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Liberty from On High: The Growing Reliance on a Centralized Judiciary to Protect Individual Liberty

Patrick M. Garry[1]

I. Introduction

THE one overriding theme used to describe the modern Supreme Court is its revival of federalism.[2] Ever since the New Deal era, "federalism concerns had been largely dormant in the Court's decisions."[3] However, under the leadership of the late Chief Justice Rehnquist, the Court has attempted to resuscitate the constitutional role and authority of the states by revitalizing constraints on national power such as the Tenth Amendment and state sovereign immunity.[4] Through a wide array of cases employing both the Tenth and Eleventh Amendments, the Court has at least somewhat stalled the constitutional drift of power from the states to the federal government that began in the 1930s.

The doctrine of federalism refers to the balancing of power between the states and the federal government.[5] The Constitution establishes a dual governmental structure consisting of state and national governments. Although its purpose was to create a strong national government, the Con-

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2 William H. Pryor, Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1167 (2002). For the first time since the post-New Deal era, the Court has struck down congressional acts on the grounds that they infringed on state powers and rights. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (Violence Against Women Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); Printz v. United States, 521 U.S. 898 (1997) (Brady Handgun Violence Prevention Act); United States v. Lopez, 514 U.S. 549 (1995) (Gun-Free School Zones Act).

3 Casey L. Westover, *Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy*, 88 MARQ. L. REV. 693, 693 (2005).

4 *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); New York v. United States, 505 U.S. 144 (1992).

5 *See* Younger v. Harris, 401 U.S. 37, 44 (1971) (suggesting that the constitutional scheme envisions a federal structure in which states are equal partners with the national government). As David Walker describes it: "[F]ederalism is a governmental system that includes a central government and at least one major subnational tier of governments; that assigns significant substantive powers to both levels initially by the provisions of a written constitution; and that succeeds over time in sustaining a territorial division of powers by judicial, operational, representational, and political means." DAVID B. WALKER, THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON 20 (1995).

stitution also sought to preserve the independent integrity and lawmaking authority of the states.[6]

During the nineteenth century and throughout the early twentieth, the Court adhered to a "federalist vision," under which it "made substantial use of the Tenth Amendment as a limit on congressional power."[7] But after 1937, the Court switched positions, adopting a nationalist approach.[8] Facilitating the expansion of federal powers following the New Deal, the Court from 1937 to roughly the 1990s "served generally as a major force for centripetalism . . . ."[9] During that time, no federal laws were held to exceed Congress' Commerce Clause powers, and only one federal law was ruled to violate the Tenth Amendment.[10]

After almost sixty years of dormancy, federalism made a constitutional comeback in the 1990s.[11] An observer describes this comeback as "a slow

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6 Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466 (1987) [hereinafter Amar, *Sovereignty*]. Robert Nagel outlines the benefits of federalism: improving the chances that "local needs and values will be served[,] . . . the possibility of certain kinds of competition among governments, the opportunity for a wide range of entry points for political participation, and the option of 'exit' for the disaffected . . . ." ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM 12 (2001).

7 Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 8 (2000). For instance, the Court ruled that a congressional act banning the shipment of goods made by child labor violated the Tenth Amendment. Hammer v. Dagenhart, 247 U.S. 251, 276 (1918), *overruled by* United States v. Darby, 312 U.S. 100, 116–17 (1941). The Tenth Amendment prohibits the national government from exercising non-delegated powers that will infringe on the lawmaking autonomy of the states; it states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

8 Chemerinsky, *supra* note 7.

9 WALKER, *supra* note 5, at 27. Whenever the Court was presented with challenges to the "expansion of national authority" during this period, it "almost always upheld these actions." *Id.* The chief exception to this rule is the Court's decision in *National League of Cities v. Usery*, which in turn proved to be aberrational. Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

10 *Nat'l League of Cities*, 426 U.S. at 852 (holding that Congress exceeded its authority when it passed legislation that would "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions"). The Commerce Clause states: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art I, § 8. Yet during this period following 1937, according to Professor Nagel, the Court continued to praise the "principle of limited national power [even as] it was subordinating [that principle] in the cases it was deciding." NAGEL, *supra* note 6, at 25.

11 The Rehnquist Court's federalism decisions have been described as the "New Federalism." Westover, *supra* note 3, at 725. This "New Federalism" attempts to counter the long drift toward an imbalanced system greatly favoring the national government over the states. It also seeks to recognize the fact that for most of American history "the states have been the chief architects . . . of the welter of servicing, financial, institutional, and jurisdictional arrangements" of the public sector. WALKER, *supra* note 5, at 249. States have also "provided the means by which most of domestic U.S. governance is conducted and nearly all domestic policies are implemented." *Id.*

but steady trend towards curbing the power of the federal government under the limitations of the Interstate Commerce Clause and the Tenth Amendment."[12] Others depict it as one in which the Court has "assumed an aggressive stance in safeguarding states from perceived overreaching by the federal government."[13] This stance contrasts with the Warren era, when the Court "exerted a generally centralizing influence throughout nearly all of the period."[14]

Despite the modern Court's dramatic move toward political federalism, it has not made a corresponding move in the area of individual rights. Rather than encouraging a decentralized rights-federalism, in which states have greater leeway to balance social values with a more particularized view of individual rights, the Court has consolidated the matter at the national level, with the Court dictating to the entire nation a uniform view and application of individual rights.[15] Thus, while there has been decentralization regarding congressional regulation of the states, there has been no decentralization regarding the judiciary's dictates and formulation of individual rights. In other words, the Court's "federalism revolution" has coincided with an opposite move regarding individual rights, where centralization has occurred despite the growing diversity of the United States.[16]

In connection with individual rights, the Court embarked on a centralizing course during the Warren era that has continued up to the present.[17] With issues ranging from how best to protect religious freedom; what limits should be placed on abortion; how convicted murderers may be punished; whether pornographic speech can be kept from minors; and how public religious symbols may be displayed, the Court has refused to permit much diversity in state policies and has ruled that only it can act with one uniform mandate to the entire country. The Court has monopolized constitutional

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12 Robert Ward Shaw, *The States, Balanced Budgets, and Fundamental Shifts in Federalism*, 82 N.C. L. REV. 1195, 1217 (2004).

13 A. Brooke Overby, *Our New Commercial Law Federalism*, 76 TEMP. L. REV. 297, 305 (2003). In the modern era, courts may have to be more aggressive in upholding federalism because of the changed realities of American life. The Framers believed that there was actually a greater risk that "the states would encroach on national authority than that the central government would usurp state authority." NAGEL, *supra* note 6, at 5. It was thought that the loyalty of citizens would be first and foremost to their state governments, and that this loyalty would then make the states "dangerous rivals to the power of the Union." *Id.* (quoting THE FEDERALIST NO. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). This state loyalty, however, no longer exists and thus cannot be counted on to protect federalism.

14 WALKER, *supra* note 5, at 10. Nor was there any "major retreat" from this nationalizing position by the Burger Court. *Id.*

15 In this respect, according to Robert Nagel, the Court has proved "hostile to the basic impulses underlying a robust form of federalism." NAGEL, *supra* note 6, at 69.

16 Consequently, government authority has not been decentralized as much as the "new federalism" might suggest.

17 *See* WALKER, *supra* note 5, at 177–78.

interpretation, precluding states from reaching their own consensus on or accommodation of individual rights.

This nationalization of issues once left to the states has not always been the most preferred strategy of the Court. In *Employment Division v. Smith*, for instance, the Court's ruling that it would no longer enforce the Free Exercise Clause as strictly as it once had suggested that responsibility would be shifted to the states to protect religious freedoms.[18] Since states could now pass neutral laws of general applicability, even if they burdened religious exercise, states could largely decide for themselves whether religious observances should be exempt from laws of general applicability.[19] And, as one court recognized nearly a century ago about the liberty-protecting structures of the Constitution, the rights of each American citizen, who is necessarily a resident of a state, "depends wholly upon laws of the state, and that as to a great number of matters he must still look to the states to protect him in the enjoyment of life, liberty, property, and the pursuit of happiness."[20] However, the decentralization of rights as suggested by *Smith* has not occurred; instead, the Court has continued to monopolize the definition and dictates of individual rights.

The alternative to this high-court monopolization lies in the Constitution's structural provisions designed to protect liberty. These structural provisions—e.g., federalism and separation of powers—offer a constitutional path for the decentralization of rights and a greater reliance on the democratic process to protect liberty. In fact, the Constitution's structural design of American democracy was intended by the Framers to be the primary protection of individual liberty, even more so than judicial enforcement of a specified set of substantive individual rights. This structural path to liberty is outlined in Part II of this Article—a path that offers a more democratic means of protecting individual rights in an increasingly diverse nation. In Part III, the Article offers examples of how the Court has centralized the whole area of individual liberty, despite the Constitution's original conception of how such liberty would be safeguarded. And in Part IV, the Article examines how this judicial centralization of rights, particularly through the use of substantive due process, has affected the political process, and how it will continue to affect that process in the future.

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18 Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that a law does not violate the Free Exercise Clause even if it requires conduct that is counter to one's religious beliefs where the law is otherwise neutral and generally applicable).

19 *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1468 (1999).

20 United States v. Moore, 129 F. 630, 632 (C.C.N.D. Ala. 1904).

II. A Structural Path Toward Decentralized Liberty

The Constitution's embodiment of the structural principles of federalism is designed not just to create a workable government but to create one that protects individual rights.[21] To the Framers, the primary justification of federalism was the role of the states as guardians against possible federal tyranny.[22] By diluting the power of the centralized national government, federalism restricts the opportunities for the abuse of power. Furthermore, by maintaining a separate governmental watchdog layer in the states, federalism provides a built-in mechanism to combat any overreaching by the national government.[23] According to the Framers, the states could mount popular uprisings against any tyrannical abuses by the national government.[24] Alexander Hamilton argued that individuals who felt their rights were violated by the central government could use the state governments "as the instrument of redress."[25] Infringements on liberty caused by a potentially tyrannical national government could be prevented by state governments standing "ready to rally their citizens and lead them in opposition."[26]

For a century and a half, the Framers' commitment to federalism was preserved in constitutional doctrine. But during the New Deal period,

21 Amar, *Sovereignty*, *supra* note 6, at 1426. An advantage of federalism is that people of different views can gather in different states with different policies. For instance, with respect to sexual rights, federalism allows people to move to the locales most hospitable to their particular orientations or proclivities.

22 *See, e.g.*, THE FEDERALIST NO. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the states "will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority"); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998) (hereinafter AMAR, THE BILL OF RIGHTS) (arguing that bolstering the states as bulwarks against federal tyranny was the primary motivation behind the adoption of the Bill of Rights).

23 The Framers believed that the states would serve to check any encroachments by the national government on the liberties of the people. *See, e.g.*, THE FEDERALIST NO. 51, at 322–23 (James Madison) (Clinton Rossiter ed., 1961). State governments would stand ready "to sound the alarm to the people" about instances where the federal government exceeded its powers. *Id.* at No. 44, at 286.

24 Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 215 (2000). Similarly, the modern Court's resurgent interest in preserving federalism is driven by a "concern for individual liberty." Pryor, *supra* note 2, at 1177. As Justice O'Connor stated, "[t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities," but rather "for the protection of individuals." New York v. United States, 505 U.S. 144, 181 (1992).

25 THE FEDERALIST NO. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

26 Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 938 (2005). To the Framers, "the primary safeguards against government tyranny were architectural." *Id.* at 919. But, this ability was possible only if state governments possessed considerable influence and leverage over federal officials to prevent federal overreaching. *Id.* at 938.

the notion of protecting liberty through the maintenance of limited and divided government gave way to the desire to ensure economic security through a powerful and activist central government. Although the Framers had sought political freedom by creating structural divisions within the government to prevent the concentration of government power,[27] the New Dealers believed they could preserve liberty solely through the judiciary's enforcement of specified individual freedoms. During the Warren era, however, the Court turned almost completely away from any structural analyses of individual rights, instead focusing strictly on judicial enforcement of particular substantive rights.[28]

Under the scheme of the Constitution, liberty is seen as the result of structural limitations on government power, not as the result of affirmative governmental edicts.[29] Thus, as originally framed, the Constitution protected liberty through a government of structurally restrained powers, not through reliance on the courts to enforce a judicially defined set of insular individual rights.[30] The Framers, committed to the notion that rights preceded government, drafted a Constitution that sought not to lay out specific individual rights, but to "devise institutional mechanisms" that would protect individual liberty in all its various forms.[31]

In the eighteenth century, there was a fear of individual dependency on government. This dependency related to more than just economic dependency; it also involved dependence on an undemocratic institution to protect liberty. Moreover, rather than on what affirmative "rights" were owed individuals by the government, the emphasis was on individual responsibility to democratic society. Only through a structural approach to liberty could this responsibility be incorporated.[32]

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27 M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 14 (1967).

28 *See* Westover, *supra* note 3, at 695, 699.

29 *See* ERVIN H. POLLACK, JURISPRUDENCE: PRINCIPLES AND APPLICATIONS 72 (1979).

30 *Id.* at 74. As Robert Nagel argues, the Constitution reflects the belief that "the preservation of broad regulatory power at the state and local level would ensure a sufficient supply of centrifugal political energy to maintain a national government of limited powers [and that this] would help preserve the people's liberties." NAGEL, *supra* note 6, at 16.

