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ARTICLE

MORAL COMMUNITIES OR A MARKET STATE: THE SUPREME COURT'S VISION OF THE POLICE POWER IN THE AGE OF GLOBALIZATION

Robert J. Delahunty & Antonio F. Perez***

TABLE OF CONTENTS

OVERVIEW	644
I. INTERNATIONAL POLITICS AND CONSTITUTIONAL LAW	656
A. <i>Globalization and Constitutional Law</i>	656
B. <i>The Constitutional Premises of the Nation State</i>	658
C. <i>The Constitutional Premises of the Market State</i>	662
D. <i>Constitutional Law Transformation and the Jurisprudence of Legal Pragmatism</i>	664
E. <i>Precedent for Constitutional Change in Response to "Strategic Threats"</i>	669

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II. THE CENTRAL TRADITION AND THE POLICE POWER IN AMERICAN CONSTITUTIONAL LAW	675
OVERVIEW: THE STATES' POWERS OF MORAL APPRECIATION	676
A. <i>The Reserved Powers of the States—The Contours of the Police Power</i>	677
B. <i>The Police Powers and the Fourteenth Amendment's Privileges or Immunities Clause</i>	680
C. <i>Moral Regulation and Substantive Due Process Doctrine</i>	682
III. THE NEW LIBERTARIAN COURT	690
A. <i>Silencing the States on Questions of Morality</i>	690
B. <i>The Court's Deference to Élite Groups and Institutions</i>	697
IV. THE NEW FEDERALISM IN INTERNATIONAL CASES.....	704
A. <i>The Pre-Garamendi Allocation of Power Between the States and the Federal Government in Foreign Relations</i>	708
B. <i>The "New Federalism" in Foreign Relations</i>	713
1. <i>Legitimate State Interests in Foreign Affairs</i>	713
2. <i>The Role of Élite Opinion in Garamendi</i>	719
3. <i>Summary</i>	721
V. WHITHER?	722

What has been called the “Central Tradition”¹ of political philosophy has long taught that the “State” is a moral community—indeed, that this is the State’s central and defining attribute. The Central Tradition has its roots in Greek political thought:² As Aristotle wrote in *The Politics*,

[A] city must concern itself with goodness if it is to be truly . . . called a city.

. . . [A] community, where they only helped each other against wrongdoers as in a defensive alliance, and each man treated his own household like a city, would not even if they came together seem a city to accurate observers, if the manner of the association remained the same. . . . [T]he city is not the sharing of a place, and does not exist to prevent wrong and promote exchange. These are necessary conditions of there being a city. But a city is not just the presence of all of them. It is the community of households and the clans in the good life, for the sake of perfect and self-sufficient life.³

In contrast to the teaching that the State is directed to the perfection of life stands the powerful tradition of Liberalism—very roughly, the idea that the proper sphere of State action is limited by private right, and consists for the most part (to use Aristotle’s words) in “prevent[ing] wrong and promot[ing] exchange.”⁴

Although the Liberal Tradition is dominant in American

1. See ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 19–20 (1995) (remarking that the Central Tradition inspires politics to do more than make people “safe, comfortable, and prosperous, but also to help make them virtuous”).

2. *Id.* at 21 (“No one deserves more credit (or blame) than Aristotle for shaping the central tradition’s ideas about justice and political morality.”). We do not, of course, deny that other central influences on Western political thought, such as Christianity, have seen the State as serving moral purposes. It must be remembered, however, that early pre-Constantinian Christianity taught that “the State, and the social order in general . . . constitute . . . a sinful, lost world . . . against a Church which alone can offer redemption,” and that it instilled in Christian believers a “dualistic tendency” towards “on the one hand, acquiescence in the existing order; on the other, the sternest opposition to the State, which reveals its demonic origin in the worship of the Emperor, in the refusal to allow Christians to form their own associations, and in its cruel condemnation of the Christians.” 1 ERNST TROELTSCH, *THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES* 145–46, 148 (Olive Wyon trans., 1949).

3. ARISTOTLE, *POLITICS: BOOKS III AND IV* 29–30 (Richard Robinson trans., 1962).

4. For perhaps the most influential exposition of traditional Liberalism, see JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION* 62–64 (J.W. Gough ed., 1947). Samuel Finer defines “a hard core of principle” in Liberalism as “the precedence of the individual over the state: hence it demands that . . . basic political freedoms of the individual be protected from the state.” 3 S.E. FINER, *THE HISTORY OF GOVERNMENT FROM THE EARLIEST TIMES: EMPIRES, MONARCHIES AND THE MODERN STATE* 1569 (1999).

constitutionalism,⁵ the Central Tradition also holds an important place in it. American federalism, while severely limiting the power of the central government to create a moral community on a national scale, has also traditionally permitted States to regulate morality by the prevailing standards of the local community.⁶ Federalism, in other words, preserves a secure place for the Central Tradition even within an overarching constitutional framework dominated by Liberalism.⁷ The Constitution addresses, almost exclusively, either the powers that must be vested in the national government in order to enable it to pursue certain limited ends (national defense, the promotion of trans-border trade, and the like), or else the procedures for choosing the leadership of the national government or the bounds within which that leadership must act.⁸ The Constitution does *not* assign to the national government the responsibility for pursuing any substantive conception of the good; indeed, by implication, it denies the national government any significant responsibility for such projects. In the eighteenth-century context, the explicit constitutional prohibition in the First Amendment of a *national* establishment of religion—coupled with the implied, and intended, protection for *state* religious establishments—would have been emblematic of precisely this division of authority between the two different levels of government.⁹

This understanding of federalism plainly reflects the intentions of the Framers and Ratifiers. Thus, in demarcating State and federal spheres, Madison stated in *The Federalist No. 45* that “[t]he powers reserved to the several States will extend to

5. For a classic study of the subject, see LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955).

6. See WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 66–67 (1964) (explaining how the States have traditionally regulated moral issues such as marriage and sexual behavior).

7. Another way to express this point is in terms of Michael Oakeshott's illuminating distinction between the polity viewed as a “civil association,” or alternatively, as an “enterprise association.” Viewed as a civil association, a polity seeks primarily to maintain civil order, and does not attempt to impose or encourage any preferred pattern of ends. See MICHAEL OAKESHOTT, *MORALITY AND POLITICS IN MODERN EUROPE: THE HARVARD LECTURES* 62 (Shirley Robin Letwin ed., 1993). Viewed as an enterprise association, the polity attempts to use law for substantive purposes, including the legislation of morality. See *id.* at 101–03. American federalism can be seen as a system creating a (primarily) civil association at the national level, but providing for and preserving enterprise associations at the subnational level.

8. See RIKER, *supra* note 6, at 20–25.

9. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 32 (1998).

all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."¹⁰ Indeed, Madison's celebrated account in *The Federalist No. 10* of the risks of capture of State legislatures by tyrannical factions and of the consequent need for an effective national government to dissipate and localize these risks presupposes that the States may and will legislate particularistic, and therefore polarizing, conceptions of the good.¹¹ American federalism thus incorporates and endorses the possibility of the enactment and enforcement of morally normative legislation on the State (as contrasted with the national) level.¹²

The judicial doctrine of the States' "police powers" has long encapsulated this understanding of federalism.¹³ As explained in a 1900 U.S. Supreme Court case upholding a local ordinance banning prostitutes from certain parts of a city, "[i]t has been often said that the police power was not by the Federal Constitution transferred to the nation, but was reserved to the States, and that upon them rests the duty of so exercising it as to protect the public health and morals."¹⁴ The breadth of the States' original police powers was also underscored by the fact that the Court long construed the Bill of Rights not to apply to the States,¹⁵ and by the patterns of nineteenth- and early- to mid-twentieth-century state legislation and case law.¹⁶ Even recent Supreme Court decisions have affirmed the power of local governments to regulate with a view to their citizens' good habits and moral well-being.¹⁷ Thus, reviewing the

10. THE FEDERALIST NO. 45, at 260-61 (James Madison) (Clinton Rossiter ed., 1961).

11. THE FEDERALIST NO. 10, at 45-52 (James Madison) (Clinton Rossiter ed., 1961) (explaining the advantage promised by the Union to break and control the violence of factions).

12. *Id.* at 51 (noting the advantages of having the federal government deal with a national aggregation of interests while preserving local decisions to the States).

13. *L'Hote v. City of New Orleans*, 177 U.S. 587, 588-90, 596, 600 (1900).

14. *Id.* at 596.

15. *See, e.g., Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247, 250-51 (1833) (promulgating the understanding that the Constitution was established "by the People of the United States for themselves, for their own government, and not for the government of the individual states"); *see also* AMAR, *supra* note 9, at 144-45 (reiterating that the Bill of Rights favored by the Anti-Federalists sought limits on the federal government to protect States' rights).

16. *See* William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1084-85 (1994) (surveying early legal practices and relating the concept of the States' obligation to provide an institutional framework that would foster the productive energies of society through the use of their police powers).

17. *See, e.g., Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328, 330-31, 341-44 (1986) (upholding a territorial law that sought to reduce casino gambling among residents); *cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489-90, 513 (1996)

state of constitutional law in 1964, the noted political scientist William Riker was able to say, as part of a classic study of federalism, that

[a]lthough the liberal tradition has always denied that private morality is of any concern to government, the fact is that governments have invariably regulated such matters as marriage, sexual behavior, the use of stimulants, sacrilege, etc. *In our tradition the states fully control these things*, although the Supreme Court sometimes has become peripherally involved via the full faith and credit clause (Article IV, Section 1). *In exceptional circumstances the United States has indirectly controlled (e.g., by refusing to admit Utah as a state until it prohibited polygamy and by prohibiting the interstate transport of women for prostitution).*¹⁸

The traditional role of the States as moral communities has, however, been called into question as a result of the perceived demands of globalization.¹⁹ The concept of globalization has acquired several different meanings, and has been used to refer to a complex and imperfectly understood phenomenon that works on several planes.²⁰ Regardless of whatever else “globalization” may signify, however, it includes a *constitutional* dimension. That constitutional dimension has recently been explored in innovative and illuminating ways by Philip Bobbitt. Contrary to analysts who perceive a global trend towards the sheer disappearance of the “Nation State,”²¹ Bobbitt sees a transition from the constitutional order of the Nation State to that of an emerging “Market State.”²² For Bobbitt, “[t]he market-state is,

(rejecting State’s claim to be able to ban truthful, nonmisleading commercial messages in order to advance its legitimate interest in promoting temperance but recognizing the State’s interest in advancing temperance).

18. RIKER, *supra* note 6, at 66 (emphasis added).

19. ZBIGNIEW BRZEZINSKI, *THE CHOICE: GLOBAL DOMINATION OR GLOBAL LEADERSHIP* 139 (2004) (describing competing understandings of globalization as both a signal of accessibility, transparency, and cooperation, and also as a symbol of moral obtuseness and indifference to social injustice).

20. *See, e.g., id.* at 139–40.

21. *See, e.g.,* Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANSNAT’L L. 7, 7–8 (1997) (surveying evidence for, and sources of decline of, the Nation State). *But see, e.g.,* Mark L. Movsesian, *The Persistent Nation State and the Foreign Sovereign Immunities Act*, 18 CARDOZO L. REV. 1083, 1089–92 (1996) (arguing that “decline of the Nation State has been greatly exaggerated”). *See generally* ROBERT GILPIN, *THE CHALLENGE OF GLOBAL CAPITALISM: THE WORLD ECONOMY IN THE 21ST CENTURY* 316–19 (2000) (reiterating the State’s importance as an actor in economic matters); STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999) (admitting that emerging international human rights concerns have limited national autonomy, but noting that Nation States had never enjoyed full autonomy in this regard).

22. PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF*

above all, a mechanism for enhancing opportunity, for creating something—*possibilities*—commensurate with our imaginations.²³ The emergence of the Market State entails sweeping consequences for the relationships between governments—whether national or subnational—and their citizens, as well as for the relationships between rival Market States themselves.²⁴ In the context of American constitutionalism, the emergence of the Market State has been taken to necessitate fundamental changes in conceptions of federalism and, relatedly, of individual liberties.²⁵

We agree with Bobbitt that a global transition from Nation States to Market States is now well underway. The chief thesis of this Article is that the Supreme Court has embarked on a program of reshaping constitutional doctrine so as to encourage and facilitate the emergence of a fully developed Market State in this polity, with a view to positioning the United States to be successful in meeting the competitive challenges of a new, post-Cold War international order. In taking this course, the Court has increasingly aligned itself with the prescriptive views of American business and political élites, for whom globalization is understood “not merely [as] a diagnostic tool but also [as] an action program.”²⁶ From this perspective, globalization “represents a great virtue: the transcendence of the traditional restrictions on worldwide economic activity . . . inherent” in the era of Nation States.²⁷ Proponents of this vision of a globalized economy characterize the United States as “a giant corporation locked in a fierce competitive struggle with other nations for economic survival,” so that “the central task of the federal government” is “to increase the international competitiveness of the American economy.”²⁸

Whether or not the Court’s membership is fully conscious of its role in underwriting this program does not ultimately matter.²⁹ It is sufficient if our explanation works merely as a

HISTORY 228 (2002).

23. *Id.* at 232.

24. *Id.* at 229–35 (explaining the changes the Market State will effectuate with regard to security, political representation, and welfare).

25. *Id.* at 230 (discussing the change of the State’s role from one enhancing the nation as a whole, to one where the State is responsible for maximizing choices available to individuals).

26. BRZEZINSKI, *supra* note 19, at 141.

27. *Id.*

28. GILPIN, *supra* note 21, at 252.

29. The Court avowedly takes conscious account of the responses of foreign governments and multinational corporations in “today’s highly interdependent commercial world” when framing its decisions. *F. Hoffman-La Roche Ltd. v. Empagran*

heuristic device—a reconstruction of how the Court *would* reason if it were perfectly lucid and candid about the results it sought to achieve.³⁰ However self-aware the Court or its individual members may be about the nature of this enterprise, the effect of the Court's jurisprudence is to uproot historic premises of American constitutional law. The Court's program might even be considered revolutionary, insofar as it represents a tectonic shift from one kind of constitutional order—the Nation State—to another—the Market State.

The effects of the Court's activities are most visible in the areas of federalism and the protection of individual liberties. In both doctrinal areas, the Court no longer starts from premises that once were axiomatic understandings of the scope and limits of State power. In order to meet the perceived needs of the emerging Market State, the Court has called into question the historic authority of States, under the police power, to advance self-consciously moral, avowedly nonutilitarian, goals. To put the matter in somewhat Darwinian terms, the Court has registered changes in the international environment that would reward certain adaptations in constitutional doctrine, including new kinds of relationships between the individual and the polity at large. In response to this changed environment, the Court has attempted to work these new relationships into the fabric of constitutional law. In particular, to serve what it understands to be the needs of the emerging Market State, the Court has set out to eviscerate the traditional role of the States as moral communities.

OVERVIEW

In essence, this Article attempts to explain the underlying logic of two intersecting lines of recent Supreme Court decisions. The first line of cases concerns the allocation of constitutional power between the Nation and the States (i.e., cases about

S.A., 124 S. Ct. 2359, 2366 (2004); *see also* *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2782–83 (2004) (Breyer, J., concurring in part and concurring in judgment).

30. There is nothing particularly novel in this method of legal analysis. Scholars have often sought to derive the Supreme Court's decisions from higher-order premises unarticulated by the Court. *See, e.g.*, John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 488–89 (2002) (attempting to ground the Rehnquist Court's jurisprudence in a Tocquevillian theory of governance). Indeed, what we are attempting here is nothing more than an application of the hypothetico-deductive method common in both the natural and social sciences: positing a hypothesis to explain the data, deriving consequences from the hypothesis, and checking the data to see if it matches the predicted consequences. *See* Bert Black, *A Unified Theory of Scientific Evidence*, 56 FORDHAM L. REV. 595, 617–18 (1988) (explaining the hypothetico-deductive method).

“federalism”); the other line concerns claims of individual right against exercises of purported State power (i.e., cases about “individual rights”). The federalism cases deal, respectively, with the powers of the States against Congress in the regulation of domestic matters³¹ and as against the Executive (and, less often, Congress) in influencing foreign affairs.³² The individual rights cases deal with equal access to State-provided benefits that take account of race³³ and with State regulation of private decisionmaking under the auspices of police power.³⁴ Both lines of cases can be understood as efforts by the Supreme Court to adapt the American constitutional order to what it perceives as the necessities of globalization, and specifically to the successful transition from the constitutional order of the Nation State to that of the Market State.

The concepts of Nation State and Market State require a brief elucidation. The Nation State is a form of constitutional order that took hold in the nineteenth century and dominated

31. See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727 (2003) (holding Congress could abrogate States' immunity by allowing employees to recover for State violations of the Family Medical Leave Act (FMLA)); *United States v. Morrison*, 529 U.S. 598, 617 (2000) (holding Congress exceeded its authority in enacting federal civil remedy for victims of gender-motivated violence); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding Congress exceeded its authority when it regulated gun possession in school zones).

32. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2394 (2003) (holding that the State of California's Holocaust Victim Insurance Relief Act (HVIRA) impermissibly interfered with the President's authority in foreign affairs); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000) (holding Massachusetts law barring trade by State entities with companies doing business with Burma unconstitutional under the Supremacy Clause because preempted by Act of Congress); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 302–03 (1994) (upholding California's taxation scheme as applied to locally operating corporations with foreign parents and to foreign subsidiaries).

