provides figures on Cub Scouts and Boy Scouts that add up to 3,049,070. The 2002 report's total is 3,011,269. *See* <http://www.scouting.org>.

88. The Scouts have revoked the charters of some local branches that refused to follow the national antigay policy. *See, e.g.*, Lisa Black & Courtney Challos, *Charters of 7 Cub Packs Not Renewed by Boy Scouts, Oak Park Anti-Bias Code Conflicts With National Policy*, CHI. TRIB., Jan. 26, 2001, at 3.

89. For an argument that freedom of association should be construed more narrowly than the Court construed it in *Dale*, see Koppelman, *supra* note 76.

90. *See* McGinnis, *supra* note 1, at 526 n.203 (noting the Court's centralizing pre-

Court's federalism jurisprudence, not as the opening trumpet of the New Jerusalem, but as pathetic grandstanding.[91]

This objection may be correct. Only time will tell. On the other hand, Professor McGinnis has amassed considerable evidence that the Court contemplates a revolution, and the Court seems, at least occasionally, to have the nerve to carry it out. The fact that it has not happened yet is comforting. So is the fact that there has not yet been a nuclear conflict between India and Pakistan. In both cases, the comfort has its limits.

III. JUST SO STORIES

Professor McGinnis, whose intellectual honesty considerably exceeds that of the Court he admires, repeatedly acknowledges that the judicial interventions he defends must rely on guesswork. "[S]pecial interests . . . *may be* able to exercise political power out of proportion to their numbers to obtain resources and status for themselves;"[92] "more decentralized democracy *could* offer a way to discover better social regimes;"[93] "sexual restraint *may be* a positive norm for society"[94] and "a religious structure *may be* necessary"[95] to support it; noneconomic associations "*may* in fact be important counterweights to narrower economic interests."[96] All of these things could be true. But why should the Court's hunches govern the rest of us?

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emption jurisprudence); *see also* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 462-63 (2002) (during the 1999 and 2000 terms, the Court found for preemption in every preemption case it heard). Fallon thinks these cases reveal that the Court is animated less by federalism than by substantive conservatism. "Because federal preemption eliminates state regulatory burdens, preemption rulings have a tendency—welcome to substantive conservatives—to minimize the regulatory requirements to which businesses are subject." *Id.* at 471. Similarly, Justices O'Connor and Kennedy abandon their concern for states' rights in the dormant commerce clause cases because their substantive conservatism leads them to read into the Constitution "antiregulatory, procompetitive ideals." *Id.* Federalism ideals are most evident in an array of subconstitutional devices, such as "judge-made equitable doctrines, pro-federalism principles of statutory construction, and official immunity rules," that make it "exceedingly difficult—even when not constitutionally impossible—for private plaintiffs to recover money damages from state and local governments and their officials." *Id.* at 437.

91. This objection was raised by Tom Merrill. *See* Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003).

92. McGinnis, *supra* note 1, at 503 (emphasis added).

93. *Id.* at 504 (emphasis added).

94. *Id.* at 506 (emphasis added).

95. *Id.* (emphasis added); *see also id.* at 546.

96. *Id.* at 542 (emphasis added).

Professor McGinnis suggests that the Court's decisions reflect "the spirit of its age,"[97] "the political ideas and ideals of its era,"[98] and that "[t]he Rehnquist Court's jurisprudence reflects a more skeptical view of centralized democracy in an era in which there is more elite skepticism about the prospects of nationally mandated social reform than existed in the eras of the New Deal and the Great Society."[99] "Skepticism about highly centralized government as a rational planner of broad social reform has grown because the Great Society's reforms are widely believed to have had certain counterproductive consequences."[100]

This is silly. Perhaps a sane person could think that Social Security, the Securities and Exchange Commission, the National Labor Relations Act, the Federal Deposit Insurance Corporation, Medicare, Medicaid, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968 are all counterproductive failures.[101] But this hardly describes any present consensus. The skepticism that Professor McGinnis calls characteristic of the modern age is actually only dominant in the right wing of the Republican Party, a faction whose ideas are widely regarded as loony and dangerous.

To some extent, Professor McGinnis is right that decentralization reflects the spirit of the age. It is sometimes reflected in the actions of elected officials.[102] A Court that finds it necessary to repeatedly strike down recently enacted statutes, however, is not merely reflecting the ideas of its time. It is taking one side of a very live political dispute and throwing its weight into the balance.