31 *See* Randy E. Barnett, *Why You Should Read My Book Anyhow: A Reply to Trevor Morrison*, 90 CORNELL L. REV. 873, 879 (2005). Structural features like limited government, federalism, and separation of powers are meant to subject government officials "to legal constraints on their exercise of power that will effectively protect the rights retained by the people." *Id.* at 882. The Framers' focus was on the larger structure of governmental organization and power, rather than on a fixed list of specific individual rights.

32 Since human beings exchange part of their natural liberty for the protections of civil law when joining a society, rights cannot then be measured by this pre-society state; nor can individuals be viewed apart from the duties and responsibilities they owe to the civil society in which they live. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES *125. Moreover, any effort to strengthen liberty must pay close attention "to the structures of civil society." MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 135 (1991).

Constitutional history suggests that the ratifiers of the Constitution believed that individual liberty would be protected more by the structural features of the Constitution than by the particular freedoms listed in the Bill of Rights. The state conventions that insisted on adding a Bill of Rights specifically suggested the addition of two separate amendments: one declaring the principle of enumerated federal power with all non-delegated power being reserved to the states, and the second declaring a rule of construction limiting the interpretation of enumerated federal power.[33] Liberty was not entrusted to a list of substantive individual rights but to the entire scheme or structure of the Constitution. This served to limit the scope of federal authority in ways that would protect individual liberty.[34] To the Framers, liberty would be protected through the decentralized political processes of the states, not through a nationalized set of uniform, mandated rights handed down by the Supreme Court. However, during the twentieth century, the Supreme Court "emerged in the public's understanding as the preeminent enforcer of limitations on the national government."[35]

III. THE CENTRALIZATION OF RIGHTS

A. *Dictating Religious Expression in a Diverse Society*

Through its individual rights decisions, the Court has nationalized its authority over many aspects of American life, including religion, violent and indecent speech through the media, sexual behavior and family relations, and the line between privacy and community values. It has used its rights doctrines to downgrade or overrule the democratic judgments of state and local communities across the nation. In *Texas v. Johnson*, the Court struck down flag desecration statutes in forty-eight states.[36] In *McIntyre v. Ohio Elections Commission*, the Court invalidated bans on anonymous campaign

33 *See* Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 603 (2005). These suggested amendments would later become the Ninth and Tenth Amendments. "One of the original purposes of the Ninth Amendment was to prevent the Bill of Rights from being construed to suggest that congressional power extended to all matters except those expressly restricted." *Id.* at 619.

34 The present situation, in which the courts are focused so primarily on satisfying specific individual claims, calls to mind de Tocqueville's warning of a society made up of disconnected individuals "endeavoring to procure the ... pleasures with which they glut their lives" under the protection of the centralized power of the judiciary. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 318 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf, Inc. 1945) (1840).

35 NAGEL, *supra* note 6, at 54. "In theory, if not in operation, judicial review has replaced political pressure from the states as the primary check on federal overreaching." *Id.*

36 Texas v. Johnson, 491 U.S. 397 (1989).

literature that had been enacted in forty-nine states.[37] In *Stenberg v. Carhart*, the Court struck down prohibitions on partial-birth abortions that were in effect in thirty states.[38] And in *City of Chicago v. Morales*, the Court undercut vagrancy laws that had existed for over one hundred years.[39]

On the one hand, legal scholars employ the multicultural model to advocate a greater respect for America's cultural mix; yet on the other, they assert a rigidly nationalistic approach to individual rights.[40] The claim is made that "the United States has one political community,"[41] and all rights must be uniformly applied within this community.[42] But, as reflected in its contradiction to the multicultural movement, this rights-nationalization goes against the inherent diversity of America. This tension is especially evident in the way the courts have used individual rights doctrines to stifle the religious life of local communities.

The Supreme Court has used the Establishment Clause to strike down many local accommodations of religious exercise, including all kinds of public displays of religious symbols.[43] Carving out a "dissenter's right" from the Establishment Clause, the Court has given a constitutional trump card to individuals who claim their rights have been violated by a prayer delivered by a rabbi at a middle school graduation[44]; a crèche displayed on public grounds[45]; a prayer recited by a student prior to the start of a high school football game[46]; and most recently by a plaque of the Ten Commandments hanging in a courthouse.[47] This dissenter's right has been uniformly applied throughout the whole nation, regardless of the religious traditions or sensibilities of the local communities in which the religious

37 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 371 (1995) (Scalia, J., dissenting).

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

39 *See* City of Chicago v. Morales, 527 U.S. 41, 103–04 (1999) (Thomas, J., dissenting).

40 *See* Hugo Rojas, *Stop Cultural Exclusions (in Chile)!: Reflections on the Principle of Multiculturalism*, 55 FLA. L. REV. 121, 135 (2003).

41 Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 945 (1994).

42 *See id.* at 948.

43 According to Professor Conkle, the Supreme Court has used the Establishment Clause "to enforce a wavering, but relatively strict, separation of church and state at all levels of American government." Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1117 (1988). As Justice Kennedy stated in *County of Allegheny*, the Court has displayed "an unjustified hostility toward religion" and a "callous indifference toward religious faith." County of Allegheny v. ACLU, 492 U.S. 573, 655, 664 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). According to the Court in *Lynch*, when courts enforce a strict separation of church and state, they assault the freedom of religious exercise as guaranteed in the First Amendment. Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

44 Lee v. Weisman, 505 U.S. 577 (1992).

45 *County of Allegheny*, 492 U.S. 573.

46 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

47 McCreary County v. ACLU, 545 U.S. 844 (2005).

displays or expressions take place.[48] It is a judicially created right that essentially dictates the public role of religion in every community of every state. Through enforcement of this right, the Supreme Court "arguably [has] reduced the role of religion in public life, and the scope of religious freedom in private life, to less than that intended by the framers and ratifiers of the First Amendment's religion clauses."[49]

The Court's use of the endorsement test reveals the way in which the Court has created and applied a nationalized Establishment Clause-based dissenter's right. As Justice Kennedy wrote in criticism of the endorsement test, it tends to foster a "jurisprudence of minutia."[50] For instance, the crèche display in *Lynch* was constitutional because it was surrounded by clowns and reindeer,[51] but the crèche display in *County of Allegheny* was unconstitutional because it was surrounded only by flowers and was located on the Grand Staircase of the courthouse.[52] Distinguishing the crèche in *Allegheny* from the one in *Lynch*, the Court examined the setting and found that, unlike the elephants, clowns, and reindeer that surrounded the crèche in *Lynch*, nothing in the *Allegheny* display muted its religious message.[53]

The endorsement test can easily descend into a judicial analysis of a dissenter's feelings of exclusion or discomfort. Under such an analysis, a dissenter can stop a public prayer inserted into a high school graduation ceremony, even when that dissenter had no obligation to participate in the prayer.[54] The only pressure felt by the dissenter was the result of perhaps some social discomfort for not participating, but there was no governmental

48 And these dissenter's rights are used to block the religious expressions of the larger community.

49 Brian J. Serr, *A Not-So-Neutral "Neutrality:" An Essay on the State of the Religion Clauses on the Brink of the Third Millennium*, 51 BAYLOR L. REV. 319, 320 (1999). The Court's Establishment Clause decisions "mandate a government 'neutrality' of hypersensitivity toward even the most limited acknowledgments of religion in public life." *Id.*

50 *County of Allegheny*, 492 U.S. at 674.

51 *See* Lynch v. Donnelly, 465 U.S. 668, 671, 687 (1984).

52 *County of Allegheny*, 492 U.S. at 598–600. At the same time, the Court upheld another holiday display also located on public property—a display that combined a forty-five-foot Christmas tree and an eighteen-foot menorah. *Id.* at 587, 617–18.

53 *Id.* at 598.

54 *See* Lee v. Weisman, 505 U.S. 577, 580–84, 594–96 (1992) (stating "the government may no more use social pressure to enforce orthodoxy than it may use more direct means"). The Court's decision in *Santa Fe* also concerns such "pressure." Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000). At issue in *Santa Fe* was a Texas school district's practice of having a student, who was annually elected to the office of student council chaplain, "deliver[] a prayer over the public address system before each varsity football game . . . ." *Id.* at 294. This practice was held by the Court to be a violation of the Establishment Clause. *Id.* at 317. The Court also found that the prayer practice was coercive, insofar as objecting witnesses were put into the position of either attending a personally offensive religious ritual or foregoing a traditional gathering of the school community. *Id.* at 311.

pressure to participate or threat of punishment for not participating.[55] Yet the Court's ruling used this discomfort by a single dissenter to transform a prayer recitation into a state establishment of religion.[56] With such a rigid and nationalized enforcement of these dissenter's rights, the Court has assumed an almost dictatorial role in shaping the religious nature of society.[57]

The judicial rulings on displays of the Ten Commandments illustrate the way in which the Court has centralized within itself all power to dictate the parameters of religious expression in public venues.[58] Essentially, the Court has enforced a rule of mandated neutrality, treating every community of the nation the same as every other; despite the history or traditions or sensibilities of that community; despite any contrary interpretations of democratically elected bodies; and despite how the Ten Commandments may have become part of a community's public life.

In *McCreary County v. ACLU*, the Court held unconstitutional a display of the Ten Commandments in a county courthouse hallway.[59] The Court found that the purpose behind the display was religious rather than secular, even though the county had altered and modified its displays on two different occasions so as to give them an increasingly secular image.[60] The third display, entitled "The Foundations of American Law and Government," contained nine framed documents of equal size, including the Declaration of Independence, the Bill of Rights, the Mayflower Compact, the lyrics of the Star Spangled Banner, and the Ten Commandments, each of which was accompanied by an educational statement about the document's historical

55 *See Lee*, 505 U.S. at 642 (Scalia, J., dissenting) ("I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty . . . .").

56 *See Santa Fe*, 530 U.S. 290; *Lee*, 505 U.S. 577.

57 *See* Edwards v. Aguillard, 482 U.S. 578 (1987) (invalidating statute requiring the teaching of creationism alongside the theory of evolution); Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating statutes authorizing a moment of silence at the beginning of the school day). Also, the Court has invalidated legislation allowing publicly funded teachers to teach secular subjects in religious schools. Sch. Dist of Grand Rapids v. Ball, 473 U.S. 373, 388 (1985) (basing its ruling at least in part on the fear that public school teachers might unwittingly "conform their instruction to the environment in which they teach," thereby furthering the religious mission of the school), *overruled in part by* Agostini v. Felton, 521 U.S. 203, 235 (1997) (acknowledging the portion of Grand Rapids addressing the "Shared Time" program is no longer good law).

58 The Court has used the endorsement test to measure the constitutionality of Ten Commandments displays. For instance, in *Stone v. Graham*, the Court held that public schools could not post the Ten Commandments in classrooms. Stone v. Graham, 449 U.S. 39, 41 (1980). But since the Ten Commandments in *Stone* hung alone, an unanswered question was whether they would still be unconstitutional if surrounded by other displays. Moreover, another unresolved issue was whether the age and sensibilities of children made the display unconstitutional, and thus whether a display seen by adults might be permissible.

59 McCreary County v. ACLU, 545 U.S. 844 (2005).

60 *Id.* at 869–72.

and legal significance.[61] Still, the Court effectively penalized the county for its attempts to expand and modify the displays, ruling that such attempts merely proved an initial and continuing religious purpose.[62] The Court also ruled that a "reasonable observer" would in fact reach certain specific understandings regarding the county's intent to endorse the Commandments' religious message.[63] According to the Court, an observer would somehow read into all the documents contained in the third display a religious theme highlighting and supporting that of the Ten Commandments.[64]

The endorsement test, as first articulated by Justice O'Connor, focuses on two different factors: the government's intention concerning the display, and the perceived meaning of the display in the community.[65] Consequently, the Court must undertake not only a subjective analysis of government intent, but also an examination of the perceptions of the reasonable observer to determine what message the government "actually conveyed."[66] This examination of what impressions viewers might have of some religious display is incapable of achieving certainty because it calls for judges to make assumptions about the opinions that unknown people may have received from certain religious speech or symbols.[67]

In *Freethought Society v. Chester County*, the Third Circuit Court of Appeals dealt with an array of factual issues relating to whether a "reasonable observer" would view a Ten Commandments display as a governmental endorsement of religion.[68] The subject of the lawsuit was a plaque of the Ten Commandments that had been erected in the county courthouse in 1920.[69] Since that time, the county had done nothing to draw attention to

61 *Id.* at 856.

62 *See id.* at 873 ("If the observer had not thrown up his hands [at the third display], he would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality.").

63 *Id.* at 847 ("The reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message.").

64 *Id.* at 872–73. But, as the dissent pointed out, "[n]othing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so . . . ." *Id.* at 889 (Scalia, J., dissenting).

65 *See* Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). According to Justice O'Connor, "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688.

66 *See id.* at 690.

67 *See* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 301 (1987) (illustrating the test's ambiguity by describing how two proponents of the test "would regularly reach precisely opposite conclusions in a wide range of controversies").