33. See, e.g., *Gratz v. Bollinger*, 123 S. Ct. 2411, 2430 (2003) (holding that the University of Michigan's admission policy violated the Equal Protection Clause because it was not narrowly tailored to achieve respondents' asserted interest in diversity).

34. See, e.g., *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003) (holding that Texas law prohibiting certain consensual sexual acts between consenting adults violated the Due Process Clause); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000) (upholding Boy Scouts' First Amendment right of expressive association to exclude homosexual scoutmaster from membership); *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (holding that Colorado constitutional amendment precluding State legislature and localities from enacting laws that prohibited discrimination against individuals based on their homosexual practices or relations violates the Equal Protection Clause); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572–73 (1995) (holding that Massachusetts law requiring private citizens to allow the marchers of a group imparting a message that parade organizers did not wish to convey violated the First Amendment); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (retaining and reaffirming Roe's “essential holding”).

most of the twentieth century.³⁵ The idea of the Nation State assumed that the population of a State would consist primarily, if not solely, of a particular “people”—understood in terms of common historical consciousness and remembered (or imagined) collective past, ethnicity, language, and possibly even religion.³⁶ In Bobbitt’s view, the Nation State’s chief functions were to ensure internal and external security, to expand material wealth, to uphold civil and political rights of popular sovereignty, to provide its people with economic security and a variety of public goods, and to protect the State’s cultural integrity.³⁷ To simplify Bobbitt’s complex and subtle thesis, the Nation State can no longer perform these functions successfully,³⁸ and a new constitutional order—which Bobbitt styles as the Market State—must supplant it.³⁹

Unlike the Nation State, the Market State is primarily a facilitator of opportunities rather than a guarantor of outcomes.⁴⁰ The Market State does not aim to promote the “welfare” of the citizen body or national people, but rather to enlarge the array of opportunities open to them.⁴¹ Accordingly, many of the Nation

35. Movsesian, *supra* note 21, at 1084–86.

36. Benedict Anderson has famously (and sympathetically) described Nation States as “imagined communities.” See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 5–7 (rev. ed. 1991) (defining the nation as “an imagined political community”).

37. BOBBITT, *supra* note 22, at 215–16.

38. For a summary of Bobbitt’s argument, see *infra* text accompanying note 118.

39. BOBBITT, *supra* note 22, at 228.

40. *Id.* at 229–30.

41. *Id.* In the Market State the distinction between citizen and noncitizen, which is fundamental to the Nation State, becomes blurred. The contrast between the traditional and more recent conception of the meaning of national citizenship is evident in the various opinions in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), a case discussing the applicability of the Fourth Amendment to an alien apprehended in a foreign country and then transported to the United States for arrest. Compare *id.* at 265–66 (“[T]he purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.”), with *id.* at 279 (Stevens, J., concurring) (“[A]liens who are lawfully present in the United States are among those ‘people’ who are entitled to the protection of the Bill of Rights”), and *id.* at 284 (Brennan, J., dissenting) (“If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them.”). A similar tendency to devalue U.S. citizenship, as opposed to alienage, can be seen at work in the plurality opinion of *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), despite the opinion’s assertion that it does not mean to “give short shrift . . . to the privilege that is American citizenship.” *Id.* at 2648. The *Hamdi* plurality incongruously models a citizen’s right to seek liberty from captivity as an enemy combatant on a claimant’s right to seek Social Security benefits—a model that could arguably be applied to aliens. *Id.* at 2646 (citing *Matthews v. Eldridge*, 424 U.S. 319 (1976) as providing the relevant test). Justices Scalia and Stevens, dissenting, would have placed the rights of citizen and alien detainees on wholly different footings, and argued

State's functions relating to the provision of welfare are delegated or privatized by the Market State. For example, deficiencies in the provision of social services, such as health care or prison planning, are addressed through incentives directed towards privatization or piecemeal private sector supplements, rather than through redistributive programs.⁴² The Market State is generally reluctant or even unable to manage economic matters through democratically elected political bodies.⁴³ It tends to cede control over monetary policy to central banks and control over exchange rates to the vagaries of currency markets.⁴⁴ Culturally, the Market State shies away from the idea of a dominant or favored ethnicity, common substantive values and traditions, or a shared way of life.⁴⁵ "[T]he market-state is largely indifferent to the norms of justice, or for that matter to any particular set of moral values so long as law does not act as an impediment to economic competition. . . . The sense of a single polity, held together by adherence to fundamental values, is not a sense that is cultivated by the market-state."⁴⁶ The Market State does not even require its citizens to respect the most central integrating symbols of the Nation State, such as the Nation's flag.⁴⁷

How is the transition from the Nation State paradigm to that of the Market State reflected in the Supreme Court's jurisprudence? Assuming—again, if only as a heuristic device—that the Supreme Court wishes to facilitate that transition, what considerations would guide the Court's thinking in federalism cases? In individual rights cases? In outline, we think the answers are the following.

In the area of federalism, the emergence of the Market State, with its strong decentralizing tendencies,⁴⁸ would seem at first to favor a robust form of federalism. After all, strong pro-federalism policies enable and encourage individual States to

that the former's rights should be measured according to a distinctive "tradition with respect to American citizens." *Id.* at 2663 (Scalia, J., dissenting).

42. BOBBITT, *supra* note 22, at 240–42.

43. *Id.* at 238–40 (explaining the Market State's influence and even attraction in precisely tying a candidate's ability to support campaigns through fundraising with the interests judged to be important to them).

44. *Id.* at 229.

45. *Id.* at 230.

46. *Id.*

47. See *United States v. Eichman*, 496 U.S. 310, 315–19 (1990) (concluding that the First Amendment protects flag burning); *Texas v. Johnson*, 491 U.S. 397, 410 (1989) (noting that while the U.S. flag serves "as a symbol of nationhood and national unity," a conviction for "desecrating a flag" is not "consistent with the First Amendment").

48. See BOBBITT, *supra* note 22, at 234.

exploit their competitive advantages to the presumed good of the greater whole. Pro-federalism policies will stimulate States to find the mix of regulatory policy, taxation levels, crime control, environmental protection, educational services, and welfare benefits that will attract investment capital and draw entrepreneurial elements of the population into the jurisdiction.⁴⁹ Indeed, one might even expect to find that the jurisprudence of the Market State invited States to take an untraditionally assertive role in foreign affairs by becoming active members of an international civil society that included other subnational or transnational actors—such as nongovernmental organizations.⁵⁰ In other words, one might have expected to find in the Court's cases a new federalism, not only in domestic affairs, but also in foreign affairs.

Both kinds of new federalism, however, have encountered sharp reversals in the Supreme Court's decisions.⁵¹ In particular, the Court has, at least for now, firmly nipped any budding federalism in foreign affairs.⁵² Yet these reversals are consistent with the hypothesis that the Court is undertaking a program of midwifing the birth of the Market State. Under the Court's developing rationale, if the States were permitted to play a significant role in foreign affairs, they would be too prone to introduce (what are deprecatingly called) "moralisms" that would tend to thwart the emergence of a Market State, i.e., the States

49. For a review of these and other advantages of federalism, see GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 139–43 (4th ed. 2001); Nelson Lund, *Federalism and Civil Liberties*, 45 U. KAN. L. REV. 1045, 1046–47 (1997); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491–93 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988); and Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 51–53 (2004) (noting that "[f]ederalism permits a diversity of regulatory regimes from state to state, which may allow satisfaction of more people's preferences, regulatory experimentation, and competition among states to provide the most attractive regime").

50. BOBBITT, *supra* note 22, at 236.

51. See, e.g., *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) (holding that Congress's Commerce Clause authority includes power to prohibit local cultivation and use of controlled substance in compliance with State "medical marijuana" law).

52. For a time, it had seemed to several legal writers that the post-Cold War decline of national sovereignty might favor a more robust role for subnational units, such as the States, in foreign affairs. See, e.g., Robert J. Delahunty, *Federalism Beyond the Water's Edge: State Procurement Sanctions and Foreign Affairs*, 37 STAN. J. INT'L L. 1, 57–59 (2001); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1223–27 (1999) (observing that while "courts have slapped down state activity that poses even the potential to complicate the nation's foreign relations," post-Cold War international society has changed to include both Nation States and subnational governments, which accordingly challenges the need for such "federal exclusivity").

would adopt policies that inhibit the cross-border flow of trade and alter the free workings of capital markets by subjecting them to moral norms and judgments.⁵³ In the Court's view, the "appropriate" role for the States in a globalized economy precludes any such moral role.⁵⁴

The doctrinal trend described above is evident in *American Insurance Ass'n v. Garamendi*,⁵⁵ in which the Court relied on a sweeping view of the President's preemptive powers to invalidate an effort by California to advance the moral interest of uncovering evidence of foreign corporate involvement in the Holocaust.⁵⁶ In *Garamendi*, the Court's majority tilted in favor of federal policy, not only because the federal interest in an international process for addressing the issue of Holocaust insurance claims was implicated, but also because it found that no significant State interest was involved.⁵⁷ The case is not fully explicable, therefore, as a restatement of the common view that the federal government has the exclusive role, or at least the lead role, in managing the Nation's foreign affairs;⁵⁸ it also required the Court to discount the State's traditional role as a regulator of insurance when the State's exercise of that authority impaired relations with foreign insurers and reflected a judgment on the morality of their conduct.⁵⁹ The Court's decision to bar the State from regulating in this manner was based on the doctrinally

53. See Delahunty, *supra* note 52, at 58 (suggesting that emergent conceptions of national sovereignty may authorize States to step forward to vindicate human rights).

54. Thus, Justice Breyer, joined by Justice O'Connor, opined that although California's attempt to ensure corporate truthfulness in describing the conditions of workers at foreign facilities was a "legitimate, traditional, and important public objective[]" for a State, nonetheless "a private 'false advertising' action brought on behalf of the State, by one who has suffered no injury, threatens to impose a serious burden upon speech." *Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2567 (2003) (Breyer, J., dissenting). Justice Breyer subsequently reiterated and defended his *Nike* views at a speech at Harvard University. See Stephen Breyer, Assoc. Justice, U.S. Sup. Ct., Speech at the Harvard University Tanner Lectures on Human Values 2004–2005: Our Democratic Constitution 14 (Nov. 17, 2004), http://www.supremecourtus.gov/publicinfo/speeches/sp_11-17-04.html (preliminary draft).

55. 123 S. Ct. 2374 (2003).

56. See *id.* at 2379; Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 924 (2004) (calling the Court's opinion an endorsement of "the entirely novel concept that presidential policy, unaided by explicit or implicit congressional authorization, possesses the quality of a legislative act, at least to the extent of displacing state law").

57. *Garamendi*, 123 S. Ct. at 2393.

58. See, e.g., *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766–67 (1972) (discussing the superior competence of the federal executive branch in the area of foreign affairs).

59. *Garamendi*, 123 S. Ct. at 2390–93.

questionable and unexamined assumption that mere executive agreements based on the President's asserted Article II powers can trump state law, even in the absence of action by Congress.⁶⁰ Given that Congress functions—and was designed to function—as a forum for articulating and defending the concerns of the States,⁶¹ *Garamendi* struck a double blow against strong readings of federalism: first by denying the weight and legitimacy of the State's interest in subjecting foreign corporations operating locally to the moral views of its citizens,⁶² and again by depriving the State of the procedural protections it would enjoy at the national level if unilateral executive action were held insufficient to supersede State law.⁶³

The Court's position on federalism in domestic affairs is more complicated, although even here the most recent cases represent a marked retreat from the Court's earlier protectiveness towards the States.⁶⁴ Cases such as *United States v. Lopez*⁶⁵ and *United States v. Morrison*⁶⁶ can be understood from our perspective as efforts to preserve an area of noneconomic activity for (primarily) State rather than federal regulation. Noneconomic action, as *Lopez* and *Morrison* understand it, appears to comprehend a large and important category of activity, including, specifically, the regulation of most violent

60. *Id.* at 2386–88, 2394. Even before *Garamendi*, the Court's assumptions and, more generally, its views of the relation between executive foreign-affairs power and the States had been subjected to withering criticisms by legal scholars. *See, e.g.*, Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1622–24 (1997); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 403–29 (1999). *But see* Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259, 1304–23 (2001) (arguing that the concerns raised by critics “do not justify the doctrine's abandonment”). The *Garamendi* Court displayed little or no awareness of these criticisms.

61. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551–52 (1985) (“[T]he Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power. The effectiveness of the federal political process in preserving the States' interests is apparent even today in the course of federal legislation.”).

62. *Garamendi*, 123 S. Ct. at 2379, 2383 (overturning the California law extending the statute of limitations “to allow state residents to sue in State court on insurance claims based on acts perpetrated” during the Holocaust).

63. *Id.* at 2390 (reaffirming the “Executive's responsibility for foreign affairs” because of the potentially sensitive nature of dealing with foreign governments).

64. *See, e.g.*, *Gonzales v. Raich*, 125 S. Ct. 2195, 2201 (2005) (holding that the Commerce Clause gives Congress the power to ban the growth and use of marijuana even when such activities are legal according to State “medical marijuana” laws).

65. 514 U.S. 549 (1995).

66. 529 U.S. 598 (2000).

crimes and the provision of most education for the young.⁶⁷ These, of course, are core areas in which any public morality operates.⁶⁸ Beyond those immediate objectives, the *Lopez* and *Morrison* decisions also aimed to limit the power of the federal government to reach “marriage, divorce, and child custody.”⁶⁹ At stake in these cases was the power of the States to function as genuine moral communities that reflected local choices and values in such sensitive areas.⁷⁰ Preserving the Central Tradition’s conception of the States as moral communities happened to dovetail, in these cases, with the quite distinct Market State conception of the States, insofar as the latter envisages that the States will have considerable discretion to devise local mixes of criminal law and educational policy. But the Central Tradition’s conception of the States as moral communities is ultimately antagonistic to the Market State’s jurisprudence of federalism—as, perhaps, the razor-thin majorities in *Lopez* and *Morrison* indicated.⁷¹ The Central Tradition sees the States as agents for the promotion of the virtues; Market State federalism is founded ultimately on the satisfaction of preferences and the promotion of economic efficiency.⁷² The latent divergence between the two conceptions of the States has become ever more apparent in the Court’s individual rights and equal protection cases.⁷³

67. *Lopez*, 514 U.S. at 564–67 (refusing to “pile inference upon inference in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States”); *Morrison*, 529 U.S. at 613 (protecting “areas of traditional state regulation” by rejecting “the argument that Congress may regulate noneconomic . . . conduct based solely on the conduct’s aggregate effect on interstate commerce”).

68. See *Raich*, 125 S. Ct at 2195 (O’Connor, J., dissenting) (“The States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.”).

69. *Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 615–16.

70. As Justice Souter argued in his *Morrison* dissent, the majority had a “new animating theory” that “serv[ed] a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit.” *Morrison*, 529 U.S. at 644–45 (Souter, J., dissenting).

71. See *Lopez*, 514 U.S. at 550 (5–4 decision); *Morrison*, 529 U.S. at 600 (5–4 decision); BOBBITT, *supra* note 22, at 228–42; GEORGE, *supra* note 1, at 20 (defending the perfectionism of the Central Tradition’s goal of promoting “morally upright and valuable lives”).

72. Compare *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (Scalia, J., majority opinion) (rejecting analogizing U.S. federalism to European subsidiarity), *with id.* at 976–77 (Breyer, J., dissenting) (suggesting that U.S. federalism should learn from European subsidiarity principles, which focus on the effective, efficient cooperation of the European Union and its member States and, accordingly, do not find objectionable executive and legislative commandeering).

73. For a different view of the relationships between the Court’s equal protection jurisprudence and its federalism cases, see Erwin Chemerinsky, *Empowering States When*

An early warning signal of the divergence came in the 1996 *Romer v. Evans* case, which invalidated, on equal protection grounds, an amendment to a State constitution that prohibited the State and its localities from adopting antidiscrimination laws in favor of homosexuals.⁷⁴ *Romer's* author, Justice Kennedy, had been part of the *Lopez-Morrison* majorities, as was Justice O'Connor, who joined the *Romer* opinion.⁷⁵ The *Romer* dissenters—Justice Scalia, Justice Thomas, and Chief Justice Rehnquist—had also been members of the *Lopez-Morrison* majorities, and sturdily defended in *Romer* the right of “the majority of [a State’s] citizens to preserve its view of sexual morality statewide.”⁷⁶ More subtly, the Court’s decisions in *Boy Scouts of America v. Dale*⁷⁷ and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*⁷⁸ signaled that the Court—including Justices in the *Lopez-Morrison* majorities—was implicitly repudiating the concept that the States could condemn certain conduct on moral grounds in the name of the polity as a whole.⁷⁹ Strikingly in those two cases, the matter at issue was the validity of antidiscrimination measures designed to protect homosexuals, and on both occasions the Court invalidated the

It Matters: A Different Approach to Preemption, 69 BROOK. L. REV. 1313, 1315 (2004) (arguing that the Court’s preemption decisions reflect the Court’s deregulatory bias in favor of business interests as well as its hostility to civil rights laws). On the contrary, this Article finds an underlying pro-Market State bias at work in both types of preemption cases that Chemerinsky contrasts.

74. 517 U.S. 620, 635–36 (1996).

75. *Id.* at 621; *Lopez*, 514 U.S. at 550; *Morrison*, 529 U.S. at 600.