The basic problem is identical to that of the *Lochner* court. In *Lochner*, in deciding whether the state had met its burden of showing that the police power could be exercised, the court necessarily relied on its own notions of reasonableness: it balanced the liberty sacrificed, which was given very great weight, against the public interest that was served. The balancing technique cannot be carried out without the judge's own views determining

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97. *Id.* at 489 n.10.
98. *Id.* at 498.
99. *Id.* at 490.
100. *Id.* at 502.
101. Here is another of my "misstatements": Professor McGinnis points out that many of these are New Deal, not Great Society, programs. Reply, *supra* note 13, at 45. But the first of the two sentences I just quoted lumps the two together and cites "skepticism" about both.
102. Professor McGinnis notes, for example, that "Congress largely has returned welfare policy back to the states." McGinnis, *supra* note 1, at 525.

the weight given to each of the factors. The trouble with *Lochner* is that under it, the judges' task of assessing the constitutionality of legislation became indistinguishable from that of a legislator deciding whether to vote for the law.[103] And the same is true of the federalism and association cases: the decisions turned on whether the judges thought the law was a good idea.

Nor is there any reason to feel confident of the Court's judgments. Professor McGinnis claims that "[m]odern political science has suggested that mass national democracy often produces legislation that neither reflects majority will nor is efficient, since special interests dominate legislators while most citizens are rationally ignorant of the salient political issues."[104] But this theory's predictions are disconfirmed by much of modern regulation, which often does resist capture and pursue the public interest.[105] Professor McGinnis fears that government tends to engage in "excessive regulation and wasteful spending on behalf of interest groups,"[106] and of course some of that does go on. But the classic tales of government waste that are repeatedly cited in the media have been proven apocryphal.[107] Discerning *which* government measures are wasteful is a quintessentially political judgment that cannot be reduced to any legal standard.

The case for radical decentralization also depends on a giddily romantic view of the states. Professor McGinnis suggests that judicially enforced federalism will "temper strategic behavior and substitute in its place the genuine concern of one citizen for another."[108] When people make decisions at the state level, apparently, no one is ever mean to anyone else and we're in the land of milk and honey. But, of course, all that really happens when the federal government is disabled is that politics gets displaced from one forum to another, thereby generating a different set of winners and losers. Decentralization may even end up promoting oligarchy, since local elites get less attention and less

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103. And, of course, the *Lochner* court was political all the way down, rationalizations to the contrary notwithstanding. Professor McGinnis thinks that *Lochner* reflects "the reigning laissez-faire theories of the day," McGinnis, *supra* note 1, at 499, but of course if these theories were really "reigning" there would have been no statute for the *Lochner* Court to invalidate. Other Americans in the same period had very different visions of constitutional liberty. *See generally* William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999).

104. McGinnis, *supra* note 1, at 490; *see id.* at 502-04.

105. Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. L. REV. 7 (2000).

106. McGinnis, *supra* note 1, at 509.

107. *See* Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE. L.J. 1981 (1998).

108. McGinnis, *supra* note 1, at 510.

monitoring by the press and public interest watchdog groups than national elites do.

Consider the case of Texas. The policies of the state reflect very different priorities from those of the federal government, and from those of most other states. Texas ranks last among the states in per capita general government revenue and expenditures, forty-fifth in per capita public welfare spending (despite ranking sixth in the percentage of population in poverty), second in the percentage of the population without health insurance,[109] forty-fifth in per capita spending on environmental programs, and forty-ninth in the average monthly benefit per participant in the Women, Infants, and Children Program.[110]

These choices did not represent the triumph of local democracy against a homogenizing center. Texas politics, in which both political parties are dominated by conservatives, is crucially dependent on the ability of moneyed elites to control the political system. In primaries, contributors of $500 or more "gave almost 90 percent of their aggregate donations to conservatives, putting most of that into the races of conservative Democrats, in order to prevent the nomination of a liberal."[111] In Texas elections, the highest spenders almost always win,[112] and liberals have always been outspent by conservatives—in races in the 1960s, "usually by a factor of two."[113] A key element of conservative control has been the ability to hold down voting turnout, particularly among the working class. The ideology of Texans who are eligible to vote is barely distinguishable from that of eligible voters in liberal states such as Minnesota and Illinois.[114] The crucial difference is the underrepresentation of the liberals' natural constituency in the electorate.[115] The conservatives' shrewdest response to the voting rights reforms of the 1960s was the decision in 1972 to move gubernatorial elections to years in which there were no

109. KENDRA A. HOVEY and HAROLD A. HOVEY, CQ'S STATE FACT FINDER 2002: RANKINGS ACROSS AMERICA 398-99 (2002).

110. These last figures are taken from the state's own web page. *See* www.window.state.tx.us/comptrol/wwstand/wwstand.html (visited July 26, 2002).

111. CHANDLER DAVIDSON, RACE AND CLASS IN TEXAS POLITICS 140 (1990).

112. *Id.* at 134. "In 1998, the candidates who won seats in the legislature collectively outspent their losing opponents by $25.6 million to $5.7 million." NEAL TANAHILL, TEXAS GOVERNMENT: POLICY AND POLITICS 174 (7th ed. 2002). "Most states restrict the amount of money individuals and groups can contribute to candidates for office, but not Texas." *Id.* Republicans outspend Democrats by a considerable margin. *Id.* at 142.