68 Freethought Soc'y v. Chester County, 334 F.3d 247, 251, 270 (3d Cir. 2003).

69 *Id.* at 251.

or maintain the plaque.[70] Then, in 2001 a lawyer for a group of atheists, agnostics, and other "freethinkers" demanded that it be taken down.[71] In the suit, commenced to force the county to remove the plaque, the primary plaintiff acknowledged she had been aware of the plaque since 1960, but she apparently did not find it offensive until she became an atheist in 1996 and was "not bothered enough by it to complain until 2001."[72] Replying to the plaintiffs' claim that the plaque represented an affirmative governmental endorsement of religion, the county argued that the plaque's long history detracted from any conclusion that the county was endorsing religion.[73] To decide the issue, the court investigated the initial purpose behind the plaque's erection in 1920, the reasons why the county refused to remove the plaque when so demanded in 2001, whether a reasonable observer would know of the plaque's long history, and whether the age of the plaque was visually apparent.[74]

Not only does the endorsement test subjectively measure perception, but it requires extensive judicial oversight of private religious speech conducted on public property, even when the government is not officially sponsoring or sanctioning that speech, lest the perception mistakenly occur that the government is so sponsoring.[75]

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70 *Id.* at 250.

71 *Id.* at 250, 255.

72 *Id.* at 250, 254; *see also* Freethought Soc'y v. Chester County, 191 F. Supp. 2d 589, 592 (E.D. Pa. 2002), *rev'd, Freethought Soc'y*, 334 F.3d 247.

73 *Freethought Soc'y*, 334 F.3d at 250.

74 *Id.* at 252, 262 (presuming a reasonable observer would be "aware of the age and history of the plaque," and finding such observer "would believe the plaque itself historic"). This inquiry then devolved into one of whether a viewer would be aware of the entire context in which the plaque was erected. *Id.* at 263. In applying the endorsement test, the courts essentially have to conduct fact-finding missions. For instance, in *Santa Fe*, to determine whether the purpose of the school district's policy permitting student-led prayer before high school football games was to endorse religion, the Court believed it should "not stop at an analysis of the text of the policy" but should also examine "the circumstances surrounding its enactment." Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000). Such an examination would extend to whatever involvement the school district had in any previous types of religion-related practices or activities in the schools. *See id.* at 295 (the complaint in *Sante Fe* alleged several religious practices by the school district).

75 In *Pinette*, which involved a private group's placement of a cross in a public plaza next to the state capitol, the Court ruled that the display did not violate the Establishment Clause. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995). However, the plurality left open the possibility that the Establishment Clause might be violated if the government "fostered or encouraged" the mistaken attribution of private religious speech to the government. *Id.* at 766. Justice O'Connor noted that "an impermissible message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism." *Id.* at 774 (O'Connor, J., concurring in part and concurring in the judgment). This may occur "even if the governmental actor neither intends nor actively encourages [the endorsement]." *Id.* at 777. Thus, the Establishment Clause imposes on the government "affirmative obligations that may require a State, in some situations, to take

The Court's creation of a nationalized dissenter's right under the Establishment Clause allows relatively little freedom or flexibility to state and local governments to accommodate the religious views and practices of their residents. This judicial intrusion into the religious expressions of society is evident in a controversy taking place in San Diego.[76] For more than fifty years, a large cross has stood in a city park atop Mount Soledad. Indeed, there has been a cross at that location since 1913, and the present cross is part of a Korean War veterans memorial. However, the park has been embroiled in litigation since 1989, when a "self-described atheist and humanist" sued to have the cross removed.[77] Despite a decade and a half of litigation, the city remains strongly supportive of the cross. In a July 2005 referendum, nearly seventy-five percent of the voters approved a measure to preserve and maintain the cross at its present location.[78]

As the Mount Soledad cross dispute shows, "the Court's generally expansive understanding of what it means to establish religion continue[s] to breed litigation, and to hinder legislative and local experiments with creative" accommodations of religion.[79] This refusal to allow local flexibility was evident in *Larkin v. Grendel's Den*, where the Court struck down a law giving a church the right to veto the grant of a liquor license to any establishment located within a five-hundred-foot radius of the church.[80] Even though the particular community may have found that nearby bars had a detrimental and discouraging effect on religious practice, the Court applied a nationalized dissenter's right to force the community to abide by mandates not at all responsive to the needs of that particular community.

Another area in which the Court's Establishment Clause doctrine prevents local flexibility or diversity is the teaching of intelligent design as an alternative to evolution. Intelligent design is described as "the idea that living organisms are so complex that the best explanation [for their exis-

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steps to avoid being perceived as supporting or endorsing a private religious message." *Id.* Consequently, even though Justice O'Connor joined in the majority opinion which stated that "private religious speech ... is as fully protected under the Free Speech Clause as secular private expression," *id.* at 760 (majority opinion), she also announced that the Establishment Clause limits the Free Speech Clause's protection of private religious speech when that speech occurs on government property or in other contexts in which the speech becomes associated with the government. *Id.* at 772 (O'Connor, J., concurring in part and concurring in the judgment). The problem, of course, is how to determine when private speech becomes associated with the government.

76 Randal C. Archibold, *High on a Hill Above San Diego, a Church-State Fight Plays Out*, N.Y. TIMES, Oct. 1, 2005, at A9.

77 *Id.*

78 *Id.*

79 Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672, 679 (1992) (using the quoted language in reference to "creative use of mediating structures to deliver social services," although it also applicable to other efforts to accommodate religion).

80 Larkin v. Grendel's Den, 459 U.S. 116, 117, 127 (1982).

tence] is that some kind of higher intelligence designed them."[81] Defenders of intelligent design argue that students should have access to a variety of scientific theories about the origins of human life.[82] But even though communities are in charge of education and the setting of school curricula, current legal doctrine suggests that schools cannot teach intelligent design because it amounts to a modern version of creationism and hence constitutes state endorsement of religion.[83]

The Court's use of a nationalized dissenter's right often makes it difficult for state and local governments to accommodate religion.[84] In *Texas Monthly, Inc. v. Bullock*, for instance, the Court struck down a statute exempting religious periodicals from a state sales tax.[85] The Court ruled that it could find "[n]o concrete need to accommodate religious activity,"[86] even though the state legislature had obviously come to exactly the opposite conclusion.[87] In the words of Justice Rehnquist, "governmental assistance which does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice does not . . . violate the Establishment Clause . . . ."[88]

By using the Establishment Clause to create a nationalized set of dissenter's rights, the Court has ignored the federalism aspect of the First Amendment. According to Professor Conkle, the Establishment Clause

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81 Laurie Goodstein, *Evolution Lawsuit Opens With Broadside Against Intelligent Design*, N.Y. TIMES, Sept. 27, 2005, at A21.

82 *See* Complaint at 2–3, Kitzmiller v. Dover, 400 F. Supp. 2d 707 (M.D. Pa. 2005) (No. 04-CV-2688), *available at* 2004 WL 3008270.

83 *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 581–82 (1987) (holding state law violated the Establishment Clause where it forbade the teaching of evolution in public schools unless "creation science" was also taught); McClean v. Ark. Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982) (striking down statute requiring public schools to "give balanced treatment to creation-science and to evolution-science").

84 Accommodation is distinct from establishment:

> The hallmark of accommodation is that the individual or group decides for itself whether to engage in a religious practice, or what practice to engage in, on grounds independent of the governmental action. The government simply facilitates ("accommodates") the decision of the individual or group; it does not induce or direct, by means of either incentives or compulsion.

Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 688 (1992). As Professor McConnell writes, "the government has some latitude to accommodate religion beyond the requirements of the Free Exercise Clause, but there has been no discussion of where the line may be drawn." *Id.* at 709.

85 Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 25 (1989).

86 *Id.* at 18.

87 Maybe, for instance, a state would want to accommodate religious organizations in their attempt to convey certain values, which in turn could have a beneficial effect on the ethical state of society.

88 Thomas v. Review Bd., 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting).

was intended by the Framers to effect "a policy of federalism on questions of church and state."[89] As originally conceived, the Establishment Clause would prohibit the federal government from interfering with the states' freedom to legislate on matters of religion.[90] The issue of federalism was central to the debate surrounding the drafting of the First Amendment.[91] Not only did the drafters not intend to apply the Establishment Clause to states and localities, but the historical evidence "strongly suggests that the fourteenth amendment, as originally understood, did not incorporate the establishment clause for application to state government action."[92]

In the first 150 years of the Constitution's existence, very few religion clause cases were decided.[93] This was because it was generally agreed that the Framers did not intend to apply the clause to the states.[94] However, in the past half-century, ever since the Court incorporated the religion clauses into the Fourteenth Amendment, there has been a flood of First Amendment litigation.[95] Furthermore, with the incorporation of the Establishment Clause in *Everson v. Board of Education*,[96] the Supreme Court shifted its First Amendment jurisprudence in an increasingly nationalized direction, leaving little room for the states to improvise.[97]

The First Amendment's federalism component has recently been resurrected by Justice Thomas. As he explained in his concurring opinion in *Elk*

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89 Conkle, *supra* note 43, at 1134.

90 *See id.* at 1134–35.

91 *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1273 (1992).

92 Conkle, *supra* note 43, at 1136.

> [T]here is . . . specific evidence that the framers and ratifiers of the fourteenth amendment, whatever their intentions with respect to the Bill of Rights generally, at least did not intend to incorporate the establishment clause for application to the states. In 1875 and 1876, after the adoption of the fourteenth amendment, Congress considered, but rejected, a resolution that was specifically designed to make the religion clauses of the first amendment applicable to the states.

Id. at 1137.

93 *See* James J. Knicely, *"First Principles" and the Misplacement of the "Wall of Separation": Too Late in the Day for a Cure?*, 52 DRAKE L. REV. 171, 173 (2004).

94 *See* Stuart D. Poppel, *Federalism, Fundamental Fairness, and the Religion Clauses*, 25 CUMB. L. REV. 247, 250 (1995).

95 *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 287 (2001).

96 Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

97 Thus, the states have to conform their religious liberty decisions to the mandates of the Supreme Court. *But cf.* Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 149 (1996) (describing how "[s]ome state courts have imposed aid restrictions that are much more limiting towards religious schools" than the restrictions imposed by the federal Constitution as the Supreme Court has interpreted it).

Grove Unified School District v. Newdow, "the Establishment Clause is a federalism provision which ... resists incorporation."[98] Justice Thomas further observed that the "text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments."[99] In this same vein, Justice Stewart had earlier recognized that "the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments."[100]

Scholars have also emphasized the federalist nature of the Establishment Clause. Professor Gerard Bradley recognized the intent of the Establishment Clause to "preserve existing state constitutional regimes from intermeddling federal legislation."[101] According to Steven Smith, "[t]he religion clauses were understood as a federalist measure, not as the enactment of any substantive principle of religious freedom."[102] Akhil Amar describes the Establishment Clause as being "utterly agnostic on the substantive issue of establishment; it simply mandated that the issue be decided state-by-state and that Congress keep its hands off . . . ."[103] Some critics even argue that the incorporation of the Establishment Clause through the Fourteenth Amendment, and hence its applicability to the states, should be rolled back.[104] Such a strategy "would certainly give the states far more latitude to acknowledge, accommodate, and promote religion than current doctrine allows."[105] Indeed, this is just what the Framers advocated. James Madison argued that "[t]here is not a shadow of right in the general government to intermeddle with religion."[106] And James Iredell, later to become a justice of the Supreme Court, explained that the proposed Establishment

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98 Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 (2004) (Thomas, J., concurring).

99 *Id.* at 49.

100 Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 309 (1963) (Stewart, J., dissenting).

101 GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 92 (1987).

102 STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 30 (1995).

103 AMAR, THE BILL OF RIGHTS, *supra* note 22, at 246.

104 *See* William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1193 (1990).

105 Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1715 (1992) [hereinafter Note, *Rethinking Incorporation*]. Many federalism critics of incorporation argue that the Framers intended states to have leeway in their own church-state relations, and that states should be free to shape those relations so as to allow for greater experimentation in education and public benefits programs. *See* Lietzau, *supra* note 104, at 1225-27 & n.202; Note, *Rethinking Incorporation*, *supra*, at 1700.

106 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 330 (Jonathan Elliot ed., Philadelphia, J.B. Lippin & Co., 2d ed. 1836).

Clause left the matter of religion "to the operation of [each state's] own principles."[107]

The modern Establishment Clause doctrine, however, was formed during the Warren and Burger eras, when the Court assumed sole and exclusive authority to dictate all matters concerning individual rights. In connection with its equal protection jurisprudence, focused as it was on the goal of preventing social exclusion, the Court derived a dissenter's-rights view of the Establishment Clause. This right reflected a fear that the failure to keep the religious and political spheres separate would lead to social strife along religious lines and a fragmentation of the political community.[108] Justices Stevens and Breyer have argued that public aid to religion would foster political discord and tear the social fabric underlying American democracy.[109] Drawing on experiences from the Balkans, Northern Ireland, and the Middle East, Justice Stevens wrote: "Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."[110]

There have been recent times when the Court, to decentralize this area of liberty, appeared as if it might be about to return religion to the states. In *Zelman v. Simmons-Harris*, the Supreme Court upheld the constitutionality of an Ohio school voucher program, in which ninety-six percent of the vouchers were used by students enrolling in religious schools.[111] Prompting the voucher program was a recognition of the "crisis of magnitude" that existed in the Cleveland public school system, with only ten percent of ninth graders able to pass a proficiency test and more than two-thirds of high school students failing to graduate.[112] The program passed with the strong support of inner-city minorities, who saw it as a way of escaping the chronically failing urban schools.[113] Indeed, studies have revealed that

107 4 *id.* at 198.