76. *Romer*, 517 U.S. at 648 (Scalia, J., dissenting). Provocatively, Justice Scalia wrote the following:

The Court has mistaken a *Kulturkampf* for a fit of spite. The [State] constitutional amendment before us here is not the manifestation of a “bare . . . desire to harm” homosexuals . . . but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.

Id. at 636. In speaking of a *Kulturkampf*, Justice Scalia is alluding to German Chancellor Bismarck’s “ultimately counter-productive effort to prevent the emergence of an independent political force committed to social justice by subjecting Prussia’s Catholic Church to state control.” JAMES JOLL, *EUROPE SINCE 1870: AN INTERNATIONAL HISTORY* 7 (1973).

77. 530 U.S. 640 (2000).

78. 515 U.S. 557 (1995).

79. *See Dale*, 530 U.S. at 660 (“Indeed, it appears that homosexuality has gained greater social acceptance. But this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views.” (internal citation omitted)); *Hurley*, 515 U.S. at 660 (“While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightening either purpose may strike the government.”).

antidiscrimination rules on the basis of their infringement on First Amendment associational freedoms.⁸⁰ Although the resemblance to *Romer* may not be immediately apparent, the underlying affinities of all three cases are deep and substantial: The Court refused to permit the States to enforce a collective moral judgment regarding homosexuality, whether to allow or to disallow discrimination against it.⁸¹ In effect, the Court was enjoining on the States a wholly neutral, nonmoral role. Even rules *prohibiting* private discrimination—which might be taken for canonical expressions of collective moral judgments—were impermissible in this area.⁸² As will become apparent when we consider *Grutter v. Bollinger*,⁸³ the Court's hostility towards morally-based State action has become so intense that it prefers to regard even antidiscrimination norms as instrumental rules rather than as moral judgments.⁸⁴

The conceptual underpinning of the *Romer*, *Dale* and *Hurley* cases—that the States are severely limited in their ability to enforce the collective moral judgments of the political community—is also central to the Court's other recent case law on the subject of individual rights, including *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁸⁵ and *Lawrence v. Texas*.⁸⁶ What is often overlooked, however, is the remarkable inner coherence of the position of some Justices that, on the one hand, rejects strong federalism in favor of claims for national and executive power and, on the other hand, upholds claims of the individual to be free from moral regulation in the private sphere.⁸⁷

80. *Dale*, 530 U.S. at 659; *Hurley*, 515 U.S. at 579.

81. *Romer*, 517 U.S. at 633 (“Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.”); *Dale*, 530 U.S. at 661 (holding that the Boy Scouts could exclude homosexuals and reasoning that “public or judicial disapproval of a tenet of an organization’s expression does not justify the State’s effort to compel the organization to accept members”); *Hurley*, 515 U.S. at 578 (allowing organizers of a private parade to exclude a homosexual group despite protective legislation meant to “prevent any denial of access to (or discriminatory treatment in) public accommodations on proscribed grounds, including sexual orientation”).

82. *Dale*, 530 U.S. at 657–61; *Hurley*, 515 U.S. at 572–75, 578–79.

83. 123 S. Ct. 2325 (2003).

84. *But cf.* *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983) (condemning racial discrimination as a violation of elementary justice).

85. 505 U.S. 833 (1992).

86. 123 S. Ct. 2472 (2003).

87. *Compare* *United States v. Morrison*, 529 U.S. 598, 644 (2000) (Souter, J., with whom Stevens, Ginsburg, and Breyer, JJ., joined, dissenting) (rejecting the Court’s reliance on the “theory of traditional state concern” as a limiting principle for the plenary

This Article attempts to explore, with special reference to Philip Bobbitt's work, the relationship between international politics and constitutional law. Part I sets out a view of the relationship between these two domains, demonstrating how developments in international society and the international political system can influence the reasoning of the Supreme Court. Part I begins by discussing the international environment created by globalization—an environment to which the traditional functions and constitutional premises of the Nation State appear badly adapted. These premises are described and then contrasted with those found suitable to the emerging Market State. Part I then examines the role of the Supreme Court in smoothing the transition from the constitutional order of the Nation State to that of the Market State, and considers the jurisprudence of legal pragmatism, which enables the Court to play the role that it desires here. Part I concludes by examining earlier phases of the Court's history in which it has engineered fundamental constitutional change with a view to the international environment and the United States' competitive position within it.

Part II explains the Supreme Court's traditional doctrine concerning the sources and limits of the States' police powers, as well as the relation of those powers to the elements of American constitutional law that protect basic liberties. Part II begins by demonstrating that established—and, indeed, recent—Supreme Court precedent has treated the legislative codification of community morality as a part of the police powers, and follows with a survey of the Court's cases on the States' police powers—including Commerce Clause, Privileges or Immunities Clause, and substantive due process decisions. The historical survey demonstrates that the Court's recent holdings, which strip the States of their power to create and sustain moral communities, are clearly contrary to the Court's own consistent teachings.

Part III explains how the premises of the traditional doctrine have been uprooted through developments culminating in recent decisions. Part III locates the ruling premise of several major recent substantive due process decisions in the Court's belief in a doctrine of radical autonomy: that the meaning of life is for the individual alone to determine, in light of his or her attitudes towards the suffering and joys incident to life. This ruling

national commerce power), *with Lawrence*, 123 S. Ct. at 2484 (Kennedy, J., delivering the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined) (holding that the petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government").

premise is understood to entail that the States may not attempt to regulate and direct the individual's pursuit of pleasure or avoidance of pain, at least in sexual activity, unless that conduct causes direct and tangible harm to another "person" (in a specifically constitutional sense of personhood). Rooted in cases such as the joint opinion of Justices Kennedy, O'Connor, and Souter in *Casey*, this doctrine serves as the master premise of the Court's later decision in *Lawrence*. *Casey* and *Lawrence*, taken together, represent decisive moves in restructuring American federalism by contracting the authority of the States to express and enforce traditional, commonly held moral judgments. Because they represent such a radical breach with the Court's own precedents, the legal justification of these decisions is problematic. This Article views the Court as, in pragmatic fashion, appealing to and relying on elite opinion to support its constitutional innovations.

Part IV argues that the *Garamendi* opinion further illustrates the developments described in Part III and evidences their extension to foreign-relations federalism. It is argued that there is a direct link between (on the one hand) the Court's view in its substantive due process and equal protection cases that the States have no legitimate interest in enacting communitarian moral judgments and (on the other hand) the Court's holding in *Garamendi* that the State had little or no interest in securing restitutionary justice for Holocaust survivors and their descendants from foreign corporations. Part IV contends that *Garamendi* posited an unprecedented and dubious view of the President's power to preempt State law, and thus reached a conclusion hostile both to "human rights internationalism"⁸⁸ and to the recognition of any role for the States in promoting moral causes in foreign affairs. Moreover, we argue that *Garamendi* should not be seen as a "sport": Its view that State regulatory power should be directed primarily to economic ends rather than to moral ones is also reflected in a dissenting opinion signed by two key "centrist" Justices—Justice O'Connor and Justice Breyer—in the *Nike* case.⁸⁹ Deferring to elite foreign opinion, the *Garamendi* Court thus eviscerates still further the conception of the States as moral communities. Both in domestic and foreign affairs, therefore, the States are—in the Court's current view—

88. Curtis A. Bradley, *World War II Compensation and Foreign Relations Federalism*, 20 BERKELEY J. INT'L L. 282, 282–83 (2002).

89. *Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2567 (2003) (Breyer, J., dissenting) (noting that "legal and practical checks . . . tend to keep the energies of public enforcement agencies focused upon more purely economic harm").

largely destitute of power to legislate moral opinion. Confining the States to largely instrumentalist, efficiency-promoting tasks, however, also deepens and entrenches the constitutionalization of the Market State.

Part V closes with some reflections on the likelihood that the Court's project, as envisaged, will be successful. Fittingly enough, the final judgment on a pragmatic judiciary is whether its constitutional responses to the Nation's strategic environment will, in the end, be pragmatically justified.

I. INTERNATIONAL POLITICS AND CONSTITUTIONAL LAW

A. *Globalization and Constitutional Law*

Globalization has been variously characterized either as the ruling ideology of American hegemony in international politics or as a necessary response to technological change.⁹⁰ Neither of these stark views seems correct: Globalization forces the United States' polity, economy, and culture into accommodations with those of other nations, rather than merely exporting American models elsewhere; and technological change interacts with, and may be modified or arrested by, ideational causes in producing political, economic, or cultural outcomes.⁹¹ Philip Bobbitt comes closer to the truth by arguing that American constitutional law is shaped, not only by the technological requirements for success in the international environment, but also by the perceived principles of legitimacy in the international system.⁹²

In his panoramic vision of the history of States, Bobbitt argues that the current international system of Nation States is yielding to a new international order, centered on what he terms the Market State.⁹³ Bobbitt contends that the rise of the Market State is based on the demise of the Nation State.⁹⁴ Epochal struggles for supremacy took place throughout most of the

90. See BRZEZINSKI, *supra* note 19, at 139–41 (distinguishing and illustrating “diagnostic” and “doctrinal” meanings of globalization and noting that globalization is “driven largely by the new technologies of communications”). Compare THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE*, at xv (1999) (emphasizing technological determinism in discussing globalization), with RICHARD FALK, *LAW IN AN EMERGING GLOBAL VILLAGE: A POST-WESTPHALIAN PERSPECTIVE* 215–16 (1998) (employing a constructivist methodology in describing globalization).

91. See generally MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., 2004) (arguing that ideational factors as well as material changes entered into the emergence of early modern capitalism).

92. BOBBITT, *supra* note 22, at 228.

93. *Id.*

94. *Id.*

twentieth century among the fascist, communist, and liberal-capitalist versions of the Nation State.⁹⁵ In this competition, the liberal-capitalist models, represented by the United States and post-war Europe and Japan, emerged triumphant primarily because they did a better job than their fascist and communist rivals of harnessing the technological revolutions in nuclear weapons, information, and communications.⁹⁶ The very triumph of the liberal-capitalist version of the Nation State has, however, through what Hegel would have called the “cunning of Reason,”⁹⁷ begun to undermine the premises of the traditional Nation State. This evolutionary process is ushering in a new domestic constitutional order that requires a new basis for legitimacy⁹⁸ and, correlatively, a new international legal and political order.⁹⁹ These developments have, in turn, given rise to a period of renewed international struggle, in which three competing versions of the Market State—a highly entrepreneurial model represented by the United States, a strongly managerial model represented by Europe, and a decidedly mercantilist model exemplified in Japan—will contend for supremacy in ways that will resemble the Market State’s emergence from the epochal wars of the Nation State and that will force and reward major technological and strategic innovations.¹⁰⁰ As the technological creativity of the liberal-capitalist Nation State provided for its triumph in the wars against fascism and communism by liberating individuals to pursue excellence and invention,¹⁰¹ so too will the next set of epochal wars produce the distinctive strategic, economic, and cultural attributes that will characterize the successful States of the future.

95. See *id.* 34–64 (describing the European political struggles of the early twentieth century).

96. *Id.* at 215–28.

97. See BURLEIGH TAYLOR WILKINS, *HEGEL'S PHILOSOPHY OF HISTORY* 138–40 (1974) (noting that “the cunning of Reason acknowledges the importance of the unintended consequences of intentional human action” and that usually “these consequences can be viewed teleologically as furthering man’s freedom”).

98. BOBBITT, *supra* note 22, at 213.

99. See *id.* at 258–64 (discussing America’s nationalist and internationalist models and the balance of international power in the “New Realism”).

100. See *id.* at 667–76 (outlining how “[t]he new orthodoxy of the market-state will . . . play out in several competing formulations”). It seems a likely defect in Bobbitt’s scenario that he does not consider the emergence of China and India as competitors potentially on the level of the United States, Europe, or Japan. For a corrective vision, see SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 218–19 (1996) (commenting on the effect of Asia’s economic development and growing self-confidence on international politics).

101. See BOBBITT, *supra* note 22, at 216, 228–31.

Bobbitt outlines the domestic constitutional arrangements that he believes will be instituted as the logic of the Market State progressively displaces that of the Nation State.¹⁰² In brief, Bobbitt sees the central move in the transition from the Nation State to the Market State as the abandonment of the State's responsibility for securing the welfare of the community as the basis for State legitimacy. Responsibility for welfare promotion will be replaced by the responsibility for promoting the opportunities of the State's individual citizens.¹⁰³ Accordingly, this Part will first describe the traditional constitutional characteristics of the Nation State; second, identify the contrasting features of the Market State; and third, summarize the innovations which apparently best adapt the American Constitution to the requirements of the emergent Market State.

B. The Constitutional Premises of the Nation State

According to Bobbitt, the Nation State "defines itself by its axiomatic linkage to a people and its portrayal as their benefactor."¹⁰⁴ Bobbitt locates the emergence of the Nation State's constitutional order in the transformation of the American Civil War.¹⁰⁵ Building on the example of French revolutionary armies, Bobbitt contends that Lincoln's great strategic achievement was inventing "total war."¹⁰⁶ Waging total war required mass mobilization¹⁰⁷ that could be sustained only by a constitutional order purporting to represent a Nation of citizens¹⁰⁸—a single

102. See *id.* at 214–34 (explaining that the State's shifting focus from the population's welfare as a whole to maximizing individual choice requires governmental restraint).

103. *Id.* at 228–30.

104. *Id.* at 208.

105. *Id.* at 215–16 (stating that the Nation State's characteristic of waging "total war" can be seen in the American Civil War).

106. *Id.* at 203.

107. *Id.* at 216 (noting that the strategy of total war involves mobilizing all the "resources of the society in pursuit of its political goals"). Although a proposal for conscription into the federal army had been mooted in the War of 1812, see *The Selective Draft Law Cases*, 245 U.S. 366, 384–85 (1918) (noting that "[p]eace came before the bill was enacted"), the first federal statute imposing conscription was the Act of Mar. 3, 1863, ch. 75, 12 Stat. 731. See *The Selective Draft Law Cases*, 245 U.S. at 386–87 (stating that the Act applied to "all the citizens of the United States" and made "every male citizen of the United States between the ages of twenty and forty-five . . . subject . . . to be called by compulsory draft to service in a national army"). As the Court noted, the compulsory mobilization of the citizenry for military service was followed soon after by the Fourteenth Amendment's transformation of the character of American citizenship from State-based to predominantly national. *Id.* at 377; see U.S. CONST. amend. XIV.

108. The post-Civil War period explored the possibility of constitutionalizing the concept of national citizenship—an innovation that was ripe with possibilities to work basic changes between the individual and the local States—until that possibility was

people composed by a multi-ethnic American republic.¹⁰⁹ Justice Holmes, himself a Civil War veteran, explained that “it has taken a century and has cost the[] successors [of the Founding generation] much sweat and blood to prove that they created a nation.”¹¹⁰ In Germany, Bismarck’s key strategic innovation, the introduction of compulsory social insurance, was equally significant for the emergence of the Nation State’s constitutional order.¹¹¹ The military and economic innovations made possible by the Nation State caused it to become the dominant form of State into the next century.

The Nation State, so viewed, represents a bargain between the State and its people: On the one side, there is the people’s commitment to upholding the State by the willing sacrifice of wealth, liberty, and even life; on the other, there is a reciprocal pledge by the State to provide for the people’s welfare.¹¹² In America, the Nation State’s commitment to the welfare of the community prescribed a set of principles that ultimately shaped post-New Deal constitutional change.¹¹³ Chief among these principles was the recognition of the Nation State’s authority, not only to provide public goods and to correct market failures, but also to pursue certain collective moral goals—such as wealth redistribution, a social safety net, and eventually racial equality¹¹⁴—through significant regulation of private

largely extinguished by the Supreme Court. See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 35–45 (1975) (discussing how the Supreme Court limited the concept of national citizenship by its narrow interpretation of the Privileges and Immunities Clause in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872)).

109. In its multi-ethnic character, the American Nation State has been and remains strikingly different from the racially-based European and Japanese versions of the Nation State; indeed, this feature of the American Nation State may arguably give it a persisting competitive advantage over those nations. *But see* PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000*, at 523–25 (1987) (arguing that the multitude of interests competing within the American polity creates certain liabilities not shared by its competitors).

110. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

111. BOBBITT, *supra* note 22, at 203–04.

112. The Court in *The Selective Draft Law Cases* assumed such a bargain when it argued that “the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it.” 245 U.S. at 378. That bargain seems to have dissolved on both sides. As Sir Michael Howard has noted, while “an individual commitment, however notional, to dying for one’s country” was characteristic of the Nation State’s heyday, “by the end of the twentieth century death was no longer seen as being part of the social contract.” MICHAEL HOWARD, *THE INVENTION OF PEACE: REFLECTIONS ON WAR AND INTERNATIONAL ORDER* 99–100 (2000).

113. BOBBITT, *supra* note 22, at 214–18.

114. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257–58 (1964) (affirming Congress’s power to prohibit racial discrimination in public accommodations and citing earlier precedent concerning congressional regulation of morally objectionable

contracting¹¹⁵ and regulation of the use of private property.¹¹⁶ In subordinating private liberty to the needs of the community, the New Deal Supreme Court proclaimed that “regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.”¹¹⁷

Bobbitt argues persuasively that the constitutional order of the Nation State is no longer tenable. Bobbitt explains that, viewed from the angle of the Nation State’s post-Cold War defaults,

[N]o nation-state can assure its citizens safety from weapons of mass destruction; no nation-state can, by obeying its own national laws (including its international treaties) be assured that its leaders will not be arraigned as criminals or its behavior be used as a legal justification for international coercion; no nation-state can effectively control its own economic life or its own currency; no nation-state can protect its culture and way of life from the depiction and presentation of images and ideas, however foreign or offensive; no nation-state can protect its society from transnational perils, such as ozone depletion, global warming, and infectious epidemics. And yet guaranteeing national security, civil peace through law, economic development and stability, international tranquility and equality, were the principal tasks of the nation-state.¹¹⁸

Further, the financial burdens of a commitment to the “ever-improving welfare of its citizens”—aggravated in the West by demographic considerations and, perhaps, by growing difficulties in extracting taxes—is one of the reasons why the contemporary Nation State appears to be defaulting on its side of the bargain.¹¹⁹

activity in interstate commerce). The Court noted, “That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing [the Civil Rights Act] Congress was also dealing with what it considered a moral problem.” *Id.* at 257.

115. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–400 (1937) (finding a Washington minimum wage law for women constitutional, the Court explained, “The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest.”).

116. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984) (determining that the State legislature could redistribute traditional land holdings because the legislature could legitimately conclude that “concentrated land ownership was responsible for skewing the State’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare”).

117. *W. Coast Hotel*, 300 U.S. at 391.

118. BOBBITT, *supra* note 22, at 228.

119. *Id.* at 222; see also Montserrat Guibernau, *Nations Without States: Political Communities in the Global Age*, 25 MICH. J. INT’L L. 1251, 1255 (2004) (maintaining that, “[a]t present, the [Nation] State seems to become increasingly unable to fulfill its citizens’

Bobbitt wrote, before September 11, 2001, that the very nature of the Nation State now debars it from performing its vital function of providing “internal security against crime and terrorism.”¹²⁰ This critical failure is, he believes, “a consequence of the *national* character of nation-states, which isolates and alienates substantial minorities of their citizens even to the point of defining some criminal behavior in essential ethnic ways.”¹²¹ Bobbitt adds that

[t]he ethnic focus of the nation-state, its pervasive analogy to the family, creates a role for antisocial elements, “misfits,” that is connected to violence because violence is the currency of the state. In every society there are such people, and such groups; in the nation-state they become the enemy of the State (and vice versa), because the State itself is fused to a national conception of the culture.¹²²

needs and consequently the citizens turn away from it and search for alternative[s]).

120. BOBBITT, *supra* note 22, at 219.

121. *Id.*

122. *Id.* Other writers have pointed out the difficulties that European societies in particular have experienced in assimilating and integrating their large Islamic populations. These commentators have noted that even apparently fully assimilated second- and third-generation Muslims often feel little identification with the surrounding polity. See generally HUNTINGTON, *supra* note 100, at 264–65 (offering reasons why Muslim minorities may be harder to assimilate—both in Europe and non-Western cultures—than other religious minorities or ethnic groups); GILLES KEPPEL, *THE WAR FOR MUSLIM MINDS: ISLAM AND THE WEST* 241–87 (Pascale Ghazaleh trans., 2004) (commenting on terrorism in Europe and the battle over Islam); OLIVIER ROY, *GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH* 143–46, 315–17 (2004) (describing the “general pattern of radicalisation [sic] in Europe” and its relationship to the Muslim youth culture). Indeed, young European-born Muslims are proving to be willing recruits to *jihād* with alarming frequency. The bombing of commuter trains in Madrid in March, 2004—an incident that left 191 dead and more than 1800 wounded—was allegedly caused by men “raised and schooled in Spain.” David Crawford & Keith Johnson, *EU’s New Threat: Radicals With Passports: Local Islamic Youth Join Jihad, Posing Big Challenge for Security Officials There*, *ASIAN WALL ST. J.* (Hong Kong), Dec. 29, 2004, at A8; see also KEPPEL, *supra*, at 241–48; Renwick McLean, *Bombings in Spain Are Seen as a Sign of Basque Group’s Decline, Not Strength*, *N.Y. TIMES*, Dec. 20, 2004, at A16 (reporting the number wounded). Spanish police “arrested more than 70 suspected Islamic terrorists [in 2004]—most of whom [had been] legally registered as long-term residents.” Crawford & Johnson, *supra*. In November 2004, a prominent Dutch filmmaker, Theo van Gogh, was assassinated, allegedly by Mohammed Bouyeri, a twenty-six year old Dutch Muslim. Bouyeri, the child of Moroccan immigrants to Holland, grew up in a suburb of Amsterdam, had written pieces celebrating mutual tolerance and respect, and was a former community organizer who “worked passionately to channel the frustrations of young Muslims like himself into positive programs” not long before his conversion to radical Islam. Glenn Frankel, *From Civic Activist to Alleged Terrorist: Suspect in Killing of Dutch Director Was Radicalized*, *WASH. POST*, Nov. 28, 2004, at A1. The mayor of Amsterdam, Job Cohen, said of Bouyeri that “[a] couple of years ago he was a well-educated guy with good prospects.” Andrew Higgins, *A Brutal Killing Opens Dutch Eyes to Threat of Terror: Crackdown on Radical Islam Follows Filmmaker’s Death; Immigrants Get Scrutiny: Shifting View of Welfare State*, *WALL ST. J.*, Nov. 22, 2004, at A1. In light of such cases, European terrorist experts say that their continent “is also proving to be a

Moreover, Bobbitt writes,

[T]wo opposing but interacting phenomena—the oppression of minority groups by the nation (that is, by the dominant ethnic group with whom the State is identified) and the resistance to an assimilation that might overcome oppression—are damaging to the legitimacy of those nation-states that are based on the promise of assuring equality among all national members. As a result, it is increasingly difficult in multicultural, multiethnic states to get consensus on public-order problems and the maintenance of rule-based legal action, which are core tasks of the State.¹²³

To summarize Bobbitt's argument, it is the confluence of increasing costs of governance—exacerbated by the availability of weapons of mass destruction to nonstate actors and the new information technology—and a legitimacy crisis in its redistributivist and communitarian goals that, taken together, doom the constitutional order of the Nation State.

C. *The Constitutional Premises of the Market State*

By contrast, according to Bobbitt, the Market State's legitimizing principle is a commitment to individual opportunity—not to collective welfare.¹²⁴ Different models of the Market State—the “Entrepreneurial,” “Managerial,” and “Mercantile” models (i.e., the American, European, and Japanese models)—offer varied interpretations of what it means to maximize opportunity.¹²⁵ The Entrepreneurial, or American, model is of chief interest here.

good substitute for Afghanistan” in training *jihādists*; one “longtime investigator” is quoted as saying, “[c]learly, the threat we have to target now is that next generation.” Crawford & Johnson, *supra*.

The noted scholar of European Islam, Gilles Kepel, head of Middle East studies at the Institute of Political Studies in Paris, has recently said that, “[t]his [cultural] schizophrenia is the most dangerous thing we face in Europe today It means Madrid. It means Mohamed Atta.” Evan Osnos, *Islam Shaping a New Europe; Staking Out Their Place in Europe*, CHI. TRIB., Dec. 19, 2004, at 1. Another scholar, Paul Scheffer of the University of Amsterdam, noted that while many second- and third-generation Muslims are integrating successfully into Dutch society, “others are living more and more distant from it and, indeed, expressing hatred and contempt for it.” Carol Eisenberg, *A Deadly Cultural Divide: Concerns About Terrorism Have Spotlighted the Failure Across Europe to Integrate a Fast-Growing Muslim Minority*, NEWSDAY, Dec. 6, 2004, at A04.

123. BOBBITT, *supra* note 22, at 225 (footnote omitted).

124. *Id.* at 228–30.

125. *Id.* at 672–74 (describing the essential features of each Market State model); see also *supra* note 100 and accompanying text.

“The basic ethos of the Entrepreneurial Model is libertarian”¹²⁶ The libertarian ethic of the Entrepreneurial Model embodies

the conviction that it is the role of society to set individuals free to make their own decisions. This ethos counsels minimal state intervention in the economy as well as in the private lives of its citizens. Privatized health care, housing, pensions, and education as well as low taxes and low welfare benefits all characterize such states. Regulation on behalf of special interests is discouraged. Indeed, responsibility for regulation of any kind is largely abdicated in favor of policing by the market, which responds with extensive information to the consumer, who is expected to look out for himself.¹²⁷

Fully enacting the libertarian agenda of the Entrepreneurial version of the Market State would imply radical changes in American constitutional law. In particular, on libertarian premises, any claim by the government to regulate private conduct for the sake of promoting commonly recognized forms of moral virtue would presumptively be illegitimate, or “unconstitutional.”¹²⁸ From the libertarian angle, it makes excellent constitutional sense to ask: “[W]hy in the West is marijuana criminalized but martinis are not? Why is polygamy criminalized but not divorce?”¹²⁹ Bobbitt argues that “[t]he sense of a single polity, held together by adherence to fundamental values, is not a sense that is cultivated by the market-state. This cultural indifference does, however, make the market-state an ideal environment for multiculturalism.”¹³⁰

The constitutionalizing of Market-State libertarianism has clear implications for the *structure*, as well as for the *ends*, of government. The radical authority of the individual to set the bounds for his or her own opportunities, with the Market State as *primus inter pares* facilitator, might at first suggest an increased demand for more devolution of authority to States and localities.¹³¹ Neither the market, nor the national government,

126. BOBBITT, *supra* note 22, at 671.

127. *Id.*

128. See, e.g., *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003) (declaring that “[t]he State cannot . . . mak[e] [a homosexual’s] private sexual conduct a crime”).

129. BOBBITT, *supra* note 22, at 219.

130. *Id.* at 230.

131. It might also suggest increased privatization of traditional State functions, such as the responsibility for education. Although steps in this direction—such as school voucher programs—have been challenged under the Religion Clauses, the Court has (guardedly, and by a slim majority) supported them. See *Zelman v. Simmons-Harris*, 536

need be the best provider of all kinds of services (e.g., protection against local crime); in some instances, States and local governments, or private nonprofit organizations, may be better equipped to carry out the necessary responsibilities. Insofar as the States' comparative advantage in performing such functions stems from their greater ability to respond to purely local values and needs, however, the Market State's intrinsic libertarianism will often collide with any attempt to augment State power beyond strict limits. In such conflicts, the constitution of the Market State would treat libertarianism as primary, and federalism as subordinate and instrumental. Thus, local States attempting to regulate genetic research, abortion, or sexual orientation would swiftly find themselves charged with "unconstitutional" encroachments on individual welfare maximization and autonomy. In such conflicts it seems overwhelmingly likely that the claims of federalism would be subordinated to libertarianism by judges managing a constitutional transformation to the Market State.

D. Constitutional Law Transformation and the Jurisprudence of Legal Pragmatism

Bobbitt's theory requires the belief that the American constitutional order is under severe strain insofar as it rests specifically on Nation State premises, and therefore must change "to reflect a new constitutional archetype" that meets the "demands for new bases for legitimacy, demands . . . aris[ing] in part as a consequence of the strategic innovations that won the Long War."¹³² How is this shift to a new "constitutional archetype" to be accomplished?

Basic changes in constitutional structure—such as the transformation to the Nation State—have often been birthed by violence, as represented by the Civil War in the United States and by Bismarck's successful wars culminating in the formation of the German Empire.¹³³ It seems most unlikely, however, that the United States' transition to the Market State, already far

U.S. 639, 652–53 (2002) (holding that Ohio's Pilot Project Scholarship Program is constitutional). The *Zelman* Court noted,

Mueller, Witters, and Zobrest thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

Id. at 652.

132. BOBBITT, *supra* note 22, at 213.

133. *Id.* at 24–26, 177.

along the way, will be marked by violence. Although the possibility of a financial or currency crisis as a catalyst for change can by no means be ruled out,¹³⁴ the ordinary mechanisms of American politics may prove adequate to manage aspects of the transition, especially those relating to national security and public finance. But a significant role in engineering the change will undoubtedly be—indeed, this Article will attempt to show that it has already been—assumed by the Supreme Court.

Yet ascribing the role of constitutional *architect* to a body that professes to be merely a constitutional interpreter is paradoxical. How can the Supreme Court, while purporting to work within the ambit of its own constitutional doctrines, so refashion those materials as to create not merely novel, but fundamentally incompatible, doctrines? Consistent with his earlier work,¹³⁵ Bobbitt appears to believe that the constitution of the American Nation State can be judicially remade to facilitate the American Market State, without departing from existing modes of constitutional argument. He emphasizes

that such a transformation does not mean that the present U.S. constitution will be replaced. It has already weathered one such transformation in the constitutional order, that from state-nation to nation-state, and its underlying theory of popular sovereignty, personal liberty, and individual equality is perfectly compatible with the multicultural market-state. On some issues, though, such as federalism and the regulatory powers of Congress, it may be interpreted in the new archetypal context in ways that are more restrictive of government; while in others, notably national security, the power of the executive may gain. But none of these developments require a departure from the available constitutional arguments that currently make up American constitutional law, even if the outcomes of

134. See NIALL FERGUSON, *COLOSSUS: THE PRICE OF AMERICA'S EMPIRE* 279–80 (2004) (pointing out that “the United States is the world’s biggest borrower. . . . In 2002 the deficit was 4.8 percent of GDP; in 2003 it was even higher.”); Robert Z. Aliber, *The Dollar’s Day of Reckoning*, WILSON Q., Winter 2005, at 14, 23–24 (commenting that it is unlikely the inevitable transition to a sustainable situation will occur without “significant effects on employment and inflation or major disruptions in the foreign-exchange market”); Peter G. Peterson, *Riding For a Fall*, FOREIGN AFF., Sept.–Oct. 2004, at 111, 117–21 (discussing the borrowing practices of the U.S. government and reporting that “[v]irtually none of the policy leaders, financial traders, and economists . . . believes the U.S. current account deficit is sustainable at current levels for much longer than five more years. Many see a real risk of a crisis”).

135. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3–8 (1982) (outlining five distinct modes of argument as the explanatory device for understanding the work product of the Supreme Court).

constitutional decision making were to undergo some considerable change.¹³⁶

Bobbitt's claim that the Court may accomplish a change in "constitutional archetypes" while operating only within the range of "available constitutional arguments that currently make up American constitutional law,"¹³⁷ is questionable. The Court's fidelity to constitutional text and structure, to the historical understandings of the framers and ratifiers, to the Court's own doctrines and precedents, and to the longstanding practices of American government sets boundaries—even if broad ones—to the Court's authority to introduce radical innovations in constitutional law.¹³⁸ To be sure, the Court has not always felt handcuffed by such constraints.¹³⁹ But the fact that it has favored modes of argument leading to such conclusions, or even met with acquiescence when it has ventured that far, does not establish that such "outcomes of constitutional decision making" are legitimate. The Court may be the (illegitimate) agent of change from one "constitutional archetype"¹⁴⁰ to another, even while seeking to maintain the outward façade of constitutional continuity and purporting to play a merely interpretive role.

Nonetheless, the Court seems prepared to undertake the task of spearheading the constitutional transition from a Nation State to a Market State by demanding a certain style of jurisprudence—one that tolerates a very relaxed approach to doctrinal reasoning that can be characterized as a kind of "legal pragmatism."¹⁴¹ Legal pragmatism seems to us to be very evident in the Court's decisions that are of most concern to this Article.¹⁴² Not altogether easy to define, legal pragmatism, in Professor Daniel Farber's words, "tries to analyze problems based on both social policy and traditional legal doctrines, seeking a satisfactory adjustment of the two. . . . [The] blend of principle and policy, of tradition and innovation, is the essence of legal

136. BOBBITT, *supra* note 22, at 213 n.†.

137. *Id.* at 213 & n.†.

138. See Nelson Lund, *The Rehnquist Court's Pragmatic Approach to Civil Rights*, 99 NW. U. L. REV. 249, 249–51 (2004) (commenting on the Rehnquist Court's consideration of precedent, interpretive fidelity, and the history, text, and structure of laws).

139. *Id.* at 251 (noting that in one particular case, "the Court's pragmatic concern with results overpowered all such specifically legal considerations").

140. BOBBITT, *supra* note 22, at 213.

141. See Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1377 (1988) ("The alternative is a less structured mode of decision making called *legal pragmatism*.").

142. See Lund, *supra* note 138, at 249–51 (finding a legal pragmatism characteristic in the Rehnquist Court's antidiscrimination decisions).

pragmatism.¹⁴³ Another scholar, Judge Richard Posner, characterizes legal pragmatism as

a functional, policy-saturated, nonlegalistic, naturalistic, and skeptical, but decidedly not cynical, conception of the legal process. . . .

. . . .

Legal rules are to be viewed in instrumental terms, implying contestability, revisability, mutability.

Law is forward-looking. This is implicit in an instrumental concept of law—which is the pragmatic concept of law, law as the servant of human needs.

. . . The judge is not merely an interpreter of legal materials. He is not only a finder but also a maker of law.¹⁴⁴

Legal pragmatism is influenced by American philosophical pragmatism,¹⁴⁵ which classically drew on evolutionary and related statistical reasoning to develop a conception of truth as a mere device for manipulating effects to produce wanted outcomes.¹⁴⁶ Truth was what worked, not what corresponded to reality.¹⁴⁷ Like statistical thinking, philosophical pragmatism saw reality as consisting in individual cases, with generalizations

143. Farber, *supra* note 141, at 1377.

144. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 26, 29 (1990).

145. See generally A.J. Ayer, *Introduction to WILLIAM JAMES, PRAGMATISM AND THE MEANING OF TRUTH*, at vii, vii–xiv (A.J. Ayer ed., Harvard Univ. Press 1978) (discussing the origins of James's pragmatism and the theory of truth's roots in the history of American philosophy).

146. RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* 27 (1999). Philosophical pragmatism maintains its long link to evolutionary theory's account of selection, because pragmatic "truth" is what confers competitive advantage in seeking survival.

Pragmatists—both classical and 'neo-'—do not believe that there is a way things really are. So they want to replace the appearance-reality distinction by that between descriptions of the world and of ourselves which are less useful and those which are more useful. When the question 'useful for what?' is pressed, they have nothing to say except 'useful to create a better future.' When they are asked, 'Better by what criterion?', they have no detailed answer, any more than the first mammals could specify in what respects they were better than the dying dinosaurs.

Id.

147. See LOUIS MENAND, *THE METAPHYSICAL CLUB* 201–32, 435–45 (2001) (drawing the connection between evolutionary and statistical reasoning and the philosophy of pragmatism, conceived by Charles Pierce but reformulated and popularized by William James, and ultimately extended to judicial reasoning by Justice Oliver Wendell Holmes, Jr.). It is a great historical irony that it was the pragmatic conception of law, an approach that found its roots in evolutionary thinking, that inspired Holmes to condemn a parallel influence of evolutionary thinking on the political process when he wrote, dissenting in *Lochner v. New York*, that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

amounting to no more than useful devices to identify a truth revealed only indirectly by probable variations in error.¹⁴⁸

The adoption of legal pragmatism as a preferred style of judicial decisionmaking is closely connected to the Court's implicit recognition that it must reshape constitutional law in order to secure comparative advantages for the United States in a competitive international environment. Three characteristics of legal pragmatism make it particularly suitable as a jurisprudential style for a Court attempting to respond to international circumstances that present what Bobbitt characterizes as strategic threats.¹⁴⁹

First, a pragmatic Court will discount traditional legal doctrine and precedent and be open to even drastic or abrupt revisions of seemingly settled law.¹⁵⁰ A pragmatic Court should espouse a very relaxed (not to say, cavalier) doctrine of constitutional *stare decisis*—which *is* part of the current Court's approach.¹⁵¹ The great exceptions, of course, are those cases in which an outward profession of belief in a strong *stare decisis* doctrine is felt to be pragmatically necessary to sustain the Court's prestige and to legitimize its decisions.¹⁵² Second, a pragmatic Court will rely heavily on nonlegal materials, including the policy recommendations of amici, in its reasoning.¹⁵³ Third, a pragmatic Court will demonstrate a willingness to step into the breaches created, as the Justices see it, by the defaults of political actors.¹⁵⁴ Such a Court will attempt to solve social or

148. See MENAND, *supra* note 147, at 177–200 (discussing the place of the law of errors in the development of philosophical thought).

149. BOBBITT, *supra* note 22, at 811–14.

150. See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 860–65 (1998) (Scalia, J., concurring in judgment) (arguing that the substantive due process methodology employed to decide the case had been specifically rejected the previous Term).

151. See, e.g., *id.*

152. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–66 (1992). Informed by pragmatic considerations, the Court purports to “explain why overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power.” *Id.* at 865; see also Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1029–39 (2003) (criticizing *Casey* as demonstrating the Court's concern with retaining political clout and asserting that “a significant part of *Casey*'s justification for . . . *stare decisis* . . . is that it enhances public perceptions of the Court's (and its members') integrity, and thus safeguards the Court's *power*”).

153. Indeed, as the philosopher Richard Rorty points out, the courts may spice their pragmatism with “visions,” as he believes was true in “such debatable decisions as *Brown v. Board of Education*, *Roe v. Wade*, . . . and some [then] future Supreme Court decision that will strike down antisodomy laws.” RORTY, *supra* note 146, at 97–98 (footnotes omitted). Pragmatic judges, as Rorty notes, hardly need be tentative or complacent; their decisions may be “breakthroughs into romance.” *Id.* at 99.

154. See Justice Scalia's view of the plurality decision in *Hamdi v. Rumsfeld*, 124 S.

political problems that are constitutionally committed to other governmental bodies if those actors prove unable or unwilling to address them.¹⁵⁵ Indeed, a pragmatic Court will characteristically see its very isolation from the political process as an institutional advantage that justifies its resolution of political or cultural issues that electorally responsive bodies may be reluctant to decide.¹⁵⁶

All three of these features of legal pragmatism, discussed more in depth below, were exhibited in *Brown v. Board of Education*,¹⁵⁷ an important and illuminating precedent for Court-led constitutional change in response to a strategic threat posed by the international environment.¹⁵⁸

E. Precedent for Constitutional Change in Response to “Strategic Threats”

It has not been uncommon for the Supreme Court to introduce fundamental legal and constitutional innovations on the basis of its perception of the surrounding international

Ct. 2633, 2660–75 (2004) (Scalia, J., dissenting). The *Hamdi* plurality held that U.S. citizens detained as enemy combatants within the United States are entitled, as a matter of due process, to have a meaningful opportunity to contest the factual basis for detention before a neutral decisionmaker. As Justice Scalia saw it, however, the plurality was attempting to

mak[e] up for Congress’s failure to invoke the Suspension [of the Writ of Habeas] Clause . . . [and to] mak[e] up for the Executive’s failure to apply what [the plurality] says are needed procedures—an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches’ actions and omissions. Has the Legislature failed to suspend the writ in the current dire emergency? Well, we will remedy that failure by prescribing the reasonable conditions that a suspension should have included. And has the Executive failed to live up to those reasonable conditions? Well, we will ourselves make that failure good, so that this dangerous fellow (if he is dangerous) need not be set free.

Id. at 2673.

155. *Id.*

156. See BOBBITT, *supra* note 135, at 4 (noting the possibility “that insulation from political reaction . . . [may] actually fit the Court to be the conservator of constitutional principles”). Thus, Richard Rorty becomes starry-eyed about pragmatic judges—those “wise elders” who “do[] their best to keep America intact” and who “are, and deserved to be, revered”—precisely *because* they stand above the banalities and compromises of the political process. RORTY, *supra* note 146, at 112. “As our presidents, political parties and legislators become ever more corrupt and frivolous, we turn to the judiciary as the only political institution for which we can still feel something like awe.” *Id.* It does not seem to have occurred to Rorty, however, that the political process may have become debased largely because the courts have siphoned off so much responsibility from elected politicians.

157. 347 U.S. 483 (1954).

158. BOBBITT, *supra* note 22, at 777–80.

environment.¹⁵⁹ The most famous example may well be the historic decisions to end racial segregation in American public schools in *Brown v. Board of Education*,¹⁶⁰ and *Brown's* companion case, *Bolling v. Sharpe*.¹⁶¹ At least one current member of the Court understands *Brown*, as we do, as directly responsive to the international environment in which the decision was handed down.¹⁶² *Brown* itself was the culmination of

159. The doctrine of “territorial incorporation,” which grew out of the Court’s *Insular Cases*, provides a clear example of constitutional decisionmaking of this kind. GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 197 (2004) (“The doctrine of ‘territorial incorporation’ that emerged from *The Insular Cases* is transparently an invention designed to facilitate the felt needs of a particular moment in American history. Felt needs generally make bad law, and *The Insular Cases* are no exception.”).

For other cases in this vein, see *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int’l*, 493 U.S. 400, 409–10 (1990) (refusing to extend the Act of State doctrine to cover a case in which foreign governmental officials were alleged to have accepted bribes for military contracts in violation of U.S. antitrust and antiracketeering law); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) (“[W]e decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . in the absence of a treaty . . . even if the complaint alleges that the taking violates customary international law.”); and *The Paquete Habana*, 175 U.S. 677, 714 (1900) (examining the pedigree of the international maritime custom of exempting fishing ships and their cargo from seizure as prizes of war and holding that this exemption is part of American law).

The Court’s uncertainty persists as to whether, and how far, to incorporate international law as a rule of decision for domestic courts. This is shown by the Court’s equivocal interpretation of the Alien Tort Statute in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). Echoing *Sabbatino*, the *Sosa* Court expressed wariness about “consider[ing] suits under [international] rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and . . . hold[ing] that a foreign government or its agent has transgressed those limits. . . . [M]any attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences.” *Id.* at 2763; see also *id.* at 2782 (Breyer, J., concurring) (limiting the application of the statute by invoking “those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement”). The Court’s caution is well-taken; indeed, the Court should arguably have been far more cautious than it was. See, e.g., J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 450–51 (1999) (arguing that “[i]nternational legal theory is in disarray” and that customary international law lacks both legitimacy and effectiveness); Michael D. Ramsey, *The Empirical Dilemma of International Law*, 41 SAN DIEGO L. REV. 1243, 1245–51 (2004) (questioning “whether U.S. courts are institutionally equipped for the project” of applying international law, and discussing the difficulties of conducting empirical investigations of modern international law).

160. 347 U.S. at 495 (declaring that “separate but equal” in public education violates equal protection of the laws under the Fourteenth Amendment).

161. 347 U.S. 497, 500 (1954) (holding “that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution”).

162. See Ruth Bader Ginsburg, Assoc. Justice, U.S. Sup. Ct., Speech at Columbia University School of Law: *Brown v. Board of Education in International Context* (Oct. 21, 2004), http://www.supremecourtus.gov/publicinfo/speeches/sp_10-25-04.html (arguing that “[a]lthough the *Brown* decision did not refer to the international stage, there is little

a series of landmark civil rights cases in which the Court took account of that environment.

Six years before *Brown*, in *Oyama v. California*,¹⁶³ four Justices took note of international influences in their opinions on the question whether to protect people of Japanese descent from discriminatory State land laws that regulated certain categories of land ownership on the basis of nationality.¹⁶⁴ The year of this decision, 1948, is significant in that it places the case at the very outset of the Cold War.¹⁶⁵ Justice Black, joined by Justice Douglas, noted the relevance of the United Nations Charter's nondiscrimination provisions to the case.¹⁶⁶ Justice Murphy, joined by Justice Rutledge, argued further that the California statute "from its inception has proved an embarrassment to the United States Government," and like Justice Black pointed out that the statute "stands as a barrier" to the United States' fulfillment of its United Nations Charter obligations.¹⁶⁷

In several of the pre-*Brown* cases in this line, the Court was responding to prodding from the executive branch, which itself was highly sensitive to growing international condemnation of American racial segregation. The Truman Administration repeatedly filed briefs urging the Supreme Court to mitigate, and finally to strike down, State-supported racial segregation.¹⁶⁸ The first such brief appeared in *Shelley v. Kraemer*,¹⁶⁹ a restrictive

doubt that the climate of the era explains, in significant part, why apartheid in America began to unravel after World War II").

163. 332 U.S. 633 (1948).

164. See *id.* at 647–50 (Black, J., concurring); *id.* at 673 (Murphy, J., concurring); Paul Gordon Lauren, *First Principles of Racial Equality: History and the Politics and Diplomacy of Human Rights Provisions in the United Nations Charter*, in RACE AND U.S. FOREIGN POLICY FROM THE COLONIAL PERIOD TO THE PRESENT 25, 48 (Michael L. Krenn ed., 1998). Six Justices comprised the majority, with four Justices concurring in two opinions written by Justices Black and Murphy. Three Justices dissented in two separate dissenting opinions. *Oyama*, 332 U.S. at 635 (majority opinion); *id.* at 647 (Black, J. concurring); *id.* at 650 (Murphy, J. concurring); *id.* at 674 (Reed, J., dissenting); *id.* at 684 (Jackson, J., dissenting).

165. THOMAS BORSTELMANN, *THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA* 46–47 (2001) (stating that "[t]he Cold War developed after 1945").

166. *Oyama*, 332 U.S. at 649–50 (Black, J., concurring).

167. *Id.* at 672–73 (Murphy, J., concurring).

168. BORSTELMANN, *supra* note 165, at 57 ("No judges were immune from the Cold War atmosphere that heightened international attention to American race relations, and the Truman administration made good use of these judicial breakthroughs in its diplomacy abroad. . . . Truman's Justice Department consistently intervened in civil rights cases in an effort to convince the country's highest court of the negative impact of officially sanctioned racial discrimination on American foreign relations.").

169. 334 U.S. 1 (1948); MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 91 (2000) (noting that the Truman Administration's participation in civil rights cases began with *Shelley*).

covenant case in which whites sold residential property to blacks in violation of a landowner's covenant.¹⁷⁰ The question presented was whether State court enforcement of such covenants was "state action" in violation of the rights of the black purchasers.¹⁷¹ Solicitor General Philip Perlman explained the Justice Department's interest in *Shelley* by noting that "racially restrictive covenants hampered the federal government 'in doing its duty in the fields of public health, housing, home finance, and in the conduct of foreign affairs.'"¹⁷² The Justice Department's amicus curiae brief followed the State Department's view that "the United States has been embarrassed in the conduct of foreign relations by acts of discrimination taking place in this country."¹⁷³

Two years later, the Justice Department again emphasized the international implications of U.S. race relations in the amicus curiae brief it submitted in *Henderson v. United States*.¹⁷⁴ This case challenged segregation in railroad dining cars.¹⁷⁵ The Justice Department's brief informed the Court of Soviet and other foreign criticisms of American race discrimination and included quotes of statements by foreign governmental representatives (i.e., the Soviet Union and Poland) at "a United Nations subcommittee meeting that 'typify the manner in which racial discrimination in this country is turned against us in the international field.'"¹⁷⁶ The Justice Department's brief opposed the Interstate Commerce Commission (ICC), which had ruled that separate seating in dining cars for black passengers did not violate the statutory equal treatment requirement of the Interstate Commerce Act.¹⁷⁷ The Justice Department disagreed with the ICC's reading of that statute and argued that if such segregation was authorized, it was an equal protection violation.¹⁷⁸ The Justice Department's argument is significant

170. *Shelley*, 334 U.S. at 4-5 (framing the case as "questions relating to the validity of court enforcement of . . . restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property").

171. *Id.* at 13-14 (recognizing that the Fourteenth Amendment only bars State, not private, action); DUDZIAK, *supra* note 169, at 91.

172. DUDZIAK, *supra* note 169, at 91 (emphasis added).

173. *Id.* at 91-92.

174. 339 U.S. 816 (1950); DUDZIAK, *supra* note 169, at 92.

175. *Henderson*, 339 U.S. at 818; DUDZIAK, *supra* note 169, at 92.

176. DUDZIAK, *supra* note 169, at 92-93 (quoting Brief for the United States at 60-61, *Henderson*, 339 U.S. 816 (No. 25)).

177. *Id.* at 92.

178. *Id.*

because the decision in *Henderson* might have resulted (although in fact it did not)¹⁷⁹ in the overruling of *Plessy v. Ferguson*.¹⁸⁰

The Justice Department was forthright in advising the Court of the foreign policy consequences of its constitutional decisionmaking in *Sweatt v. Painter*¹⁸¹ and *McLaurin v. Oklahoma State Regents for Higher Education*,¹⁸² both of which were challenges to the segregation of black postgraduate students at public universities.¹⁸³ The Justice Department's brief in the cases again stressed that the practice of racial segregation in the United States posed a danger to the United States' national security and its reputation in other countries:

"It is in the context of a world in which freedom and equality must become living realities, if the democratic way of life is to survive, that the issues in these cases should be viewed. In these times, when even the foundations of our free institutions are not altogether secure, it is especially important that it again be unequivocally affirmed that the Constitution . . . places no limitation, express or implied, on the principle of the equality of all men before the law."¹⁸⁴

The Justice Department's amicus brief in the consolidated school desegregation cases, which included *Bolling* and *Brown*, was even more emphatic on the foreign policy consequences of the Court's constitutional ruling in the case.¹⁸⁵ The Justice Department told the Court that racial segregation frustrated the Government's pursuit of its Cold War aims because "[r]acial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith."¹⁸⁶

179. *Id.* at 94 (noting that because the "Court ruled that railroad dining car segregation violated the Interstate Commerce Act because it was unequal treatment," it "did not need to decide whether . . . *Plessy v. Ferguson* should be overturned").

180. 163 U.S. 537 (1896).

181. 339 U.S. 629 (1950).

182. 339 U.S. 637 (1950).

183. *Sweatt*, 339 U.S. at 631; *McLaurin*, 339 U.S. at 638; DUDZIAK, *supra* note 169, at 94-95.

184. DUDZIAK, *supra* note 169, at 95-96 (quoting Memorandum for the United States as Amicus Curiae at 11-13, *McLaurin*, 339 U.S. 637 (No. 34) and *Sweatt*, 339 U.S. 629 (No. 44)).

185. *Id.* at 99 (explaining how the Justice Department's "brief emphasized the embarrassment of race discrimination in the nation's capital").

186. *Id.* at 100 (quoting Brief for the United States as Amicus Curiae at 6, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10)).

The Government's brief spent nearly two pages substantiating this claim by a lengthy quote from a letter written by Secretary of State Dean Acheson, who explained,

"[D]uring the past six years, the damage to our foreign relations attributable to [race discrimination] has become progressively greater. The United States is under constant attack in the foreign press, over the foreign radio, and in such international bodies as the United Nations because of various practices of discrimination against minority groups in this country. As might be expected, Soviet spokesmen regularly exploit this situation in propaganda against the United States

[T]he hostile reaction among normally friendly peoples, many of whom are particularly sensitive in regard to the status of non-European races, is growing in alarming proportions

. . . [R]acial discrimination in the United States remains a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world."¹⁸⁷

The Government's briefs in *Brown* and the civil rights cases leading up to it were "a call to arms to enlist the Court in . . . safeguarding national security in the Cold War."¹⁸⁸ Although the *Brown* decision itself did not refer to foreign relations, the public diplomacy requirements of the Cold War undoubtedly played a role in the Court's judgment that a half-century of jurisprudence expressed in the separate-but-equal doctrine of *Plessy* was no longer constitutionally tenable.¹⁸⁹ And "[w]ithin an hour of the Chief Justice's announcement of the Court's unanimous conclusion . . . the Voice of America broadcast the news, in 34 languages, around the globe. The U.S.