113. DAVIDSON, *supra* note 111, at 137.

114. *Id.* at 39.

115. *See id.* at 17-39.

presidential contests, which slashed turnout by a third.[116] Race is also a powerful force in Texas politics. Racial division continues to prevent the formation of an effective working class party. Even after the abolition of the poll tax, efforts to prevent blacks from voting continue, sometimes involving the dispatch of white poll watchers into black precincts and the dissemination of false information to convince the uneducated that going to the polls could lead to arrest for voting fraud.[117]

Nonetheless, Texas elites have lost some important fights. Blacks are now allowed to vote. The poll tax has been abolished. Even though the legislature cut off all spending on workplace safety, and even abolished funding for collecting reliable job injury and illness data,[118] there is some regulation of dangers in the workplace. Race and sex discrimination in employment have been outlawed. Social Security prevents poverty among the elderly, and Medicare, Medicaid, Head Start, and Legal Aid provide services for the poor.

Every one of these measures, however, were "primarily the result of federal intervention—often over the fierce resistance of the conservative-dominated state and local governments."[119] Texans such as Lyndon Johnson and Ralph Yarborough played an important role in these developments. But they accomplished what they did by enlisting the federal government to give them what they could not get out of the local legislature. Federal intervention did not crush local initiative. It tempered the worst

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116. *Id.* at 53-55. Even in presidential contests, though, turnout is low. In the November 2000 election, Texas ranked 48th in the percentage of population voting. HOVEY AND HOVEY, CQ'S STATE FACT FINDER 2000, *supra* note 109, at 113. "Not once in the twentieth century has a majority of the total voting-age population of Texas gone to the polls in a single election." DAVIDSON, *supra* note 111, at 113. *See also* TANAHILL, *supra* note 112, at 91-97 (documenting low turnout). Tanahill notes that poor adults are far less likely to vote in Texas than in the average state, and concludes that this effect

> is the legacy of the state's long history of public policies designed to limit the right to vote to middle-class and upper-income white people. . . . Parents who could not vote were unable to serve as participation role models for their children. Adult Texans who grew up in households with adults who could not vote are less likely to participate politically than are citizens who were raised in families that participated in the political process.

Id. at 97.

117. DAVIDSON, *supra* note 111, 235-36; *see also* Laughlin McDonald, *The New Poll Tax*, AM. PROSPECT, Dec. 30, 2002; John B. Judis, *Soft Sell: Can the GOP Convince Blacks Not to Vote?*, NEW REPUB., Nov. 11, 2002.

118. DAVIDSON, *supra* note 111, at 122. The need for such data collection is shown by continuing, vigorous efforts by large Texas businesses to prevent workers from securing truthful information about the dangerousness of their jobs. *See id.* at 118-20. One might usefully write a study, parallel to the present one, of how "libertarianism" rationalizes force and fraud.

119. *Id.* at 247.

excesses of one of the most pitiless and greedy ruling classes in the country.[120] Texas is an extreme case, but it shows the extremes of which states are capable absent federal intervention.

Professor McGinnis claims that decentralization is supported by "[t]he best recent scholarship,"[121] but there is no reason to think that the judges are even aware of this scholarship. What seems to the judges to be the "spirit of the age" is more likely to be the conventional wisdom of the conservative magazines and radio shows that they and their friends consume.[122] The prospect of being ruled by this crowd of insular, ignorant mandarins is pretty scary. Of course, they're confident that they're promoting decentralization and democracy. But Fester is equally confident that he's got that transmitter in his brain.

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120. *See id.* at 198-220.

121. McGinnis, *supra* note 1, at 509 n.105. Specifically, Professor McGinnis responds to the familiar "race to the bottom" rationale for uniform federal standards by claiming that the "best recent scholarship" indicates that "there will not generally be a race to the bottom, absent interjurisdictional spillover effects." *Id.* For this proposition he cites only Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom-Rationale" in Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992). Revesz claims, on the basis of an abstract economic model unsupported by empirical evidence, that abandoning federal environmental standards would promote benign competition among the states that "can be expected to produce an efficient allocation of industrial activity among the states." *Id.* at 1212; *see also* Richard L. Revesz, *The Law and Economics of Federalism: The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997). Revesz's article has produced numerous critical responses, which offer considerable empirical and theoretical evidence that the race to the bottom is a reality, and that the likely consequence of Revesz's proposal would be massive increases in pollution, with no compensating increase in welfare. *See, e.g.*, Douglas R. Williams, *Cooperative Federalism and the Clean Air Act: A Defense of Minimum Federal Standards*, 20 ST. LOUIS U. PUB. L. REV. 67 (2001); Scott R. Saleska & Kirsten H. Engel, *"Facts Are Stubborn Things": An Empirical Reality Check in the Theoretical Debate Over the Race-To-The-Bottom in State Environmental Standard Setting*, 8 CORNELL J. L. & PUB. POL'Y 55 (1998); Franz Xaver Perrez, *The Efficiency of Cooperation: A Functional Analysis of Sovereignty*, 15 ARIZ. J. INT'L & COMP. L. 515 (1998); Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom?"*, 48 HASTINGS L.J. 271 (1997); Joshua D. Sarnoff, *The Continuing Imperative (But Only From A National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225 (1997); Peter Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL'Y REV. 67 (1996); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996).