108 *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting). Another concern includes not making "a person's standing in the political community" turn on her religion. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring). As one commentator has noted, "it is plausible to conclude that today's Establishment Clause doctrine communicates at least one thing very clearly: that the intermingling of political and religious authority is categorically bad." Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 685 (2003).

109 *Zelman*, 536 U.S. at 717 (Breyer, J., dissenting); *id.* at 686 (Stevens, J. dissenting).

110 *Id.* at 686 (Stevens, J., dissenting).

111 *Id.* at 644–47 (majority opinion).

112 *Id.* at 644.

113 *See* Joseph P. Viteritti, *Reading* Zelman*: The Triumph of Pluralism, and its Effects on Liberty, Equality, and Choice*, 76 S. CAL. L. REV. 1105, 1173–74 (2003) (discussing the argument that almost a half-century after *Brown v. Board of Education* was handed down, most African American children are still not getting a decent education, so vouchers are the necessary next step beyond *Brown*).

most urban public school students around the nation are failing to perform at even the most basic level of achievement and that African American parents strongly support school choice, "with 60 percent saying they would switch their children from public to private school if money were not an obstacle."[114] An investigation commissioned by the National Center for Education Statistics shows that private schools tend to produce superior cognitive outcomes, provide a safer and more structured learning environment, and have less racial segregation.[115] It was also found that "minority students who attend Catholic schools do better than their public school peers" and that "disadvantaged minority students who attend Catholic high schools are more likely to graduate, go on to college, and earn a degree."[116]

In *Zelman*, Justice Thomas cited data from Cleveland showing that religious schools are more educationally effective than public schools. Whereas ninety-five percent of the eighth graders in Catholic schools passed a state reading test, only fifty-seven percent of their public school peers did; similarly, whereas seventy-five percent of the Catholic school students passed a math proficiency test, their public school peers had only a twenty-two percent passage rate.[117] Furthermore, "the average [government] cost of sending a child to a religious school is considerably lower than the cost of public school."[118] The facts behind the *Zelman* case provide a clear example: "[R]eligious schools received a maximum of $2250 per student in public funding, whereas public schools were allocated $7746 per student."[119]

In *Employment Division v. Smith*, the Court also indicated a propensity to return religion to the states.[120] Prior to *Smith*, the rule was that state-imposed burdens on religious exercise presumptively violated the Free Exercise Clause and that government could sustain those burdens only by demonstrating a compelling government interest.[121] *Smith* replaced this rule with one stating that no compelling interest is required to enforce neutral state laws of general applicability that burden religious exercise.[122] Thus, *Smith* largely left regulation of religious practices to the states, as long as they regulated such practices with neutral, generally applicable laws.

114 JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 7 (1999).

115 *Id.* at 80.

116 *Id.* at 83. Other studies have also found "Catholic schools to be an effective vehicle for educating the same minority populations that have not been well served by urban public schools." *Id.* at 84.

117 *Zelman*, 536 U.S. at 681 (Thomas, J., concurring).

118 Viteritti, *supra* note 113, at 1163.

119 *Id.* at 1164.

120 Employment Div. v. Smith, 494 U.S. 872 (1990).

121 *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

122 *See Smith*, 494 U.S. at 881, 883.

Smith was followed by *City of Boerne v. Flores*, in which the Court overruled a congressional attempt to restore the pre-*Smith* rule through the Religious Freedom Restoration Act of 1993.[123] The Act required strict scrutiny to be the test used in determining whether a governmental regulation violated the Free Exercise Clause. However, the Court struck down this test, arguing that when Congress acts under section five of the Fourteenth Amendment, it cannot expand the scope of rights or create new rights.[124] Congress can only act to remedy rights recognized by the courts or adopt laws to prevent the violation of rights recognized by the courts.[125] Because the Court saw the Religious Freedom Restoration Act as creating new rights, it declared the Act an unconstitutional exercise of congressional power.[126]

Although the *Boerne* Court seemed to uphold federalism principles by noting that the Act exceeded Congress's enumerated power under section five and significantly intruded "into the States' traditional prerogatives and

123 Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–bb-4 (2000) [hereinafter RFRA]; City of Boerne v. Flores, 521 U.S. 507 (1997). In the *Boerne* case, a generally applicable zoning ordinance that required permission to make structural changes in a designated historical area was enforced by the Boerne City Council against a Catholic church that needed to expand in order to accommodate its growing congregation. *Id.* at 511–13. After permission to modify the church building was denied, the church filed suit, claiming that the city could not demonstrate a compelling justification, as required by RFRA, for enforcing its zoning ordinances against the church. *Id.* at 512. Prior to *Smith*, however, the First Amendment itself would have required the demonstration of such a compelling government interest before a zoning ordinance could restrict a church's efforts to accommodate the worship needs of its parishioners. But under *Smith*, the First Amendment provided no protection to the church, effectively giving the city council the absolute power to deny the church an exemption from the ordinance, without even giving any reason therefore. *See id.* at 513–14. In *Boerne*, the Court struck down RFRA as an unconstitutional exercise of congressional power. *Id.* at 536.

124 *City of Boerne*, 521 U.S. at 527–29. According to the Court, Congress's power under section five of the Fourteenth Amendment gives it the authority only to remedy violations of constitutional rights, not the authority to expand substantive constitutional rights. *Id.* at 520–29. Because the Court held in *Smith* that neutral laws of general applicability incidentally burdening religious practices do not require a compelling justification in order to comply with the First Amendment, RFRA's requirement of a compelling governmental justification for such laws improperly expands religious rights beyond the degree of religious freedom afforded by *Smith*. *Id.* at 529–35. Thus, RFRA exceeded the scope of Congress's authority under section five of the Fourteenth Amendment. *Id.* at 536.

The newly restrictive test for laws under section five of the Fourteenth Amendment, as announced in *City of Boerne*, was later applied in three subsequent cases—*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001)—to invalidate congressional enactments. However, more recently, the Court has somewhat reversed course by upholding federal laws in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003) and *Tennessee v. Lane*, 541 U.S. 509 (2004).

125 *City of Boerne*, 521 U.S. at 518–25.

126 *Id.* at 532, 536.

general authority to regulate for the health and welfare of their citizens,"[127] its decision may actually have been influenced more by a desire to repel what it saw as a direct challenge to its authority to interpret the scope of a constitutional right. Thus, the Court appeared to be "looking at the case through the lens of judicial supremacy and felt compelled to put down what it saw as a congressional rebellion."[128]

B. *A Centralized Free Speech Doctrine in a Time of Divergent, Pervasive Media*

Only with respect to obscenity has the Court held that First Amendment rights should not be defined by uniform, centralized standards.[129] The *Miller* doctrine looks to local community standards to determine what is so offensive as to constitute obscenity.[130] Thus, in theory, the moral views of the pertinent community define what is obscene. This injects an element of federalism into obscenity law because different communities can have different moral views. Relying on principles of federalism, the Court has stated that "our Nation is simply too big and too diverse for this Court to reasonably expect that such standards [of offensiveness] could be articulated for all 50 States in a single formulation."[131] *Miller* recognized that "[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."[132] As the Court stated, "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."[133]

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127 *Id.* at 534.

128 Stephen Gardbaum, *The Federalism Implications of* Flores, 39 WM. & MARY L. REV. 665, 669 (1998). The Court held that the Act exceeded Congress's section five power because it attempted a "substantive change in constitutional protections." *City of Boerne*, 521 U.S. at 532. The Court distinguished legislation that enforces rights from legislation that defines or creates constitutional rights. *Id.* at 519. But, of course, "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern." *Id.*

129 On the other hand, the Court has rejected centralization in other areas. For instance, in *Grutter*, the advocates of colorblindness argued for a national constitutional ban on racial preferences. *See* Grutter v. Bollinger, 539 U.S. 306, 367–78 (2003) (Thomas, J., concurring in part and dissenting in part).

130 Miller v. California, 413 U.S. 15, 24 (1973).

131 *Id.* at 30.

132 *Id.* at 33. This rejection of national standards was reasserted in *Hamling v. United States*, where the Court held that the community standards test for federal obscenity prosecutions was local, not national, and not necessarily statewide—the relevant geographic community could be even smaller than that of an entire state. Hamling v. United States, 418 U.S. 87, 105 (1974).

133 *Miller*, 413 U.S. at 32. As one commentator has argued, if the Court's objective in *Miller* "was to craft a test that would allow rational men and women to play a role in policing

But theory has not translated into practice, particularly in connection with these federalism-type concerns. First, because of the Internet and its nationalizing effect, *Miller* is losing its effectiveness in allowing communities to regulate according to their standards of decency.[134] Second, the community-standards focus of *Miller* applies only to hard-core obscenity, not to the vast amount of pornography that currently exists.

The *Miller* community-standards test has become "difficult to apply in recent years with the explosion of the Internet as the dominant and most efficient means for disseminating pornographic material."[135] Because of the Internet, "communities now transcend geographic boundaries."[136] On the Internet, "the increasing globalization of information flows . . . make the use of local community policing standards obsolete."[137] For instance, in *ACLU v. Reno*, the Third Circuit asserted that the Child Online Protection Act would require Internet site operators to screen their content according to the geographic criteria of each of its users, which would then create a duty on the operators to comply with all the different community standards concerning minors throughout the United States.[138] Later, on appeal in *Ashcroft v. ACLU*, Justice O'Connor rejected the use of community standards for the Internet.[139] She argued that a national standard was "necessary in my view for any reasonable regulation of Internet obscen-

their community's morality, Miller fits the bill, for it succeeds in giving fact finders the opportunity to express their moral indignation and outrage." Cara L. Newman, Comment, *Eyes Wide Open, Minds Wide Shut: Art, Obscenity, and the First Amendment in Contemporary America*, 53 DEPAUL L. REV. 121, 145 (2003).

134 Despite the Court's opinion in *Miller*, 413 U.S. at 30–34, which expanded the reach of governmental regulation of obscenity to include materials offensive to the moral standards of the local rather than the national community, pornography "grew like weeds in a vacant lot." William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2346 (2002). Eventually, obscenity cases stopped reaching the Court, partly because government agencies abandoned any censorship efforts, and partly because "local censorship efforts were easily evaded by national channels of communication such as mail service, telephone, and the internet." *Id.* Moreover, given the mobility of persons and families, as well as the relative isolation of people within defined geographic boundaries, the concept of "community standard" is difficult to apply.

135 John Tehranian, *Sanitizing Cyberspace: Obscenity,* Miller, *and the Future of Public Discourse on the Internet*, 11 J. INTELL. PROP. L. 1, 18 (2003); *see also id.* at 2 (stating that an effective standard for obscenity has "proven quite elusive").

136 Patrick M. Garry, *The First Amendment in a Time of Media Proliferation: Does Freedom of Speech Entail a Private Right to Censor?*, 65 U. PITT. L. REV. 183, 216 (2004).

137 Tehranian, *supra* note 135, at 17–18.

138 ACLU v. Reno, 217 F.3d 162, 166 (3d Cir. 2000) ("COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability."), *vacated*, Ashcroft v. ACLU (*Ashcroft I*), 535 U.S. 564 (2002).

139 *Ashcroft I*, 535 U.S. at 587 (O'Connor, J., concurring). This rejection coincided with Judge Leonard Garth's ruling in the case below, in which he disavowed the use of contemporary community standards entirely for the Internet. *Reno*, 217 F.3d at 166.

ity."[140] Justice Breyer agreed, stating the relevant standard for the Internet "is national."[141] However, as Justice Thomas argued for the majority, "[i]f a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities."[142]

The Court's centralized approach to individual rights can also be seen in its treatment of legislative attempts to regulate Internet indecency. No matter how pornographic the material, as long as it falls just short of obscenity, the Court—using the single nationalized standard of whether the regulations restrict adult access—has struck down attempts to regulate pornography for the sake of child protection.[143]

According to a 1999 article, "[a]lmost 70% of the current traffic on the Internet is 'adult-oriented material,'"[144] and there are "approximately 200 new pornographic sites created each day."[145] This is a particularly worrisome problem, since "[n]inety percent of children between the ages of five and seventeen ... now use computers."[146]

In addressing the problem of pornography on the Internet, Congress has tried on several occasions to construct doorways that will seal off sexually explicit material from children. In 1996, it passed the Communications Decency Act, which prohibited the transmission over the Internet of indecent material to anyone under the age of eighteen.[147] This prohibition, however, was ruled unconstitutional in *Reno v. ACLU*.[148] Next, Congress passed the Child Online Protection Act ("COPA"),[149] which tried to address the concerns articulated in *Reno* by forcing commercial vendors of

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140 *Ashcroft I*, 535 U.S. at 587.

141 *Id.* at 590 (Breyer, J., concurring).

142 *Id.* at 583 (majority opinion).

143 *See* Reno v. ACLU, 521 U.S. 844, 874-75 (1997) (stating the interest in protecting children "does not justify an unnecessarily broad suppression of speech addressed to adults").