187. *Id.* at 100–01 (first two alterations in original) (quoting Memorandum for the United States as Amicus Curiae at 7–8, *Brown*, 347 U.S. 483 (Nos. 1, 2, 4, 10)). Justice Ginsburg emphasized the importance of Secretary Acheson's remarks in her speech at Columbia University Law School. Ginsburg, *supra* note 162.

188. DUDZIAK, *supra* note 169, at 104.

189. *Id.*; Ginsburg, *supra* note 162; see BORSTELMANN, *supra* note 165, at 93 ("The Court's logic in *Brown* was at least partly international. . . . The Court's decision did not specifically cite the Cold War or the retreat of colonialism in the rest of the world, but the justices could not help being affected by the dominant political and social realities of their time.").

Information Agency promptly placed articles on *Brown* in almost every African journal."¹⁹⁰

Brown underscores two relevant lessons. First, *Brown* freed the Court to transform American constitutional law, enhancing its self-confidence as a policymaking organ.¹⁹¹ The prestige that accrued to the Court from *Brown* bolstered the Court's willingness to mediate later change from one constitutional order to another. As in *Brown*, the Court in later cases has been prepared to make dramatic constitutional innovations that it considers necessary to enable the United States to address strategic international needs.

Second, *Brown* helped generate the self-consciously "pragmatic" jurisprudence that has encouraged and enabled the Court to undertake constitutional transformations dictated by perceived strategic needs. *Brown* was not altogether well received by legal scholars at the time; indeed, a substantial body of criticism developed, suggesting that the Court had imposed its own values on the political community.¹⁹² But the critique of the Supreme Court's decision in *Brown* and later cases did not have the intended effect; rather, it gave rise to a school of jurisprudence explicitly defending the right and duty of the Supreme Court to make pragmatic judgments concerning preferred social outcomes in constitutional law.¹⁹³ And there things stand.

II. THE CENTRAL TRADITION AND THE POLICE POWER IN AMERICAN CONSTITUTIONAL LAW

Our argument requires us to show that the Court is indeed *reordering* constitutional law, i.e., that its increased willingness to deny that the States may enact and enforce locally prevalent moral norms and values is contrary to its traditional jurisprudence on the subject of the States' police powers. Here we try to substantiate that claim.

190. Ginsburg, *supra* note 162.

191. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (declaring the Court's interpretation of the Constitution to be the supreme law of the land).

192. See, e.g., Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1374 (1990) (observing that in terms of an originalist interpretation of the Constitution, the case was wrongly decided); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 26-27, 33-34 (1959).

193. See, e.g., Posner, *supra* note 192, at 1371 (positing that "the Court's survival and flourishing are indeed more likely to depend on the political acceptability of its results than on its adherence to an esoteric philosophy of interpretation").

Traditionally, the Court's jurisprudence has supported the view that the States may legislate to promote the community's distinctively moral objectives—that is, that the States may legislate within the Central Tradition of political theory. Part II begins with a survey of that earlier jurisprudence. This review encompasses the description and analysis not only of the Court's traditional view of the States' police powers (often defined in opposition to the powers of Congress), but more generally of the States' power to regulate conduct deemed vicious or immoral (often defined by reference to the scope of constitutionally protected individual liberties). Thereafter, Part II shows how the Court's recent decisions represent a striking departure from its earlier (and better established) jurisprudence—a departure that this Article believes is designed to be adaptive to the assumed requirements of globalization and, specifically, to the emergence of a Market State constitution.

OVERVIEW: THE STATES' POWERS OF MORAL APPRECIATION

The States' authority to pursue specifically moral objectives is deeply rooted in the American constitutional tradition. Indeed, it is one of the fundamental features of our federalism.¹⁹⁴ Typically, the legal analysis of this form of State authority is part of the doctrine of the States' "police power," which itself falls under the more general doctrine of the States' "reserved powers."¹⁹⁵ Consequently, our review starts with the Court's delineation of the scope of the States' reserved powers.

The relevant decisions fall into three main categories. First, the police powers are sometimes defined by inference from the Court's jurisprudence regarding the enumerated powers of the federal government, such as Congress's power under the Commerce Clause. Second, they have been defined by reference to the Fourteenth Amendment's Privileges or Immunities Clause. Third, they may be defined in relation to the conceptions of substantive due process.¹⁹⁶

194. For a detailed historical account, see generally Novak, *supra* note 16, providing a detailed historical account of the evolution of the balance of private rights with public values.

195. See, e.g., *L'Hote v. New Orleans*, 177 U.S. 587, 596 (1900) (stating that "the police power was not by the Federal Constitution transferred to the nation, but was reserved to the States").

196. This Article will also briefly discuss certain aspects of the Court's equal protection jurisprudence closely related to the relevant substantive due process conceptions.

A. *The Reserved Powers of the States—The Contours of the Police Power*

In the Court's earliest formulation, the reserved powers of the States were described in sweeping terms. Discussing State inspections in *Gibbons v. Ogden*,¹⁹⁷ Chief Justice John Marshall wrote, "They form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves."¹⁹⁸ Although Marshall's language does not identify the purposes for which the reserved powers may be exercised, the later course of Commerce Clause and Fourteenth Amendment jurisprudence makes clear that the objects of State legislative power included the moral objectives of the community.¹⁹⁹

In *Champion v. Ames*,²⁰⁰ in the course of upholding a federal ban on interstate commerce of lottery tickets, the Court, through the first Justice Harlan, stated,

[T]he suppression of nuisances injurious to public health or morality is among the most important duties of Government

If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another?

. . . .

. . . As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another.²⁰¹

197. 22 U.S. (9 Wheat.) 1 (1824).

198. *Id.* at 203.

199. See, e.g., *Phalen v. Virginia*, 49 U.S. (8 How.) 163, 168 (1850) (justifying a State law prohibiting lotteries—even though recognizing that this law interfered with some individuals' rights to contract—because the State's duty to suppress moral nuisances was paramount).

200. 188 U.S. 321 (1903).

201. *Id.* at 356–57.

In dissent, Justice Fuller agreed with the premise of Justice Harlan's argument, that the States themselves retained the power to abolish lotteries for essentially moral reasons.²⁰² Indeed, he went further, arguing that the States' power to permit or prohibit lotteries was *exclusive*: "[T]hat power belongs to the States and not to Congress. To hold that Congress has general police power would be to hold that it may accomplish objects not entrusted to the General Government, and to defeat the operation of the Tenth Amendment."²⁰³

A decade later, in sustaining the Mann Act's attack on so-called "white slavery,"²⁰⁴ or prostitution, the Court reaffirmed the power of the federal government to regulate interstate commerce, even if its purpose in so doing was explicitly moral.²⁰⁵ Justice McKenna, writing for a unanimous Court, stated,

[I]f the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls.²⁰⁶

In *Hammer v. Dagenhart*,²⁰⁷ the Court, while rejecting the extension of this line of cases to a congressional act banning the products of child labor from interstate commerce, reasoned that production employing child labor was itself a "purely local matter," beyond the competence of Congress—not that such a matter was beyond the competence of government at *any* level.²⁰⁸ Further, Justice Holmes, in a dissent that a generation later would form the basis for the overruling of *Dagenhart*,²⁰⁹ insisted that established precedent had made it clear that political branches were free to legislate on the basis of either the moral values or the prudential judgments of the community. Holmes explained that

the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and

202. *Id.* at 364–65 (Fuller, J., dissenting).

203. *Id.* at 365.

204. *Hoke v. United States*, 227 U.S. 308, 317 (1913).

205. *Id.* at 322.

206. *Id.*

207. 247 U.S. 251 (1918), *overruled in part by* *United States v. Darby*, 312 U.S. 100, 115–17 (1941).

208. *Id.* at 276.

209. *See Darby*, 312 U.S. at 115–16 (describing Holmes's dissent in *Dagenhart* as "powerful and now classic").

that this Court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible as against strong drink but not as against the product of ruined lives.²¹⁰

Holmes's analysis presupposes that even the federal government (and undoubtedly also the States) could legitimately act for moral purposes—purposes that could not be reduced merely to questions of policy but that must rely, instead, on community moral values.²¹¹

Holmes's view of the scope of the police power became common currency. Within a generation, the Court could treat it as unproblematic that even the national legislature “is free to exclude from [interstate] commerce articles whose use in the states . . . it may conceive to be injurious to the public health, morals or welfare.”²¹² There was thus, by the early 1940s, an agreed understanding as to the existence of both a national and a local police power that embraced the moral judgments of the relevant political community. Relying on that understanding, the Court, in *Heart of Atlanta Motel, Inc. v. United States*,²¹³ could subsequently determine that Congress was entitled to give effect to the national community's sense of justice in enacting civil rights legislation: “That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing . . . [the Civil Rights] Act Congress was also dealing with what it considered a moral problem.”²¹⁴

The States' power of appreciating and relying on the moral values of the community has also played a role in the Court's reformulated understanding of the limits of congressional power under the Commerce Clause. In *United States v. Lopez*,²¹⁵ the Court refused to rely on the so-called “cumulative effects” principle, which by aggregating the effects of local economic activity purports to justify a challenged exercise of Congress's power to regulate “interstate commerce.”²¹⁶ The Court

210. *Dagenhart*, 247 U.S. at 280 (Holmes, J., dissenting).

211. *See id.* at 277–78 (framing the issue of the case completely without regard to the moral purposes of the statute and focusing only on the control of production methods and excluding the purpose of a statute from judicial consideration of Congress's power to enact it).

212. *Darby*, 312 U.S. at 114.

213. 379 U.S. 241 (1964).

214. *Id.* at 257.

215. 514 U.S. 549 (1995).

216. *Id.* at 556–59 (concluding that the appropriate test is “whether the regulated

characterized the regulation of hand gun possession in school zones as a *noneconomic* question and, therefore, not within the federal regulatory power under the Commerce Clause.²¹⁷ And in *United States v. Morrison*,²¹⁸ the Court invalidated a portion of the Violence Against Women Act, which created a civil cause of action against gender-motivated crime.²¹⁹ In finding that the Commerce Clause did not provide Congress the power to criminalize the behaviors in question, the Court did not consider violence an economic activity²²⁰ and was unwilling to permit regulation of a noneconomic activity based on an “aggregate effect on interstate commerce.”²²¹ The *Morrison* Court reasoned that gender-motivated violence fell within certain core areas that had been traditionally subject to State rather than federal regulation.²²² Activities in these quintessentially moral categories—“marriage, divorce, and childrearing”—might well have cumulative economic impacts on interstate commerce, but to regulate them at the federal level would eviscerate the distinction between “what is truly national and what is truly local.”²²³ The regulation of the activities falling into these categories was thus, in the Court’s view, inherently a State power. In light of these cases, the States’ police powers may undoubtedly be exercised on policy or moral grounds, subject to the limits imposed by constitutional protections of individual rights.

B. *The Police Powers and the Fourteenth Amendment’s Privileges or Immunities Clause*

The States’ traditional police powers, including the regulation of morality, have also been delineated and upheld in the Court’s Privileges or Immunities Clause jurisprudence of the nineteenth century. Under this rubric, we shall discuss *Mugler v. Kansas*,²²⁴ a case in which the Court upheld a State’s power to enact criminal restrictions on the manufacture and sale of alcohol.²²⁵

activity ‘substantially affects’ interstate commerce”).

217. *Id.* at 560–61.

218. 529 U.S. 598 (2000).

219. *Id.* at 601–02, 605.

220. *Id.* at 613.

221. *Id.* at 617.

222. *Id.* at 615–16, 618.

223. *Id.* at 615–18.

224. 123 U.S. 623 (1887).

225. *Id.* at 657, 662–63.

In reaching its result, the Court rejected the defendant's libertarian argument²²⁶ (which is paraphrased in the synopsis to the reprint of the case in West's Supreme Court Reporter) that the State had "no power to prohibit any citizen to manufacture for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others. . . . [U]nder our form of government, the state does not attempt to control the citizen except as to his conduct to others."²²⁷

Speaking through Justice Harlan, the Court found that "the decisions of this court, rendered before and since the adoption of the Fourteenth Amendment," had made clear that the States' police power extended to statutory regulations designed to protect or promote morality.²²⁸

To make that demonstration, Justice Harlan quoted extensively from the opinions of the Justices in the *License Cases*.²²⁹ Thus, he quoted Justice McLean, who had written there that "[a] State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare,"²³⁰ and Justice Grier, who had stated that "[w]ithout attempting to define what are the peculiar subjects or limits of this [police] power, it may safely be affirmed, that every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals must come within this category."²³¹ Harlan also quoted statements in *Beer Co. v. Massachusetts*:²³² "[A]s a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States."²³³ He cited *Foster v. Kansas*²³⁴ for the proposition that States constitutionally

226. It is interesting to note that the brief for appellant includes a citation to John Stuart Mill's "On Liberty," perhaps the greatest and most influential defense of libertarianism ever written. *Id.* at 632.

227. *Mugler v. Kansas*, 8 S. Ct. 273, 288 (1887) (writing in concise form the arguments of appellant, which appear in their entirety in volume 123 of the *U.S. Reports* at 628 to 637 under the heading "Mr. Vest's Argument for Mugler").

228. *Mugler*, 123 U.S. at 657.

229. 46 U.S. (5 How.) 504 (1847).

230. *Mugler*, 123 U.S. at 658 (quoting *The License Cases*, 46 U.S. (5 How.) at 588 (McLean, J.)).

231. *Id.* (quoting *The License Cases*, 46 U.S. (5 How.) at 631 (Grier, J., concurring)).

232. 97 U.S. 25 (1877).

233. *Mugler*, 123 U.S. at 659 (quoting *Beer*, 97 U.S. at 33).

234. 112 U.S. 201 (1884).

have the power to regulate liquor.²³⁵ Harlan concluded that “[t]hese cases rest upon the acknowledged right of the States . . . to protect the health, morals, and safety of their people.”²³⁶ Fortified by these precedents, Justice Harlan then turned to the appellant’s Millian argument and robustly rejected it:

Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.²³⁷

C. *Moral Regulation and Substantive Due Process Doctrine*

Just as the States’ right to assert moral grounds as a basis for legislation under its reserved powers is revealed by negative inference from the Court’s jurisprudence concerning the scope of enumerated federal powers, so too is that right revealed inferentially by the Court’s substantive due process case law. The cases are of interest here in two ways. First, in holding that certain “liberties” are protected against State regulation aimed at a moral objective, the Court has indicated that other, perhaps

235. *Mugler*, 123 U.S. at 659.

236. *Id.*

237. *Id.* at 660–61. Other courts of about this period were more sympathetic to the claim that the Constitution effectively embodied and protected a Millian conception of liberty. Thus, in *Commonwealth v. Campbell*, 117 S.W. 383, 386–87 (Ky. 1909), the court, in voiding a municipal ordinance that forbade the bringing of liquor into a county, interweaving a long discussion of Mill with the racism characteristic of its time, concluded:

Under our institutions there is no room for that inquisitorial and protective spirit which seeks to regulate the conduct of men in matters in themselves indifferent, and to make them conform to a standard, not of their own choosing, but the choosing of the lawgiver; that inquisitorial and protective spirit which seeks to prescribe what a man shall eat and wear, or drink or think, thus crushing out individuality and insuring Chinese inertia by the enforcement of the use of the Chinese shoe in the matter of the private conduct of mankind.

Id.; see also HOWARD MUMFORD JONES, *THE PURSUIT OF HAPPINESS* 48–49 (1953) (describing the moral justifications for exercises of the police power as part of society’s pursuit of happiness and discussing Mr. Campbell’s challenge of the State’s alcohol prohibition as his personal pursuit of happiness, which the Court indulged).

related, areas of individual conduct are subject to State regulation on that basis.²³⁸ Second and more subtly, in identifying and characterizing the kinds of conduct that are constitutionally protected “liberties” not subject to State moral regulation, the Court has impliedly assumed certain conceptions of “morality.”²³⁹

The Court’s substantive due process jurisprudence has undergone at least two distinct phases—an earlier phase in which its understanding of morality is rooted in the experience and values of the community, and a second phase in which the Court abandoned a communitarian conception of moral reasoning and replaced it with libertarian or individualistic ideals.²⁴⁰ The first phase did nothing to impair the notion of the States’ police powers that we have examined above; indeed, the cases in this group directly or by implication affirm the States’ police power to adopt and enforce traditional community moral standards.²⁴¹ The second phase, however, marks the steady contraction of the States’ police power to uphold moral traditions, and, relatedly, the displacement in the Court’s thinking of one conception of “morality” by another.²⁴²

The earlier phase of the Court’s substantive due process precedents recognized a special place for historically accepted associations and relationships, including marriage and the family, as the basis for identifying liberty interests protected under the Due Process Clause. In *Meyer v. Nebraska*,²⁴³ for instance, the Court reversed the conviction of a teacher for teaching German in violation of a State law prohibiting the teaching of foreign languages to young children.²⁴⁴ Justice McReynolds’s opinion held that, although the State might have been able to defend its policy of “foster[ing] a homogeneous people with American ideals” in the immediate wake of World

238. See, e.g., *Phalen v. Virginia*, 49 U.S. (8 How.) 163, 168 (1850) (justifying a State law prohibiting lotteries—even while recognizing that this law interfered with an individual’s right to contract—because the State’s duty to suppress moral nuisances was paramount).

239. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (invalidating a criminal law preventing married couples from obtaining birth-control devices on the ground that the law invaded a marital “zone of privacy” protected by the Constitution, but suggesting that less invasive laws to achieve the same purpose would be upheld).

240. Although the Court’s substantive due process decisions have often been criticized for being extra-textual, scholars have noted that “[t]hrough one device or another, the Court has always managed to read into the Constitution limits on legislative power that can hardly be gathered from within that document’s four corners.” Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 742 (1989).

241. See *supra* Part II.A–B.

242. See *infra* Part III.

243. 262 U.S. 390 (1923).

244. *Id.* at 396–97, 399, 403.

War I,²⁴⁵ the statute conflicted “with the power of parents to control the education of their own.”²⁴⁶ The Court specifically affirmed that “the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally . . . but the individual has certain fundamental rights which must be respected.”²⁴⁷ Further, the area of liberty protected against State regulation, though not “define[d] with exactness,” was at least roughly coextensive with “those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”²⁴⁸ In short, the legal and cultural tradition embodied in the common law—which marked out, in the marital union and the family, social spaces largely immune from governmental intrusion—set limits to State power.

Shortly thereafter, *Pierce v. Society of Sisters*²⁴⁹ struck down a State statute requiring children to attend public (rather than parochial) schools.²⁵⁰ Justice McReynolds again located parental rights in a broader communitarian context, for “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”²⁵¹

Strikingly, even the Court’s later contraception jurisprudence made clear that the Court identified the substantive personal “liberties” protected by the Due Process Clause through reference to the dominant, traditional moral practices and views of the American people. Thus, when the second Justice Harlan’s influential concurrence in *Griswold v. Connecticut*²⁵² invoked the methodology of “ordered liberty” to analyze the State’s criminalization of the provision of contraceptive services to married couples, it emphasized the social context in which the case arose.²⁵³ Relying on his earlier dissent in *Poe v. Ullman*,²⁵⁴ Justice Harlan articulated a vision of the Court’s role in assessing the moral judgments of the State.²⁵⁵ In this view, the Court seeks to balance the legislative power of

245. *Id.* at 402.

246. *Id.* at 401.

247. *Id.* (emphasis added).

248. *Id.* at 399 (emphasis added).

249. 268 U.S. 510 (1925).

250. *Id.* at 530, 534–36.

251. *Id.* at 535.

252. 381 U.S. 479, 499–502 (1965) (Harlan, J., concurring).

253. *Id.* at 500–01.

254. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

255. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring).

the State against the protected liberty of the individual, using the *community's* judgment on morality.²⁵⁶ Harlan's remarks in *Poe* deserve to be quoted at length:

It is argued by appellant that the judgment, implicit in this statute—that the use of contraceptives by married couples is immoral—is an irrational one, that in effect it subjects them in a very important matter to the arbitrary whim of the legislature, and that it does so for no good purpose.

Yet the very inclusion of the category of morality among state concerns indicates 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. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, 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.

It is in this area of sexual morality, which contains many proscriptions of consensual behavior having little or no direct impact on others, that the State of Connecticut has expressed its moral judgment that all use of contraceptives is improper. . . . Certainly, Connecticut's judgment is no more demonstrably correct or incorrect than are the varieties of judgment, expressed in law, on marriage and divorce, on adult consensual homosexuality, abortion, and sterilization, or euthanasia and suicide. If we had a case before us which required us to decide simply, and in abstraction, whether the moral judgment implicit in the application of the present statute to married couples was a sound one, the very controversial nature of these questions would, I think, require us to hesitate long before concluding

256. *Id.* at 501; *Poe*, 367 U.S. at 542 (Harlan, J., dissenting) ("The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.")

that the Constitution precluded Connecticut from choosing as it has among these various views.

But . . . we are not presented simply with this moral judgment to be passed on as an abstract proposition.²⁵⁷

Harlan did *not* find the statute unconstitutional because of its ends—because it was designed to regulate consensual private conduct in furtherance of the State’s moral ideals.²⁵⁸ Rather, he objected to *the means* that the State had chosen—the machinery of the criminal law, brought to bear on the marital union.²⁵⁹ This he considered an excessive intrusion on marital intimacy within the privacy of the home. The State had entered into what “by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of ‘liberty,’ the privacy of the home in its most basic sense.”²⁶⁰

A close reading of the other opinions in *Griswold* reveals that other Justices shared Harlan’s emphasis on the need to locate the balance between State interests and individual rights in the context of the historic practices of the community.²⁶¹ Justice Goldberg’s concurrence, though nominally grounded in the Ninth Amendment, shared Harlan’s view on the need to locate fundamental rights in the historic practices recognized by the people as a core part of its ethos.²⁶² Similarly, while Justice Douglas’s majority opinion identified the right to “privacy” as an independent source for constitutional analysis, he too emphasized the “sacred” character of the historic institution of marriage as the context for the exercise of the privacy right he found in the Fourteenth Amendment.²⁶³

257. *Poe*, 361 U.S. at 545–47 (Harlan, J., dissenting).

258. *Id.* at 547–48.

259. *Id.*

260. *Id.* at 548.

261. See *Griswold*, 381 U.S. at 505–07 (White, J., concurring) (discussing Connecticut’s asserted interests in sustaining the ban on contraceptives and finding “nothing in [the] record [to] justify[] the sweeping scope of [the] statute”); see *infra* note 262 (providing Justice Goldberg’s concurrence).

262. *Griswold*, 381 U.S. at 493, 495 (Goldberg, J., concurring) (“In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the ‘traditions and [collective] conscience of our people’ to determine whether a principle is ‘so rooted [there] as to be ranked as fundamental’ . . . The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.”).

263. *Id.* at 485–86 (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with a right of privacy older than the Bill of Rights . . . Marriage is a coming together for better or for

While setting limits to the States' powers to legislate for moral reasons, these substantive due process cases nonetheless affirmed the relevance and legitimacy of moral traditions in determining the scope of individual "liberties" protected by the Fourteenth Amendment's Due Process Clause.²⁶⁴ The limits to the States' regulatory powers were *derived from* traditional morality; only when a State's regulation threatened to *encroach on and injure* an established institution or practice like marriage or the family was it found to have improperly negated "liberty." Moreover, claims to protected "liberties" were evaluated against the background of traditional norms and understandings; "liberty" was not the freedom to engage in radical, innovative, and counter-cultural experiments in living. Traditional associations like marriage or the family created zones of privacy that were to be free of criminal regulation and surveillance by the States, because State action there was deemed to *threaten* the flourishing of a commonly held morality, not to sustain and uphold it.²⁶⁵ By necessary consequence, if the States *did* act to the end of promoting virtue *without* trespassing into the zones marked off from regulation, their regulatory activity—as Justice Harlan clearly implied in *Griswold*—would presumptively *survive* constitutional review.²⁶⁶

This historically rooted approach to identifying protected liberty interests, rather than positing a generalized right to privacy, was followed as recently as seven years ago in *Washington v. Glucksberg*.²⁶⁷ In *Glucksberg*, the Court rejected a substantive due process challenge to State legislation generally prohibiting physician-assisted suicide.²⁶⁸ The Court began as it does "in all due process cases, by examining our Nation's history, legal traditions, and practices."²⁶⁹ It found that State assisted-

worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.").

264. See *supra* text accompanying notes 243–248 (quoting *Meyer v. Nebraska*, 262 U.S. 390 (1923) and noting that the State has great liberty to improve the morals of its citizens).

265. See *Griswold*, 381 U.S. at 485 (predicting that the Connecticut contraceptive law would have "maximum destructive impact upon [the marital] relationship" (emphasis added)).

266. See *id.* at 500 (Harlan, J., concurring) (stating that the standard for substantive due process cases should be whether a statute "violates basic values 'implicit in the concept of ordered liberty,'" thereby leaving the States free to regulate, substantially as they pleased, any areas not covered by this pronouncement).

267. 521 U.S. 702 (1997).

268. *Id.* at 735.

269. *Id.* at 710.

suicide bans, far from being “innovations,” were “longstanding expressions of the States’ commitment to the protection and preservation of all human life.”²⁷⁰ Indeed, the Court observed, “for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.”²⁷¹ Even though “the States’ assisted-suicide bans have in recent years been reexamined,” they have been “generally, reaffirmed.”²⁷² In summary, the Court found that although “[a]ttitudes toward suicide itself have changed since Bracton, . . . our laws have consistently condemned, and continue to prohibit, assisting suicide.”²⁷³ Turning then from the States’ legal traditions and practices to the “liberties” of the individual, the Court affirmed, over objection from Justice Souter, the “restrained methodology” of its usual substantive due process jurisprudence.²⁷⁴ On that approach, “the outlines of the ‘liberty’ specially protected by the Fourteenth Amendment . . . [must be] carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition.”²⁷⁵ Only if the “challenged state action implicated a fundamental right,” would its defense require a showing of more than a “reasonable relation to a legitimate state interest.”²⁷⁶ The asserted right to die—including the “right’ to assistance in committing suicide”—was not, however, constitutionally “fundamental.”²⁷⁷ Far from being rooted in the Nation’s history and practices, it stood against “a consistent and almost universal tradition” of lawmaking.²⁷⁸

Moreover, the Court rejected the challengers’ appeal to a purported “general tradition of ‘self-sovereignty’” found embodied in “the broad, individualistic principles” of the Court’s recent “liberty jurisprudence.”²⁷⁹ Rather than accepting the invitation to place its liberty jurisprudence on a radically individualistic and libertarian foundation, the Court sought to rein in the broad implications of its reasoning in *Casey*, insisting (more than a little disingenuously) that *Casey*’s affirmation of the right to abortion announced in *Roe* merely concerned one of “those

270. *Id.*

271. *Id.* at 711.

272. *Id.* at 716.

273. *Id.* at 719.

274. *Id.* at 721–22.

275. *Id.* at 722.

276. *Id.*

277. *Id.* at 728.

278. *Id.* at 723.

279. *Id.* at 724, 728.

personal activities and decisions that this Court has identified as . . . deeply rooted in our history and traditions, or [as] fundamental to our concept of constitutionally ordered liberty.²⁸⁰ “That 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”²⁸¹

The controlling standard of review in *Glucksberg*, therefore, was merely whether the challenged statute had a rational relationship to legitimate State interests.²⁸² In identifying those interests, the Court clearly accepted that the State could legitimately act to advance a “symbolic and aspirational as well as practical” interest in the preservation of human life.²⁸³ In particular, the State could legitimately “decline to make judgments about the “quality” of life.”²⁸⁴ For example, the State could use the criminal law for the moral and educative purpose of affirming the value of *all* human life, including that of the terminally ill.

Even if *Glucksberg* now seems plainly out of alignment with the Court’s latter-day substantive due process case law,²⁸⁵ it stands as a recent affirmation of the States’ power to legislate, protect, and uphold a moral tradition, even in the face of the claim that that tradition restricts the radical autonomy of individuals to decide the fates of their own bodies. In the broader historical perspective, it is the cases discussed below in Part III, rather than *Glucksberg*, that seem to be aberrational. *Glucksberg* preserves the Central Tradition’s view of the States as moral

280. *Id.* at 726–27.

281. *Id.* at 727. In the equal protection companion case to *Glucksberg*, the Court also relied on common law and custom to distinguish between a decision to refuse life-sustaining treatment and an assisted suicide. *See* *Vacco v. Quill*, 521 U.S. 793, 807–08 (1997) (noting the “well-established, traditional rights to bodily integrity and freedom from unwanted touching” that form the basis of the right to refuse treatment). Justice Stevens noted in his concurrence in *Glucksberg* that the majority left open “the possibility that some applications of the New York statute may impose an intolerable intrusion on the patient’s freedom.” *Glucksberg*, 521 U.S. at 751–52 (Stevens, J., concurring). Agreeing with Justice Stevens’s assertion, Chief Justice Rehnquist, in *Vacco*, held open the possibility of as-applied challenges, but on a severely limited basis. *See* *Vacco*, 521 U.S. at 809 n.13.

282. *Glucksberg*, 521 U.S. at 728.

283. *Id.* at 728–29.

284. *Id.* at 729–30 (quoting *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 282 (1990)).

285. It did not seem so to some legal scholars at the time. *See, e.g.*, Michael W. McConnell, *The Right To Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 669–72 (finding the reasoning of the Court to be in line with earlier cases).

communities, empowered to legislate so as to enforce the common ethos of their people.

III. THE NEW LIBERTARIAN COURT

With the notable exception of *Glucksberg*, the Court's individual rights jurisprudence has moved away in recent years from recognizing the beliefs and practices of the community as sources of normativity and value and as a legitimate basis for legislation. Instead the Court, retracing the arguments of the nineteenth century, seems inclined now to take the path that it had earlier rejected, and to constitutionalize much of John Stuart Mill's libertarianism.

This Part will identify two crucial shifts in the Court's understanding of the nature of individual rights, leading its jurisprudence to a radical rejection of history and experience as a source of moral value. The first involves a reduction in the power of the State to base its decisions on the moral values of the community, as evidenced in its traditions. The second involves an increased deference by the Court, not to the political branches, but rather to elite institutions and decisionmakers. The first limb of the argument involves an examination of the Court's decision in the sodomy case, *Lawrence v. Texas*,²⁸⁶ the second limb involves not only *Lawrence* but also the Court's affirmative action decisions in *Grutter v. Bollinger*²⁸⁷ and *Gratz v. Bollinger*.²⁸⁸

A. *Silencing the States on Questions of Morality*

The Court's reasoning in *Lawrence*, rejecting the community or traditional view of morality as a basis for legislation,²⁸⁹ follows directly from libertarian principles articulated in its other recent precedents. It is no less revolutionary for that. The master premise in all these libertarian decisions is the view that how one finds meaning in the universe is, in considerable part, bound up with the role of joy and suffering, pain and pleasure in one's own life.²⁹⁰ The individual is to determine his or her conception of

286. 123 S. Ct. 2472 (2003).

287. 123 S. Ct. 2325 (2003).

288. 123 S. Ct. 2411 (2003).

289. 123 S. Ct. at 2383–84.

290. This assumption may derive from the existential philosophy that informed the thinking of the generation that followed the exposure of the Nazi concentration camps. See, e.g., VIKTOR E. FRANKL, *MAN'S SEARCH FOR MEANING: AN INTRODUCTION TO LOGOTHERAPY* 178, 183 (Wash. Square Press ed., 1968) (1959) (arguing that the key to emotional and spiritual well-being is one's interior attitude towards suffering, even in the face of concentration camp torture). More generally, the Court's master premise in these

meaning, and it is therefore for him or her alone to decide what attitude to adopt towards, and what meaning to confer on, the pain, deprivation and suffering that are necessarily incident to that individual's life. The State, as a moral community, therefore cannot impose on individuals a *collective* or *social* conception of the significance of pain, or require unwilling individuals to undergo a deprivation that they would consider meaningless and without value.²⁹¹

Thus, the joint opinion in *Casey*, arguing in support of the conclusion that a woman's decision to terminate a pregnancy is a protected liberty, focuses on the place of unwanted pain in the woman's conception of a meaningful life:

Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.²⁹²

And again,

[R]easonable people will have differences of opinion about [abortion]. One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to

individual liberty cases tracks changes in the general culture that have been at work since the 1950s. "[T]he 'pursuit of (individual) happiness' took on a new meaning in the postwar period," so that it was no longer "inscribed within certain taken-for-granted boundaries" set originally by "the citizen ethic, centered on the good of self-rule," as well as by "certain basic demands of sexual morality . . . [and] the values of hard work and productivity, which gave a framework to the pursuit of individual good." CHARLES TAYLOR, *VARIETIES OF RELIGION TODAY: WILLIAM JAMES REVISITED* 90–91 (2002); see also CHARLES GUIGNON, *ON BEING AUTHENTIC* 46 (2004) (noting the long-term secular "transformations that [have] occur[red] in the concept of happiness . . . from the eighteenth-century ideal of serene contentment in the bosom of one's family to the twentieth-century notion of happiness as a pleasurable feeling . . . no matter what the cause of that feeling might be"). However one evaluates these cultural transformations, it is not clear why they should serve to provide the ruling principle in constitutional analysis.

291. For a probing critique of the view that the States may not interfere with the activity of personal self-definition and an explanation of the conceptual linkage between that view and Millian libertarianism, see Rubinfeld, *supra* note 240, at 754–61 (analyzing the "personhood" or "self-definition" basis for the constitutional right to privacy and arguing that the privacy right cannot be based on the Millian notion of restricting personal liberty only when one's actions infringe on the liberty of others because controversial personal actions always have some effect on society at large).

292. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992).

the parent. These are intimate views with infinite variations. . . .