122. The Justices, Professor McGinnis notes, "pick up the outlines of broad social theories as they are reflected in the media." McGinnis, *supra* note 1, at 499. In Plato's theory, the guardians had more reliable means of access to Truth than this. In some moods, Professor McGinnis is acutely conscious of the judges' limitations. *See id.* at 566.

CONCLUSION

Ely responded to the *Lochner* problem by confining judges to procedural questions, and leaving substantive questions to the legislature. The difference between Rehnquist's Constitution and Ely's is starkly illustrated by the difference between *Bush v. Gore*[123] and the Warren court case it relied upon, *Reynolds v. Sims*,[124] which may be the paradigmatic Elyan case. In the 2000 election the only elite that was manipulating the process to keep itself in power was the Republican-dominated Supreme Court. Representation-reinforcement theory hardly entails that the Court install in the White House the loser of the popular vote, whose narrow Florida majority crucially depended on the deliberate disenfranchisement of black voters.[125]

Professor McGinnis writes about the need to generate norms "from below," but there are numerous candidates for the title of "below": the business or the worker endangered by unsafe conditions in a job that pays starvation wages, the manufacturer or the consumer, the state employer or the disabled employee, the state criminal justice system or the raped woman, the discriminator or the person seeking an apartment or a job, the lynch mob or its victim. The Court's decisions do not delegate these determinations to discovery machines. Rather, the Court itself decides which aspects of the status quo should not be interfered with by federal power.

What Professor McGinnis's paean to local control loses sight of is that the best discovery machines of all are *people*—individuals who want to take control of their own lives and who can be oppressed by local as well as by national elites. And people are less effective discovery machines when they are inadequately nourished, homeless, denied medical care, denied opportunities because of their race or sex, or poisoned or mutilated on the job. The undefended preference for local elites is starkest when Professor McGinnis claims that the jurisprudence he describes is inconsistent with the Court's protection of fundamental rights, because, for example, "a right to abortion does not empower a discovery machine that helps us find social norms."[126] On the contrary, the right to abortion makes the decision about

123. Bush v. Gore, 531 U.S. 98 (2000).

124. 377 U.S. 533 (1964), *quoted in Bush*, 531 U.S. at 105.

125. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1046-49 (2001).

126. McGinnis, *supra* note 1, at 565-66.

what norms ought to govern the abortion question more decentralized than any other rule of law could. There are as many decisionmakers as there are pregnant women. A rule of law that forces women to have babies, on the other hand, is a pretty severe constraint on their ability to craft norms of their own.[127]

As noted earlier, the Court hasn't done that much yet with this federalism jurisprudence. The judges have claimed the power to decide what the federal government may try to accomplish, to predict what means are necessary to those ends, to decide which inequalities are just and not to be touched by Congress, and which associations are specially protected. What restrains them isn't doctrine (which they have made indeterminate), but their own prudence and common sense. *Bush v. Gore* shows that these are exceedingly weak reeds on which to rely. Mexico has just triumphantly cast aside a corrupt political system in which the holders of power got to choose their successors. The U.S. Constitution gives no such power to Supreme Court justices, but they have seized it and evidently have gotten away with it. Maybe we will need to get used to being ruled by them, in the same way that citizens of Zimbabwe had better get used to being ruled by Mugabe, or the Iranians to rule by the ayatollahs. But to claim that the Rehnquist Court's innovations stand for democratic legitimacy and the protection of local control is to declare one's love for Big Brother. The Court's "decentralization" jurisprudence is a series of abuses of power, with promise of worse. It is not decentralization. It is not democracy.

127. *See* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990). Professor McGinnis thinks that I have here undercut the rest of my critique, since I support judicial intervention when the unenumerated rights in question are ones that I like. Reply, *supra* note 13, at 55-58. But he does not engage or even mention the detailed arguments from text, original intent, and precedent that I develop in my abortion article. (And he elsewhere chides me for paying no attention to these sources of law.) He claims that I think judges ought to decide issues of cloning and assisted suicide, neither of which I have ever addressed. Actually, my views of substantive due process doctrine are skeptical and not all that different from his. *See* KOPPELMAN, THE GAY RIGHTS QUESTION, *supra* note 82, at 35-52.