144 Elizabeth M. Shea, *The Children's Internet Protection Act of 1999: Is Internet Filtering Software the Answer?* 24 SETON HALL LEGIS. J. 167, 174 (1999); *see also* H.R. REP. NO. 105-775, at 10 (1998).

145 Shea, *supra* note 144.

146 Mitchell P. Goldstein, *Congress and the Courts Battle Over the First Amendment: Can the Law Really Protect Children from Pornography on the Internet?* 21 J. MARSHALL J. COMPUTER & INFO. L. 141, 143 (2003). Studies have shown that most adult-oriented commercial websites do not use age verification measures, and that about a quarter of them employ practices like "mouse trapping" that aim to keep users from exiting the site. *Id.* at 144. Moreover, approximately three quarters of them displayed "adult content on the first page, which was accessible to everyone." *Id.* at 145.

147 *See* 47 U.S.C. § 223(a), (d) (1996).

148 *Reno*, 521 U.S. 844 (holding that the Act's provisions were unconstitutionally vague and burdensome to the First Amendment rights of adults).

149 47 U.S.C. § 231 (2000).

pornographic Internet material to require a credit card for access to their sites.[150] This statute forbade any person from using the World Wide Web to make "any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors."[151] Litigation regarding COPA's constitutionality is ongoing; although, the Court has indicated the law is likely to be struck down.[152] Similarly, with the Child Pornography and Prevention Act, Congress tried to expand the federal prohibition on child pornography to include computer-generated images of minors engaging in sexually explicit conduct ("virtual child pornography").[153] This law was overturned in *Ashcroft v. Free Speech Coalition*.[154]

Aside from the effects of the Internet, developments in privacy law may also be eroding the enforcement of community standards in obscenity law. In *Lawrence v. Texas*, the Court dealt a severe blow to legal expressions of community morality.[155] *Lawrence* essentially created a centralized standard of sexual privacy that trumps any countervailing community moral standards. If, as *Lawrence* stated, decisions concerning sexual activity are at the core of individual autonomy protected by the Due Process Clause,[156] then communications about sexual activities may also receive similar constitutional protections, regardless of how offensive or obscene those communications are to community standards. If the Court's ruling that the Constitution "gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"[157] is extended to sexual communications, then obscenity regulation could only be supported if injuries other than moral harms are involved. Justice Scalia in fact

150 *See* 47 U.S.C. § 231(c)(1)(A). The Act imposed criminal penalties for the knowing posting, for "commercial purposes," of Internet content that is "harmful to minors," but provided an affirmative defense to commercial vendors who restricted access to prohibited materials by "requiring use of a credit card" or "any other reasonable measures that are feasible under available technology." *Id.* § 231(a)(1), (c)(1); *see also* Communications Decency Act of 1996, 47 U.S.C. § 223 (an earlier attempt by Congress to criminalize certain speech on the Internet); Ashcroft v. ACLU (*Ashcroft II*), 542 U.S. 656, 661–63 (2004) (describing COPA).

151 47 U.S.C. § 231(a)(1).

152 *Ashcroft II*, 542 U.S. at 673 (affirming grant of a preliminary injunction against enforcement of COPA). Leading up to the *Ashcroft II* decision, the district court found that COPA is "likely to burden some speech that is protected for adults." *Id.* at 665 (citing ACLU v. Reno, 31 F. Supp. 2d 473 (1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000)).

153 Child Pornography and Prevention Act, 18 U.S.C. § 2256(8)(A)–(C) (2000).

154 Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) (holding provisions banning virtual child pornography to be overbroad and unconstitutional).

155 Lawrence v. Texas, 539 U.S. 558, 577 (2003).

156 *See id.* at 574.

157 *Id.* at 572. Justice Kennedy further wrote: "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . ." *Id.* at 577 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

observed that *Lawrence* "effectively decrees the end of all morals legislation."[158]

A steadfast refusal to allow for any decentralization regarding the individual rights doctrines governing indecency and pornography has exacerbated the Court's listless attempt to localize obscenity law.[159] This refusal stifles any flexible or innovative response a democratic community might create to the unique problems it encounters with respect to the effect of such speech on their community and children.

In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, the Court addressed the constitutionality of regulations in the Cable Act of 1992, which required cable operators to place indecent programs on a separate channel, to block that channel, and to unblock it within thirty days of a subscriber's written request for access to the channel.[160] In holding these regulations unconstitutional, the Supreme Court focused primarily on the inconveniences to would-be viewers of indecent programming, including the viewer who might want a single show, as opposed to the entire channel; the viewer who might want to choose a channel without any advance planning (the "surfer"); or the one who worries about the danger to his reputation that might result if he makes a written request to subscribe to the channel.[161] However, none of these burdens presented insurmountable obstacles. Each one of these types of viewers could get access to the desired programming by simply following the established procedures. Furthermore, even though the Court recognized that the purpose of the regulations was to protect minors, that it was a compelling purpose,[162] and that

158 *Id.* at 599 (Scalia, J., dissenting). As Justice Scalia argued, "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution ... bestiality, and obscenity are ... called into question by today's decision." *Id.* at 590.

159 One example of a national standard is the FCC's national standard for broadcast indecency, as revealed in *FCC v. Pacifica Foundation*, 438 U.S. 726, 737–38 (1978). In a case involving "The Howard Stern Show," the FCC ruled that community standards for broadcast were to be judged by a national standard. *In re* Infinity Broad. Corp. of Pa., 2 F.C.C.R. 2705, 2706 (1987). Current law does not take into account society's desire to regulate certain moral harms, which can be quite different from other harms such as violence against women. For instance, some pornography could be considered morally bad because it encourages sexual promiscuity or narcissistic personality characteristics or because it causes the reader to regard other people as mere objects of sexual interest, whose feelings do not matter. *See, e.g.*, Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1666–67, 1672 (2005) (stating that "moral harm exists"). Moreover, for many parents, a desire to shape their children's character through the avoidance of pornography is itself "an important aspect of human liberty that deserves respect." *Id.* at 1673.

160 Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 753 (1996). In addition to these restrictions, the regulations also required the programmers of leased channels to alert cable operators of their intent to broadcast indecent material at least thirty days before the scheduled broadcast date. *Id.* at 754.

161 *Id.* at 754, 760.

162 *Id.* at 755.

the regulations only applied to sexual material (and not the kind of vitally important political information present, for instance, in the *Pentagon Papers* case[163]), the Court still struck them down, focusing on the provisions' burdensome impact on the programming available to adults.[164]

With respect to indecent speech, the courts have created special constitutional rules for children.[165] Because of the importance of the child-rearing process, the constitutional demands of free speech must be "applied with sensitivity . . . to the special needs of parents and children."[166] The Supreme Court has specifically ruled that the government has an interest in facilitating parental control over what their children see and hear.[167] As the Supreme Court stated, a democratic government requires "the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."[168] Consequently, where children are involved, freedoms of speech may have to be "balanced against society's countervailing interest in teaching . . . the boundaries of socially appropriate behavior."[169] This balancing requires flexibility at the local level, but the Court's strictly nationalized First Amendment doctrine prevents such flexibility.[170] Moreover, the doctrine basically casts aside all social interests in child protection whenever those interests come in conflict with the access rights of adults.[171]

163 N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).

164 *Denver Area*, 518 U.S. at 759.

165 *See* New York v. Ferber, 458 U.S. 747, 757, 774 (1982) (describing numerous protections for children which have been upheld by the Court and upholding statute that prohibited distribution of child pornography); Ginsberg v. New York, 390 U.S. 629, 637 (1968) (upholding statute that restricted the distribution of printed obscene material to children).

166 Bellotti v. Baird, 443 U.S. 622, 634 (1979) (discussing reasons why "the constitutional rights of children cannot be equated with those of adults").

167 FCC v. Pacifica Found., 438 U.S. 726, 749–50 (1978).

168 Prince v. Massachusetts, 321 U.S. 158, 168 (1944).

169 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

170 Such flexibility is sorely lacking, as illustrated by the continual yet unsuccessful efforts of states and localities to regulate the distribution of violent and sexually explicit video games to children. *See, e.g.*, Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003) (holding ordinance prohibiting certain video games unconstitutional because video games are a protected form of speech under the First Amendment). Despite federal court after federal court striking down such attempted regulations, state after state and locality after locality keep trying to regulate because of their beliefs in the harms caused by such games. *See* Patrick M. Garry, *Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games*, 57 SMU L. REV. 139 (2004); John M. Broder, *Bill is Signed to Restrict Video Games in California*, N.Y. TIMES, Oct. 8, 2005, at A11 (describing legislation prohibiting "the sale to teenagers of electronic games featuring reckless mayhem and explicit sexuality").

171 As Professor Shiffrin notes, "[c]hildren are the Achilles heel of liberal ideology." Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 647 (1980). They are "more impressionable and they constitute a captive audience"; therefore, it is understandable that the most difficult speech problems occur with children. *Id.* But, the Court has stated that "protect-

C. Enforcing a Nationalized View of Individual Autonomy

Privacy has been a particularly prominent area in which the Court has used centralized mandates concerning individual rights to dictate policy choices and social values uniformly to every community in the nation. In its privacy decisions, the Court has not only used a right not mentioned in the Constitution to strike down a host of state regulations, but in doing so, it has defined what constitute the vital ingredients of personal dignity and autonomy for all Americans. Moreover, as the privacy cases show, the nine-person, unelected Supreme Court has decided that constitutional privacy is to be defined almost exclusively in terms of sexual activity freedoms.[172]

According to the Court, privacy involves those "choices central to personal dignity and autonomy" that help "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[173] Furthermore, the types of choices described by the Court as vital to human development include "the choice to engage in sexual conduct and the choice to have an abortion."[174] The Court has not extended its privacy jurisprudence to the problem of identity or informational privacy, despite the fact that such privacy is increasingly under attack from new technologies. Indeed, individual claims against media or technological invasion of privacy have not found a receptive ear in the Court. In fact, through its First Amendment rulings, the Court has protected those actors and conditions that contribute to this erosion of personal privacy.

The Court's privacy rulings presume that judges have the ability and the duty to determine those personal choices that define human life and sustain personal dignity. Privacy law also presumes that the courts can adequately draw the fine lines between individual privacy, democratic values, and social policies. Finally, the constitutional doctrines on privacy presume that one centralized judiciary can better determine the parameters of individual autonomy than can any democratically elected state legislature or county commission.

In *Lawrence v. Texas*, the Court held that a state statute criminalizing same-sex sodomy violated the Fourteenth Amendment's Due Process

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ing children . . . does not justify an unnecessarily broad suppression of speech addressed to adults." Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001) (quoting Reno v. ACLU, 521 U.S. 844, 875 (1997)). The Court has even granted constitutional protection to the distribution of virtual child pornography. Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002) (holding provisions banning virtual child pornography to be overbroad and unconstitutional).

172 *See infra* notes 173–96 and accompanying text.

173 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (indicating that a constitutional right of sexual privacy can trump all other community values or morals).

174 Patrick M. Garry, *A Different Model for the Right to Privacy: The Political Question Doctrine as a Substitute for Substantive Due Process*, 61 U. MIAMI L. REV. 169, 188 (2006) [hereinafter Garry, *A Different Model*]; *see e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); *Casey*, 505 U.S. 833; Roe v. Wade, 410 U.S. 113 (1973).

Clause.[175] *Lawrence* built upon the foundation initially laid in *Griswold v. Connecticut*, which announced a right of privacy belonging to married couples wishing to use contraceptives.[176] This right of privacy was then extended in *Eisenstadt v. Baird* to unmarried couples.[177] Then, in *Roe v. Wade* and *Carey v. Population Services International*, the Court applied the right of privacy to a woman's decision to abort her unborn fetus and to a minor's freedom to use contraceptives.[178] Later, in upholding *Roe*, the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* equated the abortion decision with the right to define one's own existence.[179]

There is a significant debate among constitutional scholars as to whether *Lawrence* involved a right of privacy or a liberty interest, both of which are based on the Due Process Clause.[180] Yet despite the grounds on which it

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175 *Lawrence*, 539 U.S. at 578–79, *overruling* Bowers v. Hardwick, 478 U.S. 186 (1986).

176 Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

177 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (ruling that a law banning the distribution of contraceptives to unmarried persons violated their right of privacy).

178 Carey v. Population Servs. Int'l, 431 U.S. 678, 681–82 (1997) (overturning a state statue forbidding the distribution of contraceptives to persons under sixteen years of age); Roe v. Wade, 410 U.S. 113, 164 (1973) (holding that women have a constitutional right to choose an abortion). In *Carey*, the Court ruled that "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults." *Id.* at 693. Prior to *Carey*, the Court had already overturned statutory restrictions on a minor's right to obtain an abortion. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976). In *Stenberg v. Carhart*, the Court struck down a Nebraska law outlawing partial birth abortion as violating the "undue burden" test. Stenberg v. Carhart, 530 U.S. 914, 945–46 (2000).

179 *Casey*, 505 U.S. at 851.

180 As the Court framed it, the question was "[w]hether petitioners' criminal convictions for adult consensual sexual intimacy in the home violates their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment." *Lawrence*, 539 U.S. at 564. In his dissent, Justice Scalia notes that the majority did not describe the right to sexual intimacy as a fundamental right, but only describes petitioners' conduct as "an exercise of their liberty." *Id.* at 586 (Scalia, J., dissenting). Professor Hermann categorizes *Lawrence* as a privacy case: "[n]ow that *Lawrence* has overruled *Bowers*, the question is no longer whether there is a right to sexual privacy, but rather, what specific aspects of sexual privacy cannot be burdened by state regulation." Donald H.J. Hermann, *Pulling the Fig Leaf off the Right of Privacy: Sex and the Constitution*, 54 DEPAUL L. REV. 909, 956 (2005). Professor Carpenter likewise sees *Lawrence* as a privacy case. Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140, 1160 (2004). Professor Tribe, however, argues that *Lawrence* is best viewed as an equality decision. Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004). Professor Barnett also sees the case as one involving liberty. Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21, 33 (2003). However, as Barnett argues, seeing *Lawrence* as a liberty case calls its reasoning into question. *See* Randy E. Barnett, *Grading Justice Kennedy: A Reply to Professor Carpenter*, 89 MINN. L. REV. 1582 (2005). Since the Court does not identify the liberty involved as a fundamental right (because the Court does not find that the liberty is deeply rooted in the nation's history), it should receive the lowest level of scrutiny—the rational basis test, which "almost always" finds a "conceivable rational basis" in the statute under question. *Id.* at 1583.

relied, the Court decided to protect the right of intimate sexual relations.[181] Furthermore, even though the *Lawrence* Court did not specifically declare homosexual sodomy a fundamental right, it seemed to apply the same kind of scrutiny that is usually given to fundamental rights.[182]

Previously, in *Bowers*, Justice White's opinion examined whether American history and tradition had in effect created a fundamental right "to engage in sodomy," and concluded there was no constitutional basis for such a right.[183] When the Court reversed itself in *Lawrence*, "Justice Kennedy conducted the same kind of historical examination that swayed the Court's decision in *Bowers*, but this time found no national history or tradition of condemning homosexual sodomy."[184] Justice Kennedy argued that history and traditions "show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[185] Meanwhile, Justice Scalia, in dissent, wrote that "an 'emerging awareness' does not establish a 'fundamental right.'"[186]

Perhaps the most far-reaching consequence of *Lawrence* involves its future effect on morals laws of any kind. Justice Scalia argued that *Lawrence* has put into jeopardy all morals laws—e.g., those against bigamy, same-sex marriage, adult incest, and obscenity.[187] Constitutional scholar Steven Ca-

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181 The *Lawrence* Court concluded that the "liberty protected by the Constitution allows homosexual persons the right to [form intimate bonds in their private lives]." *Lawrence*, 539 U.S. at 567.

182 Justice Scalia characterized the decision as a result of the Court signing on to an activist agenda that seeks to declare homosexuality a fundamental right, even though "the Court does not have the boldness" to say so. *Id.* at 594, 602 (Scalia, J., dissenting).

183 Bowers v. Hardwick, 478 U.S. 186, 190–92 (1986), *overruled by Lawrence*, 539 U.S. 558. The Court also rejected the finding of a more general right to sexual intimacy from which a right to engage in homosexual sodomy could be derived. *See id.* at 190–91.

184 Garry, *A Different Model, supra* note 174, at 193 (citing *Lawrence*, 539 U.S. at 567–74 (majority opinion)).

185 *Lawrence*, 539 U.S. at 572.

186 *Id.* at 598 (Scalia, J., dissenting). Scalia also noted that "[c]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation." *Id.* at 589.

187 *Id.* at 590. As one commentator argued, *Lawrence* was "based solely on moral grounds." Hermann, *supra* note 180, at 910.

The future of morals laws was previously seriously threatened in *Romer v. Evans*, in which the Court struck down an amendment to the Colorado Constitution that prohibited any state laws or policies permitting homosexuals to assert any claim of "protected status or . . . discrimination." Romer v. Evans, 517 U.S. 620, 624 (1996). In ruling that there could be no legitimate purpose for such an amendment and that it was inspired exclusively by animosity toward homosexuals, the Court basically equated traditional religious disapproval of homosexual conduct with hatred of homosexuals themselves. *Id.* at 632. The Court also seemed to dismiss the notion that the amendment could be based on uncertainty about the moral values involved in the gay rights movement. *See id.* at 644–45 (Scalia, J., dissenting) (discussing "our moral heritage").

labresi agrees: "*Lawrence* could foreshadow the end of all morals laws . . . ."[188] If this is the result of *Lawrence*, it is one that contradicts long-standing precedent.

Courts have long supported the ability of states to pass morals laws. Justice Harlan argued that "society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well."[189] Indeed, there is much Supreme Court precedent for the ability of states to "legislate morality."[190] Even as recently as *Bowers*, the Court has acknowledged the validity of laws based on notions of social morality and that social morality constituted a legitimate state interest.[191] As the Court warned in *Bowers*, "[I]f all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[192]

Laws based on social morality are a necessary compliment or counterweight to an individualistic legal culture. An argument exists that a community is weakened if it can only protect rights and not express any collective moral judgments defining the duties owed by individuals to society.[193] One claim is that the decline of community life in America, precipitated by an obsessively individualistic orientation, creates a society of self-absorbed individuals engrossed in the pursuit of private comforts and devoid of any public-spiritedness.[194] Similarly, based on the "Platonic ideal . . . that the State exists to promote virtue among its citizens," one scholar has observed

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188 Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 GEO. L.J. 1023, 1044 (2005). The opinion, according to Calabresi, is "one of the most strikingly libertarian opinions the Court has ever issued." *Id.* As Calabresi argues, "*Lawrence* is the Court's latest pronouncement on the scope of substantive due process, and it displaces the more socially conservative opinion that Chief Justice Rehnquist had written in the assisted suicide case . . . ." *Id.*

189 Poe v. Ullman, 367 U.S. 497, 545–46 (1961) (Harlan, J., dissenting) (observing that laws relating to morality "form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis").

190 Christopher J. Gawley, *A Requiem for Morality: A Response to Peter M. Cicchino*, 30 CAP. U. L. REV. 711, 719, 728 (2002) (stating that the Court "has consistently accepted notions of public morality as legitimate government objectives").

191 Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (stating that the law is "based on notions of morality"), *overruled by Lawrence*, 539 U.S. 558..

192 *Id.*

193 *See* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 323–24 (1992).

194 *See id.* at 328. Having the legislature express moral judgments is much less risky or rigid than the courts doing so because with democratically enacted laws there is always the potential for change. In the wake of *Bowers*, for instance, activists used the democratic process to repeal many state anti-sodomy laws in the United States. *See* Gawley, *supra* note 190, at 754. In addition, personal autonomy may well depend as much on the definition of one's self in the context of a community as on the definition of one's self apart from the community. *Id.* at 758.

that the public "must have the right and duty to declare what standards of morality are to be observed as virtuous . . . ."[195]

A problem with the Court's individual-autonomy-trumps-community-morals approach in *Lawrence* is that it has no logical boundaries. The Court downgrades morals laws but only in connection with those laws pertaining to sexual activity. Other kinds of moral values seem to present no problem. For instance, there seems to be no legal problem with a law based on the public's moral objection to people engaging in sadistic acts of cruelty toward animals in the privacy of their own homes. Nor is there a problem with sexual harassment laws that reflect a majoritarian morality.

The Court's privacy doctrine also promotes "the illusion that individuals are sovereign jurisdictions, entitled to and able to exercise the most significant personal liberties without concern for others."[196] Under this illusion, the individual owes no duties to society and does not depend on society for his or her physical comfort, emotional satisfaction, personal security, or liberty; thus, the individual is completely separate from society.

D. *Judicial Supremacy and Substantive Due Process*

The Due Process Clause has come to serve "as the Supreme Court's 'chosen vessel' for the protection of unenumerated rights."[197] Under a substantive due process approach, the Court looks to tradition to determine whether a right is fundamental.[198] However, tradition can be difficult to define.[199] As John Hart Ely writes, "people have come to understand that 'tradition' can be invoked in support of almost any cause."[200] According to Justice Rehnquist, substantive due process can be used to keep legislatures from considering important issues of self-governance.[201] Even though the determination of whether a specified right is fundamental depends on history and tradition, there seems to be little logic in determining what qualifies as a fundamental freedom, other than the apparent rule that sexual freedom

195 PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 89 (1965). On a more contemporary level, Professor Christopher Wolfe argues that the absence of morals laws "may make certain practices more widespread, and thereby contribute to people's sense that such conduct is normal or at least unobjectionable, and it may help to shape people's ideas about whether certain conduct is legitimate, since society withholds any negative public judgment about that conduct." Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 68 (2000).

196 NAGEL, *supra* note 6, at 149.

197 Isaac J.K. Adams, *Growing Pains: The Scope of Substantive Due Process Rights of Parents of Adult Children*, 57 VAND. L. REV. 1883, 1889 (2004).

198 *See id.*

199 *See id.* at 1890.

200 John Hart Ely, *Foreward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 39 (1978).

201 *See* Furman v. Georgia, 408 U.S. 238, 470 (1972) (Rehnquist, J., dissenting).

is much more likely to receive fundamental rights status than any other type of activity.

In *Washington v. Glucksberg*, for instance, the Court refused to designate physician-assisted suicide as a fundamental right.[202] In upholding Washington's ban on assisted suicide, the *Glucksberg* Court explained that just because "many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected."[203] Still, this explanation does not satisfactorily address why certain rights are considered more fundamental than others.[204]

When one compares *Glucksberg* with *Casey* and *Lawrence*, there is a clear indication of "the heightened status given to sex by substantive due process."[205] Under this approach, a person's concepts of existence and the meaning of life are uniquely tied to his or her sexual activities and preferences.[206] Thus, the sexual nature of a particular human activity or decision "seems to be more important in determining fundamental rights status than either history or tradition."[207]

A great many of the Supreme Court's rulings of unconstitutionality are based on a mere two words in a single constitutional provision: due process. Clearly these two simple but vague words do not themselves shed light on controversial issues of social policy, and clearly the courts cannot receive direction on deciding such issues by studying these two words. Consequently, the Due Process Clause has become a means of transferring policymaking power from legislatures to the courts.

A constitutional republic cannot guarantee personal happiness; it can only provide for what the Framers called "public happiness."[208] This is achieved by creating a constitutional structure that guarantees every per-

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202 Washington v. Glucksberg, 521 U.S. 702, 735 (1997) (rejecting due process challenges to Washington's law banning assisted suicide).

203 *Id.*

204 *See* Garry, *A Different Model*, *supra* note 174, at 192 ("[T]he underlying questions remain: How is assisted suicide so much less of a fundamental right than assisted fetal termination? Why is sodomy protected but not prostitution? Why doesn't the right of privacy extend to polygamy or the use of recreational drugs?").

205 *Id.*

206 Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 851 (1992).

207 *Id.* In *Lawrence*, however, Justice Scalia argued that the Constitution is not committed to substantive protection of sexual liberty against government regulation and that sodomy reform is a matter of moral judgment better left to state political processes. Lawrence v. Texas, 539 U.S. 558, 602–05 (2003) (Scalia, J., dissenting).

For a discussion of how economic substantive due process has been rejected and of how this rejection discredits the Court's current use of substantive due process, see Garry, *A Different Model*, *supra* note 174, at 194–96.

208 Bradford P. Wilson, *Separation of Powers and Judicial Review*, *in* SEPARATION OF POWERS AND GOOD GOVERNMENT 63, 85 (Bradford P. Wilson & Peter W. Schramm, eds., 1994).

son an equal right to participate in the democratic process free from the tyranny of government.[209] The weakness of substantive due process is that it tries to achieve personal happiness at the expense of public happiness. It places within the courts issues that should be addressed in the democratic arena.[210] Justice Kennedy repeated this theme when he said that "[s]ociety has to recognize that it has to confront hard decisions in neutral, rational, dispassionate debate .... And not just leave it to the courts .... That's a ***weak*** society that leaves it to courts."[211]

IV. A STIFLING OF THE POLITICAL PROCESS

The Court's monopolization of individual-rights issues and its use of substantive due process calls into question the proper balance between legislative and judicial power. In 1824, Chief Justice John Marshall expressed the prevailing view of the Court's role: "Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature . . . ."[212] Marshall also suggested that, on doubtful questions of constitutionality, political decisions "ought not to be lightly disregarded," if not given decisive weight.[213]

Some scholars have argued that the Court should not be given the exclusive job of constitutional interpretation. In *The People Themselves*, Larry Kramer argues that American constitutional history reflects a struggle between the legal elite and ordinary people for control over the Constitution.[214] Kramer believes the people should have a role in determining the Constitution, and he insists that Madison "never wavered in his belief that final authority to resolve disagreements over [the Constitution's] meaning

209 *See id.*

210 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 85-88 (1980) (arguing that an over-active judiciary can exert a suffocating influence on the democratic process). Only when that process is broken should the courts get involved, such as when the process does not adequately represent minority interests. *See id.* at 86. It follows that the political process should otherwise be relied upon to fix bad or undesirable laws. For instance, since women make up more than half the voting population, there is no structural bias against, or impediment to, the issue of abortion being decided through the political process.

211 Jeffrey Rosen, *The Agonizer*, NEW YORKER, Nov. 11, 1996, at 90.

212 Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 866 (1824), *overruled in part as stated in* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997); *see also* CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 159-60 (1960) (quoting *Osborn* for the same point).

213 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819).

214 LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004). Kramer claims that advocates of judicial supremacy are anti-democratic elites who believe "that popular politics is by nature dangerous and arbitrary; that 'tyranny of the majority' is a pervasive threat; that a democratic constitutional order is therefore precarious and highly vulnerable; and that substantial checks on politics are necessary lest things fall apart." *Id.* at 243.

must always rest exclusively with the people."[215] In Madison's view, the judiciary was never to be the supreme judge of constitutional meaning.[216]

According to Kramer, the regime of judicial supremacy, based on a widespread belief that the Supreme Court is the ultimate constitutional authority, has sapped much of the life from democratic politics.[217] He dates the victory of judicial supremacy back to the Warren Court of the 1960s, when "the principle of judicial supremacy came to monopolize constitutional theory and discourse," at least in the area of individual rights.[218] Thus, he disagrees with those who claim that the Court has been the supreme voice in constitutional interpretation throughout most of the nation's history.[219]

A host of other constitutional scholars have likewise addressed the connection between judicial review and the political process. Cass Sunstein presents an argument supporting the theory that judicial minimalism promotes democratic deliberation.[220] Mark Tushnet calls for the near total abolition of judicial review; he argues that other branches of government could adequately interpret the Constitution[221] and that the Court has its own imperialistic incentives to expand constitutional control over Congress.[222]

In *Glucksberg*, the Court recognized the dangers that substantive due process posed, and it refused to transfer an important issue from the political process to the judiciary. The Court noted that "[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide."[223] The Court further stated: "Our holding permits this debate to continue, as it should in a democratic society."[224] Substantive due process cases require

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215 *Id.* at 47.

216 *See id.* at 146–47; *see also* Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 678 (2005) (discussing Kramer's argument).

217 *See generally* KRAMER, *supra* note 214.

218 *Id.* at 224. The notion of judicial supremacy took hold in the middle of the twentieth century when the Court, after having given up monitoring structure-of-government issues during the New Deal, became active in protecting individual rights. *See id.* at 219–20.

219 *Id.* at 207–08. Kramer's views are supported by John Marshall and Joseph Story, both of whom considered Congress "to have the primary role in interpreting the Constitution and adapting it to changing circumstances." Robert J. Kaczorowski, *Popular Constitutionalism Versus Justice in Plainclothes: Reflections from History*, 73 FORDHAM L. REV. 1415, 1425 (2005). The Court's power of judicial review permitted it to nullify acts of Congress only in very limited circumstances where Congress had clearly exercised constitutionally prohibited powers. *Id.*

220 CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT ix, 132 (1999).

221 *See generally* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

222 *See* Mark Tushnet, *Two Versions of Judicial Supremacy*, 39 WM. & MARY L. REV. 945, 950–52 (1998).

223 Washington v. Glucksberg, 521 U.S. 702, 735 (1997).

224 *Id.*

the courts not just to judge the specifics of individual cases but to lay down a general rule that will govern a whole array of cases. The question is where the lines should be drawn between privacy and social morality or community values, and this question—the matter of balancing interests to arrive at social policy—is best addressed by the legislative branch.[225]

For controversial issues that "roil the nation," the Court should not impose national resolutions but should instead remand the issues to the democratic process to flush out all the viewpoints, educate the polity, and reach a compromised consensus.[226] In the early abortion cases, for instance, the Court prematurely removed from the political process one of the most difficult and divisive public law debates of American history.[227] Because state legislatures all over the country were beginning to rethink their abortion laws in the early 1970s, the Court should have denied review in *Roe* so that the issue could ripen.[228] Furthermore, abortion does not represent a minority right that only the courts can protect. Women constitute a voting majority, and there is no procedural reason why the political process should not take account of their interests.[229] For this reason, John Hart Ely argued that it would be more legitimate for women's rights reforms to win in the legislative rather than the judicial process.[230]

The centralizing tendency of the Supreme Court and its corrosive effect on decentralized democratic processes can be seen in the Court's recent death-penalty decisions. In *Roper v. Simmons*, the Court struck down a state's imposition of the death penalty for convicted murderers under the age of eighteen.[231] At issue in *Roper* was the fate of seventeen-year-old Christopher Simmons, who had been sentenced to death for the murder of Shirley Crook.[232] The evidence showed that Simmons had plotted the murder by assuring friends that "they could 'get away with it' because they were minors."[233] They broke into the home of Ms. Crook, kidnapped her,

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225 TOM CAMPBELL, SEPARATION OF POWERS IN PRACTICE 22–23 (2004). This is particularly true because the judiciary "is at a disadvantage in trying to ascertain facts not of the kind presented as evidence in trials." *Id.* at 22.

226 William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1283 (2005).

227 *Id.* at 1282.

228 *Id.* at 1312–13.

229 *See* ELY, *supra* note 210, at 164–69 (discussing the voting power of women, though not addressing the topic of abortion specifically).

230 *Id.* at 167–68. As another example, the Court's centralized Establishment Clause jurisprudence hurts the political process because it restricts rather than opens the operation of the process by foreclosing certain types of political activity and certain types of substantive government policies. The Court's doctrines form a barrier to political participation and expression.

231 Roper v. Simmons, 543 U.S. 551, 578 (2005).

232 *Id.* at 556–58.

233 *Id.* at 556.

drove her to a railroad bridge, tied her hands and feet with electrical wire, and threw her off.[234] Afterward, Simmons boasted that he had killed Ms. Crook "because the bitch seen my face."[235] In recommending the death penalty, the jury rejected Simmons's claim that his age should mitigate the vileness of the murder.[236]

Justice Kennedy, writing for the Court, held that the death penalty for people under the age of eighteen violated the "evolving standards of decency that mark the progress of a maturing society."[237] According to Justice Kennedy, American society had reached a "national consensus" against capital punishment for juveniles, even though twenty states still permitted such punishment.[238] However, the terms "evolving standards of decency" and "national consensus" obviously carry subjective meanings.

Undoubtedly, the question of capital punishment for seventeen-year-olds is a wrenching moral question; and indeed, of the thirty-eight states that permit the death penalty, eighteen states forbid the execution of convicted murderers under the age of eighteen.[239] But, the issue is how this moral question should be decided in a democracy: by the expressed view of democratic legislatures or by a mandate from a nine-justice Supreme Court? Moreover, the Court's justification for its decision rested on rather undemocratic and extra-constitutional sources. By citing international opinion on this subject, the Court selectively chose foreign laws and pronouncements in which the American people never had any input and to which they never expressed any consent.[240] For instance, Justice Kennedy cited the United Nations Convention on the Rights of the Child, which the United States has never signed, and the International Covenant on Civil and Political Rights, which the United States signed subject to a reservation regarding the provision that prohibits the death penalty for juvenile offenders.[241]

Aside from the Court's assumption of a legislative role and its reliance on international law, *Roper* also violated basic federalism principles. No matter how one may feel about the death penalty, it is part of the criminal justice system administered by state governments.[242] The federalist scheme of criminal justice gives the states primary control over all aspects

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234 *Id.* at 556–57.

235 *Id.* at 557.

236 *Id.* at 558.

237 *Id.* at 561 (citing Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

238 *Id.* at 564.

239 *Id.*

240 *See id.* at 575–76 (discussing numerous international authorities in support of the Court's decision).

241 *Id.* at 576.

242 Historically, crime prevention and punishment is a function of the states rather than the federal government. *See, e.g.*, Medina v. California, 505 U.S. 437, 445 (1992).

of criminal law—including the defining of crimes and the levying of punishment.[243] Consequently, federal courts should be hesitant to intrude upon a state's moral priorities in sentencing.[244] Nevertheless, as demonstrated in *Roper*, and previously in *Atkins v. Virginia*, the Supreme Court has ignored this federalism aspect of criminal punishment.[245]

In *Roper*, the Court stated that its decision was necessitated by an apparent national consensus on standards of decency.[246] This argument directly contradicts the very essence and purpose of federalism. Uniform national approaches are contrary to the spirit of federalism, which in fact encourages each state to deviate from other states.[247] Just as due process is not violated every time a state finds itself in the minority, "[t]he Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws."[248]

Not only does the Court intrude on federalism principles when it decides matters of state criminal law, but it frequently engages in the type of policymaking that is the province of state legislatures. In striking down the death penalty for mentally retarded defendants, the Court in *Atkins* came to a conclusion about the deterrent value of the death penalty, reasoning that someone whose intellectual abilities are impaired cannot fully understand the meaning of the death penalty and hence cannot be deterred by it.[249] While this may be a reasonable assumption, it is a judgment that should be made by state legislators. Deterrence is a matter of policy best suited to the fact-finding process used by legislative bodies.

The exclusionary rule is another example of how the Court engages in legislative-type policymaking to uphold a centralized mandate of individual rights. In *Dickerson v. United States*,[250] the Court reaffirmed the Warren

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243 *See* Payne v. Tennessee, 501 U.S. 808, 824 (1991). For a statement on federalism in the non-criminal context of civil commitment proceedings, see Addington v. Texas, 441 U.S. 418, 431 (1979) ("The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold.").

244 *See* Harris v. Alabama, 513 U.S. 504, 510 (1995).

245 *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that execution of a mentally retarded offender violates the Eighth Amendment).

246 *See* Roper v. Simmons, 543 U.S. 551, 564 (2005).

247 A similar contradiction of the basic principles of federalism occurred in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (striking down a state law imposing term limits for congressional representatives of that state). Reflecting a nationalistic viewpoint, the Court seemed to indicate distaste for the dual sovereignty aspect of federalism, implying that citizens could only have one type of loyalty—to either a state or the nation, but not both. As Robert Nagel observed, "[i]f the *Term Limits* majority is committed to the idea that local interests and divided loyalties are undesirable just because they can reflect different values and interests than those that prevail at the national level, its opinion is powerful confirmation that the justices are instinctively opposed to federalism." NAGEL, *supra* note 6, at 76.

248 Spaziano v. Florida, 468 U.S. 447, 464 (1984).

249 *See Atkins*, 536 U.S. at 321.

250 Dickerson v. United States, 530 U.S. 428, 432 (2000).

Court's decision in *Miranda v. Arizona*.[251] Just as the Court ruled in *Atkins* that the threat of a death penalty would not deter the mentally retarded from committing heinous criminal acts, the Court in *Miranda* made a policy judgment that the exclusionary rule—the rule precluding the government from using evidence obtained in violation of the Fourth or Fifth Amendments—would in fact deter the police from committing such violations.[252] Thus, in focusing on protecting individual rights, *Miranda* produced a nation-wide mandate on deterrence that should otherwise have come from the legislative arena.

The exclusionary rule is grounded on assumptions about how best to deter certain kinds of police misconduct.[253] However, a determination of deterrent value is one that calls for the kind of decision-making that is characteristic of the legislative branch and is supported empirically rather than doctrinally.[254] Legislatures can hold hearings on all the various steps that can or should be taken to deter police misconduct, as well as the relative costs of those steps, and how much deterrence is actually sufficient or necessary. Aside from these policy matters, there is the question of whether the exclusionary rule is even constitutionally compelled. In *Arizona v. Evans*, the Court conceded that the exclusionary rule had no explicit basis in the Fourth Amendment.[255] And yet, an attempt by Congress to statutorily undo *Miranda* was rejected by the Supreme Court in *Dickerson v. United States*.[256]

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251 Miranda v. Arizona, 384 U.S. 436 (1966).

252 *See id.* at 444, 478–79 (holding statements obtained in violation of the Fifth Amendment are inadmissible in a criminal trial). As Tom Campbell states, "[t]o determine what rule of policy will best deter constitutional violations is legislature-like." CAMPBELL, *supra* note 225, at 103.

253 *See* United States v. Leon, 468 U.S. 897, 916 (1984) ("[T]he exclusionary rule is designed to deter police misconduct . . . .").

254 *See* CAMPBELL, *supra* note 225, at 5 (stating that a deterrence decision "calls for the weighing of interests, at which the legislative branch, not the judicial branch, excels").

255 *See* Arizona v. Evans, 514 U.S. 1, 10 (1995).

256 Dickerson v. United States, 530 U.S. 428 (2000). The Court has also assumed legislative functions in connection with race issues. In *Grutter v. Bollinger*, in upholding the law school's affirmative action admissions plan, the Court selectively gave different treatment to an academic institution than it had previously given to other kinds of institutions in connection with affirmative action matters. *Compare* Grutter v. Bollinger, 539 U.S. 306 (2003), *with* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (striking down the city's affirmative action plan for awarding construction contracts), *and* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding strict scrutiny applied to federal government's use of racial classification in providing highway contracts). Furthermore, in *Grutter*, the Court made a legislative-type decision insofar as it implied a twenty-five year deadline for racial preference programs. Grutter v. Bollinger, 539 U.S. 306, 343 (2003). Professor Campbell also demonstrates how the Court, in establishing liability tests under Title VII of the Civil Rights Act, is engaging in legislative functions. *See* CAMPBELL, *supra* note 225, at 159–65.

Having grown accustomed to bypassing or trumping the political process in the name of individual rights, the courts have come to blatantly intrude upon the legislative process in ways not even connected to traditional individual rights issues. For instance, a judge ordered New York City to spend an additional five billion dollars *every year* to ensure that students receive a sound, basic education.[257] Not only did the judge proclaim a specific amount of money to be spent, but he even designated how it was to be spent—for example, shrinking class sizes, increasing laboratories, and expanding libraries.[258]

In January 2005, the Kansas Supreme Court ruled that even though education spending in Kansas had increased since 1989, the current spending on education was inadequate.[259] Consequently, the court ordered the legislature to increase funding levels.[260] This order would very likely result in a tax increase, which is a function strictly belonging to the legislature.

Whereas many courts have abstained from dictating education funding because they see the area as one entrusted exclusively to the elected branches,[261] other courts have reasoned that once a legislature creates a school system, the judiciary is empowered to ensure that the system is "fair."[262] In *Missouri v. Jenkins*, the Court upheld a lower court order that a local school district pay for the implementation of a magnet-school desegregation plan.[263] This decision was the first time the Supreme Court upheld a direct judicial mandate to a legislative body to raise funds for a specific purpose, and serves as a major precedent for courts across the country to enforce their decrees. In another example of judicial intrusion into the workings of elected bodies, the Court refused to terminate judicial control of a school district that had been going on for more than thirty years as a result of a desegregation case.[264]

Aside from its increasing assumption of legislative-type functions, the Court also seems willing to use its individual rights jurisprudence to single out the political process for special handicaps. For instance, even though the Court has given constitutional protection to animated cyberspace child

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257 Greg Winter, *Judge Orders Billions in Aid to City Schools*, N.Y. TIMES, Feb. 15, 2005, at A1.

258 *Id.*

259 Montoy v. State, 120 P.3d 306 (Kan. 2005).

260 *Id.*

261 *See, e.g.*, Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1197 (Ill. 1996); City of Pawtucket v. Sundlun, 662 A.2d 40, 56 (R.I. 1995).

262 Aaron Jay Saiger, *Constitutional Partnership and the States*, 73 FORDHAM L. REV. 1439, 1454 (2005).

263 Missouri v. Jenkins, 491 U.S. 274, 276, 290 (1989).

264 *See* Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 240, 250 (1991). The Court refused to terminate court supervision over the school district even though the district court found that the school district had complied with the desegregation decree. *Id.* at 247–51.

pornography, it has held that certain political ads broadcast before elections can be banned.[265] Using an individual rights mandate to drain power from the political arena, the Court in *Republican Party v. Rutan* ruled that the use of various political patronage practices violated the First Amendment.[266] Critics argued this ruling would further weaken "already feeble state and local party organizations."[267] Since the 1960s, the Court has also significantly narrowed the political question doctrine, which states that the Supreme Court will not adjudicate certain issues that are better left to the more political branches[268] whenever an issue of individual rights might be involved.[269]

The increasing role of the judiciary in American politics is not the sole work of the courts, but rather has been accomplished with at least the passive acquiescence of the public.[270] In *Democracy by Decree: What Happens When Courts Run Government*, Professors Ross Sandler and David Schoenbrod illustrate how various public interest groups have used the courts to pursue a policy agenda that they were not able to achieve in the legislative arena.[271] According to Sandler and Schoenbrod, the courts are a favored policy venue for several reasons.[272] First, the judicial process is not as long or messy as the legislative process.[273] Second, since the courts tend to focus

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265 It is highly ironic that a Court that is so protective of flag burning, soft-core pornography on cable television, and commercial speech would end up being so cavalier about what seems to have been a regulation of core political speech in *McConnell*. *See* McConnell v. FEC, 540 U.S. 93 (2003) (upholding various campaign finance restrictions).

266 Republican Party v. Rutan, 497 U.S. 62, 64–65 (1990).

267 *See* WALKER, *supra* note 5, at 196. The decline of "traditional political parties as mediating and moderating institutions within the federal system" further contributes to the centralizing role of the Court. *Id.* at 251. Years earlier, the Court ruled that patronage systems violate the Free Speech Clause, since to replace a public employee because of that person's political affiliation is to penalize that person's political beliefs. *See* Elrod v. Burns, 427 U.S. 347 (1976).

268 *See, e.g.*, Coleman v. Miller, 307 U.S. 433, 450 (1939); Luther v. Borden, 48 U.S. 1, 42–43 (1849).

269 *See* Powell v. McCormack, 395 U.S. 486 (1969) (declining to apply the political question doctrine in case challenging a resolution that excluded a member-elect from being seated in the House of Representatives); Baker v. Carr, 369 U.S. 186 (1962) (declining to apply the political question doctrine where voters claimed a state apportionment statute denied them equal protection).

270 It may also be due to the increasing role played by the media in society. The electronic media may well favor and hence highlight the speed and drama of court decisions.

271 ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 6–9, 26, 31 (2003).

272 *See generally id.*

273 However, while some may think that the courts provide stability and a final settlement to controversial social issues, this may not be the case. In *Casey*, the Court even acknowledged that its abortion decisions had not provided settlement to the issue: "19 years after our holding . . . [in] *Roe v. Wade*, . . . that definition of liberty is still questioned." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

on individual rights, a judicial agenda can be pursued by a small minority, or even by a single person or group. Third, there seems to exist a mistrust of legislative bodies to handle controversial moral and cultural questions.[274] Fourth, a court ruling can be enforced immediately, and noncompliance can be punished with a contempt order. Thus, under a regime of judicial activism, social policymaking has come increasingly from judicially enforceable rights, which although arising out of legislation, serve to ultimately trump the legislative process.

The courts' increasingly legislative role is perhaps being fueled by a public which has lost faith in the democratic process and by judges who have lost faith in our constitutional norms, as reflected in the rising tendency of the Court to rely on international law for its controversial individual-rights decisions.[275] In *Lawrence*, for instance, the Court cited a decision of the European Court of Human Rights to support the finding that the privacy right to engage in homosexual sodomy is constitutionally protected in the United States.[276] According to the Court, this right is "an integral part of human freedom in many other countries," and hence it is part of a scheme of ordered liberty.[277] In *Atkins*, the Court used the opinions of the "world community" to help establish "evolving standards of decency" which the death penalty at issue violated.[278] Likewise, in *Thompson v. Oklahoma*, Justice Stevens referred to international standards regarding capital punishment of criminals under sixteen years of age.[279] Criticizing this use of international law, Richard Posner raises the problem of citing laws that come from non-democratic nations: "To cite foreign law as authority is to . . . suppose fantastically that the world's judges constitute a single, elite community of wisdom and conscience."[280]

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274 As Robert Nagel theorizes, there may also be a fear of the conflict and uncertainty caused by a full and open democratic airing of such issues. He argues that the legislative branch will only assume responsibility for these issues when society, as well as the courts, stop viewing the conflicts caused by such issues as akin to anarchy, chaos or social warfare. NAGEL, *supra* note 6, at 11, 99, 106–11.

275 For those who rely on international law to help interpret our Constitution, constitutional truth depends not just on our national experience, but also on global realities. *See* Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 695–96 (2005) (discussing Justice Breyer's approach of "transnational pragmatism").

276 Lawrence v. Texas, 539 U.S. 558, 573, 576 (2003).

277 *Id.* at 577.

278 Atkins v. Virginia, 536 U.S. 304, 312, 316 n.21 (2002).

279 Thompson v. Oklahoma, 487 U.S. 815, 830 (1988).

280 Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July–Aug. 2004, at 40, 42.

V. CONCLUSION

The so-called federalism revolution, in which the Court has tried to revitalize a more decentralized, non-national political process, has not spread to the area of individual rights. Even though the decentralized, federalist structure of the Constitution was intended to preserve individual liberty, the Court's attempt to restore that structure has not translated into a retreat from its centralized mandates on individual rights. There has been no lessening of judicial activism regarding substantive individual rights and no increasing reliance on the Constitution's structural provisions for the protection of liberty. Indeed, the Rehnquist Court reversed none of the significant individual rights decisions of the Warren and Burger Courts. To the contrary, individual-rights issues have become the most intensely followed judicial issues of the time, and evidence of this can be seen in the heightened role that privacy rights played in the Supreme Court nomination of John Roberts.[281]

There is also an indication that even the Court's limited-scope federalism revival may have stalled. In *Gonzalez v. Raich*, the Court held that a federal law, the Controlled Substances Act of 1970, precluded any state legislature from authorizing the medical use of marijuana by doctors and patients within its state.[282] As Justice Thomas argued in his dissent, this was a decision that went against federalism principles.[283] If Congress could use the Commerce Clause to regulate doctors' prescriptions of marijuana to the sick, according to Justice Thomas, "then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers."[284] As Thomas noted, the American federalist system should allow states "to decide for themselves how to safeguard the health and welfare of their citizens."[285]

Over the course of the last decade and a half, it was often predicted that the Court was preparing to "attack the 'core' of the modern regulatory state" in its campaign to revive federalism.[286] But this never happened.

281 Adam Liptak, *Privacy Views: Roberts Argued Hard for Others*, N.Y. TIMES, Aug. 8, 2005, at A1.

282 Gonzales v. Raich, 545 U.S. 1 (2005). As one commentator noted, the medical marijuana case marks "the end of the 'federalism revolution.'" Ramesh Ponnuru, *The End of the Federalism Revolution . . . If Such a Revolution Had Ever Occurred*, NAT'L REV., July 4, 2005, at 33.

283 *Raich*, 545 U.S. at 65–69 (Thomas, J., dissenting). The federalism issues in *Raich* required real commitment. Although conservatives usually favor federalism, they also want the federal government to crack down on illegal drugs; liberals, on the other hand, are often leery of federalism, as well as of harsh penalties against individual freedom to use marijuana in certain circumstances.

284 *Id.* at 58.

285 *Id.* at 74.

286 Ponnuru, *supra* note 282, at 33, 34.

Instead of attacking centralized government at its core, according to critics, the Court tended to hit it at the edges in ways that did not make a significant difference.[287] Even more importantly, the Court never imposed serious constraints on itself and its centralizing jurisprudence of individual rights. As demonstrated by the substantive due process cases, the Court did not accompany its political federalism, in which it tried to limit the power of Congress, with a moral federalism that allowed states to develop their own social and moral policies free of judicial dictate.

Perhaps the Court has been able to exert such a centralizing influence because we have lost faith in the democratic process.[288] According to Mary Ann Glendon, "[m]uch judicial activism in recent years ... [is] attributable to a lack of confidence in our state legislatures."[289] We rely on the courts, just as we did on administrative agencies during the New Deal, to decide the important matters of public interest.[290] Furthermore, we rely on the courts to make the moral judgments that used to flow up from society and culture through the democratic process. Given the increasing moral complexity that necessarily accompanies a more individualistic and libertarian culture, society may be looking for some clear-cut, definitive direction from the Court, as if its far-off centralization confers upon it a greater sense of authority. Perhaps in this way, we have become dependent on the Supreme Court to tell us how to live and what to think.

Rights and liberty have come to be seen as strictly judge-made, unconnected and maybe even antagonistic to the democratic process. Consequently, whenever rights are involved, courts can immediately bypass the political process, as if the workings of self-government cannot be trusted to reach the right result. This only tends to cut off democratic debate and dialogue on such matters as individual liberty and cultural values, which in turn only further erodes majoritarian rule.

With its substantive due process rulings, the Court has cast the Constitution as a Solomon-like source of wisdom on the moral truths of life. But the Constitution is not a moral edict, it is a political document. The Constitution simply establishes a structure for majority rule, and because the Constitution confers this freedom of self-government, it allows much that is foolish and ill-advised. It sets the ground rules for making democratic decisions; it does not state what those decisions should be. Consequently,

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287 *See id.* at 33.

288 The Supreme Court has served as a force that has been centralizing. Since the early sixties, its jurisprudence regarding the scope of Fourteenth Amendment protections, in particular, has "produced a cumulative effect that was highly centripetal." WALKER, *supra* note 5, at 315.

289 MARY ANN GLENDON, *supra* note 32, at 162.

290 During the New Deal, "the faith in bureaucratic administration was based on the ability of regulators to discern the public interest and to promote, though indirectly and through their very insulation, democratic goals." Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 444 (1987).

the Court should not use its powers of constitutional interpretation to do what the Constitution does not do. The Constitution sets a culture of freedom, but it is up to democracy to set a culture of morality. As Chief Justice Rehnquist once said, "in the long run it is the majority who will determine what the constitutional rights of the minority are."[291]

The constitutional provisions for the federal judiciary are relatively meager. The Constitution does not actually create the federal judiciary as an institution; it only creates the judicial power, leaving most of the institutional details—such as kinds and numbers of courts, number of justices on the Supreme Court, appellate jurisdiction, and the regulation of the judicial process—to the discretion of Congress. There is also no explicit provision in the Constitution for the power of judicial review itself. In sum, this is hardly the kind of constitutional foundation one would expect for an institution that some now insist is meant to be the moral guardian of the republic.

291 Linda Greenhouse, *William H. Rehnquist, Architect of Conservative Court, Dies at 80*, N.Y. TIMES, Sept. 5, 2005, at A16.