It was this dimension of personal liberty that *Roe* sought to protect. . . .²⁹³

The liberty *Casey* protects is thus the freedom to reject the “anxieties,” “physical constraints,” and “pain” incident to pregnancy, and to a lesser extent the “cruelty to the child” and “anguish to the parent” that could result from being forced to bear a child.²⁹⁴ The logic of the *Casey* joint opinion leads inexorably to Justice O’Connor’s *Glucksberg* concurrence, in which she reserved the question of whether there might be a constitutional right to avoid pain at the time of death through physician assisted suicide.²⁹⁵ Seen in this light, *Casey*, like *Roe*, appears to embody “a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.”²⁹⁶

Lawrence flows readily from *Casey*. If the freedom of the individual to frame a conception of meaning shields from State regulation his or her decisions to avoid “meaningless” pain, anguish, or deprivation, it should equally protect the individual’s pursuit of those pleasures that he or she finds to be the constituent elements of a meaningful life. In other words, if the right to decide whether or not to accept meaningless pain is a liberty interest worthy of constitutional protection, surely the right to receive or give pleasure is equally a part of protected individual liberty. Certainly, sexual activity—whether narrowly understood as a mere physical act, or more broadly taken as an intimate association with another human being—is the most intense form of pleasure within the common experience of most persons. As such, sexual activity will form a central element in most individuals’ conceptions of meaning and value. Surely, then, “the right to define one’s own concept . . . of meaning,” as enunciated in the joint opinion in *Casey*, must include the right to decide to engage in activities that produce sexual pleasure.²⁹⁷

293. *Id.* at 853.

294. *Id.* at 852–53.

295. See *Washington v. Glucksberg*, 521 U.S. 702, 736 (1997) (O’Connor, J., concurring).

296. *Casey*, 505 U.S. at 857.

297. *Id.* at 851. For a critique of the idea that “homosexual identity” is essential to the self-identity of those who practice homosexual acts, see Rubinfeld, *supra* note 240, at 779–80. Standing views like Justice Kennedy’s on their head, Rubinfeld argues that

[I]n the very concept of a homosexual identity there is something potentially

Lawrence makes clear that “the right to define one’s own concept . . . of meaning” is so central an individual right that it is now outside the ken of social construction and, therefore, of State regulatory power.²⁹⁸ Justice Kennedy, writing for the *Lawrence* Court, stated baldly that, for purposes of substantive due process analysis, “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”²⁹⁹ Driving the point home, Justice Kennedy also cited Justice Stevens’s sweeping view, in his dissent in *Bowers v. Hardwick*, that “the 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.”³⁰⁰ Justice O’Connor, concurring in the judgment, asserted that, for purposes of an equal protection analysis of the distinction the State drew between heterosexual and homosexual sodomy, “[m]oral disapproval of this [homosexual] group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”³⁰¹ Drawing on the (implicit) reasoning underlying Justice Kennedy’s opinion for the Court in *Romer v. Evans*,³⁰² Justice O’Connor went on to say that “we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.”³⁰³ Thus, both Justice Kennedy’s opinion for the Court on substantive due process grounds and Justice O’Connor’s concurrence on equal protection grounds share the premise that enforcement of the moral values of the community cannot extend

disserving—if not disrespectful—to the cause advocated.

. . . .
 . . . [T]he idea of a “homosexual identity” has its origin in precisely the kind of invidious classification described earlier. Homosexuality is first understood as a central, definitive element of a person’s identity only from the viewpoint of its “deviancy.”

Id.

298. *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) (quoting *Casey*, 505 U.S. at 851).

299. *Id.* at 2484.

300. *Id.* at 2483 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

301. *Id.* at 2486 (O’Connor, J., concurring) (citing *Romer v. Evans*, 517 U.S. 620, 634–35 (1996)). Justice O’Connor’s notion that the Texas legislation is caste-based rather than act-based is flatly mistaken. The statute condemned a specific homosexual *act*, not the “group” of homosexuals as such. The State’s effort to introduce a degree of accuracy into Justice O’Connor’s analysis was unavailing. *Id.* at 2486–87.

302. 517 U.S. at 635–36.

303. *Lawrence*, 123 S. Ct. at 2486 (O’Connor, J., concurring).

to regulating the individual's pursuit of certain forms of pleasure or the avoidance of certain forms of pain. These activities are now matters that constitutional law has reassigned from the political community's authority to unfettered individual self-determination. Defining meaning is now, constitutionally, a solitary act, not a project to be undertaken through public reflection and collective choice.

The Court's decision in *Lawrence*, as indeed in *Casey*, is not (or not only) a shift in the locus of decisionmaking authority from the community to the individual. It is more revealing to say that it bleeds power out of the political order so as to serve the economic. In the categories we have been using, it represents a decisive move in restructuring the Constitution to fit the demands of an emerging Market State.

First, *Lawrence* furthers the deconstruction of the States as moral communities, capable of legislating in ways that might inhibit the functioning of markets for the sake of higher-order collective values. More specifically, *Lawrence* diminishes the States' ability to use criminal law to serve expressive and educative purposes, tending therefore to restrict criminal law to purely instrumental uses. Justice O'Connor's concurrence in particular goes so far as to imply that a communally deliberated judgment on moral worth, as codified in the criminal law, cannot be distinguished from "a bare desire to harm" the group whose activities the law condemns. The possibility of achieving and enforcing a collective moral judgment through the criminal law is thus collapsed into the expression of crude majoritarian repugnance or distaste. As Justice Scalia provocatively put it in his *Romer* dissent, "[t]he Court has mistaken a Kulturkampf for a fit of spite."³⁰⁴

Second, *Lawrence* promotes the "mainstreaming" of homosexuals, a group that in the past has suffered from private discrimination in the marketplace,³⁰⁵ but that may now be perceived to bring certain competitive advantages to it. Homosexual employees may, for example, be able or willing to work longer hours than married heterosexuals with families; may be more open to relocating as corporate needs require; may not be as likely to sacrifice career goals to child-bearing or child-

304. 517 U.S. at 636 (Scalia, J., dissenting); see *supra* note 76.

305. See *Lawrence*, 123 S. Ct. at 2482 (reasoning that the criminalization of homosexual conduct "is an invitation . . . to discrimination both in the public and in the private spheres"); see also *id.* at 2485-86 (O'Connor, J., concurring) (contending that the effect of the sodomy law is to "brand[] all homosexuals as criminals, thereby making it more difficult for [them] to be treated in the same manner as everyone else").

rearing; may require a lower level of health care benefits (because of fewer partners or dependents); may be drawn to employment opportunities in more dynamic or “creative” parts of the economy, such as technology or entertainment; or may find more welcoming employers in those cutting edge sectors.³⁰⁶ *Casey* hinted at similar market-linked arguments for the permissive-abortion régime instituted by *Roe*:

[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.³⁰⁷

While characterizing its jurisprudence in the rhetoric of freedom and equality, the Court in fact casts a cold eye on the consequences of its decisions for the market economy.

Third, *Lawrence* helps to constitute the legal framework for a system in which individuals do not seek and find meaning, value, and satisfaction in collective political action or in the public affirmation of common identities and purposes, but find their rewards instead in purely private, nonpolitical pleasures and gratifications. *Lawrence* thus marks a further step in the direction of the overall depoliticization of society, and the consequent devaluation of the citizenship—fundamental characteristics of the Nation State.³⁰⁸

306. All of these possibilities are conjectural. Nonetheless, there is a common, perhaps prevalent, perception that homosexuals constitute a particularly affluent, well-educated, and technologically-friendly demographic. See, e.g., Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 408–09 (1994) (gathering empirical data to support findings of homosexual affluence); Vilma Barr, *Coming Out to Shop: Gay and Lesbian Consumers Are a New Driving Force in the Marketplace*, DISPLAY & DESIGN IDEAS, Nov. 1, 2004, available at 2004 WLNR 16779297 (reporting that 27% of same-sex households have an annual income of \$100,000 or more; that 37% of homosexuals are college graduates and that 19% have postgraduate degrees; that the average same-sex household annual income of \$61,000 is 8% higher than the average heterosexual annual household income of \$56,000; that over 50% of homosexuals own their own homes; and that 31% have Internet broadband connections at home). Same-sex households are also disproportionately found in economically dynamic urban settings throughout the country, including San Francisco, Seattle, Berkeley, Atlanta, and Washington, D.C. Barr, *supra*; see also RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY, AND EVERYDAY LIFE* 255–58 (2002) (finding high concentrations of homosexuals in high-tech areas).

307. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

308. On the causes and effects of depoliticization, see CARL BOGGS, *THE END OF POLITICS: CORPORATE POWER AND THE DECLINE OF THE PUBLIC SPHERE* 25, 30 (2000)

The future trajectory of the *Lawrence* opinion is of course unforeseeable, but we think that there is no defensible basis to limit its holding to criminal laws condemning homosexual sodomy. Although *Lawrence* speaks (on occasion) of the special constitutional place of the home, an individual may well have a constitutionally protected legitimate expectation of sexual privacy in many other locations.³⁰⁹ Moreover, although the *Lawrence* Court refers to intimate personal relationships,³¹⁰ there is no intelligible basis for limiting the holding to acts that occur within durable and longstanding homosexual relationships, as opposed to casual or anonymous acts of sodomy. Indeed, the rationale of *Lawrence* arguably extends to all modes of sexual pleasure, including those involving relations with animals or any genetically-created beings the *Blade Runner*³¹¹ world of biotechnology may yet fashion for human use and gratification. The capacity to decide questions of meaning and value on the basis of one's personal pain or pleasure knows no principled bounds, for a constitutional libertarian, until another (constitutional) person is "harmed."

The values of such an extreme libertarianism are, of course, unrooted in the history and traditions of the Nation, and are furthermore at odds with the Court's own traditional understanding of American federalism. They are, therefore, highly problematic to justify in terms of original understanding, constitutional text or structure, or judicial precedent. In trying to sustain its innovations, the Court reasons in a characteristically

(asserting that paltry public participation in government, as evidenced by low voter turnout, points to a more general depoliticization and devaluation of the individual citizen in the eyes of the governing élite).

309. Thus, at one place, Justice Kennedy states that the laws at issue in *Lawrence* and in *Bowers* "have more far-reaching consequences [than prohibiting a particular act], touching upon the most private of human conduct, sexual behavior, and in the most private of places, the home." *Lawrence*, 123 S. Ct. at 2478. Earlier in the opinion, however, he had recognized that "there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence." *Id.* at 2475. Logically, nothing in the opinion restricts it either to sodomy practiced in the home or to sodomy practiced as part of an intimate personal relationship. After all, the Court has elsewhere found that there can be a "constitutionally protected reasonable expectation of [Fourth Amendment] privacy" in a public phone booth. *See Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

310. Justice Kennedy remarked, platitudinously, that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." *Lawrence*, 123 S. Ct. at 2478. But of course the "bond" may also be no more substantial than a fleeting encounter.

311. *BLADE RUNNER* (Blade Runner Partnership and The Ladd Company 1982) (a Ridley Scott film in which genetically engineered human "rePLICants" are used to colonize other worlds and perform labor that is either too dangerous or too demanding for humans).

“pragmatic” fashion: It functions as a self-conscious, policymaking organ of the government, relying for legitimacy on the fact that its choices serve the (purportedly) emergent needs of the Nation in international competition and accord with the outcomes demanded by elite domestic and international opinion.

B. The Court’s Deference to Élite Groups and Institutions

A common theme in recent decisions of the Court is the clear appeal to the views of elite groups and institutions. In *Lawrence* and, when identifying legitimate State interests for purposes of equal protection analysis, in *Grutter*, the Court’s deference to the concerns of economic, political, and cultural elites suggests that a pattern is at work in which community morality is subordinated to the wishes of the “winners” in the emerging Market State.³¹²

Justice Kennedy’s reasoning in *Lawrence* is striking for the use it makes of elite opinion in deciding a question that was properly never before the Court. Ordinarily, substantive due process jurisprudence relies on American history and tradition to substantiate the claim that a fundamental right is at stake, thus triggering a requirement for special justification of the State’s need to limit the exercise of that right.³¹³ Justice Kennedy’s use of history in *Lawrence* neither established, nor claimed to establish, the conclusion that homosexual sodomy was recognized at any point in time by American society as within the sphere of protected individual liberty.³¹⁴ Rather, attempting to refute the interpretation of history reflected in *Bowers v. Hardwick*,³¹⁵ Justice Kennedy argued that the historical record did not demonstrate that the coercive power of the State had been directed at homosexual activity.³¹⁶ In other words, he shifted the burden of persuasion so as to require the State defendant to demonstrate historically that its interest in the regulation of particular sexual conduct had been traditionally asserted and

312. See generally CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY* (1995) (arguing that American elites are betraying democracy and embracing global economy as panacea).

313. See *supra* text accompanying notes 261–276.

314. See *Lawrence*, 123 S. Ct. at 2478–80 (concluding that prior to the 1970s criminal sodomy statutes sought to prohibit “nonprocreative sexual activity more generally” (as opposed to homosexual conduct) but never asserting a general acceptance of homosexual practice).

315. 478 U.S. 186, 192–94 (1986) (finding no historical evidence of a liberty right to engage in consensual homosexual sodomy); *id.* at 196–97 (Burger, C.J., concurring) (underscoring his “view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy. . . [and that] proscriptions against sodomy have very ‘ancient roots’”).

316. See *Lawrence*, 123 S. Ct. at 2478–80.

accepted. The key materials for the conclusion that the States had never relied on the community's conception of morality to justify the prohibition of homosexual activity was the nearly unanimous verdict, in Justice Kennedy's view, of the professional historical community.³¹⁷

Justice Kennedy in *Lawrence* also relied on another segment of elite opinion—the international legal community's understanding of homosexual rights.³¹⁸ While some early Supreme Court precedent had alluded to the possibility that identifying a violation of a constitutionally protected "liberty" might require the Court to explore conceptions of justice prevailing outside the United States,³¹⁹ recent efforts to rely on foreign precedent to inform American conceptions of substantive due process have been met with failure.³²⁰ In *Lawrence*, however, Justice Kennedy relied expressly on the jurisprudence of the European Court of Human Rights to determine that several European nations held views "at odds with the premise in *Bowers* that the [liberty] claim put forward was insubstantial in our Western civilization."³²¹

Even more telling than its use of elite opinion in *Lawrence* was the Court's unembarrassed reliance on elite views to determine the scope of a highly contested constitutional antidiscrimination norm in *Grutter*. Relying extensively on amicus briefs submitted by elite corporate, military, and educational authorities, Justice O'Connor, writing for the majority, asserted the following:

[M]ajor American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people,

317. See *id.* (relying on submissions by the libertarian Cato Institute and the "Professors of History, et al."); see also Rick Perlstein, Op-Ed, *What Gay Studies Taught the Court*, WASH. POST, July 13, 2003, at B3 (noting the Court's reliance on an amicus brief submitted by a coalition of history professors, some of whose work had until recently been derided as reflecting marginal scholarship representing the politically correct values of academic elites).

318. See *Lawrence*, 123 S. Ct. at 2480–81 (referencing the Wolfenden Report—advising the British Parliament to repeal laws against homosexual conduct—and the decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at ¶ 52 (1981)—holding that laws proscribing homosexual conduct are "invalid under the European Convention on Human Rights").

319. See, e.g., *Hurtado v. California*, 110 U.S. 516, 531–32 (1884) (stating that "[t]here is nothing in Magna Charta . . . [that] ought to exclude the best ideas of all systems and of every age").

320. See, e.g., *Lawrence*, 123 S. Ct. 2494–95 (Scalia, J., dissenting) (noting in his dissenting opinion that foreign views are "meaningless dicta").

321. *Id.* at 2481, 2482–83 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at ¶ 52 (1981), a case interpreting the European Convention on Human Rights).

cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, “[b]ased on [their] decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.” The primary sources for the Nation’s officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. At present, “the military cannot achieve an officer corps that is *both* highly qualified and racially diverse unless the service academies *and* the ROTC used limited race-conscious recruiting and admissions policies.”

....

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders. Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives.

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.³²²

In short, the Court based its constitutional reasoning on the contention of a group of the Nation’s key corporate, political, and military leaders that the Nation’s prospects of success in the face of international strategic threats, as well as the continued stability and perceived legitimacy of its domestic political institutions, required racial preferences in elite formation through our major educational institutions.

Fascinating as it is for what it says, the *Grutter* opinion is perhaps still more fascinating for what it does *not* say. Faced with the highly charged question of the constitutionality of racial preferences in public higher education—which it had not addressed since the split *Bakke*³²³ decision of 1978—the Court *could* have rested its approval of such preferences on the

322. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2339–41 (2003) (emphasis added) (citations omitted).

323. *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265 (1978).

squarely moral grounds that the State had a compelling interest in overcoming and remediating the effects of past discriminatory practices. In other words, the Court might have seen the State's action as permitted, or even required, by the demands of corrective justice. Instead, the Court chose to rest on purely amoral, instrumentalist grounds³²⁴—thus evidencing its aversion to the public invocation of a presumptively common or shared morality, not only by the Nation's legislatures, but also by its courts.³²⁵

But was a corrective justice rationale available to the Court, even given the longstanding exclusion of minority groups from American leadership cadres? The Court's own affirmative action precedents admittedly tended to block reliance on any such rationale, insofar as they held that governmental racial preferences could be justified as remediation only if they were carefully crafted to redress particularized wrongs committed by the State against specified groups.³²⁶ Accordingly, the State tactically eschewed reliance on a remediation theory, arguing instead that it had sought merely to promote educational diversity.³²⁷ But another body of precedents—the Court's desegregation cases—had recognized that measures to eliminate racial discrimination and its lingering effects had a fundamentally moral basis.³²⁸ At any rate, no remedial rationale ever surfaced in *Grutter*; the keynote of the opinion was diversity, not corrective justice.³²⁹

324. See *Grutter*, 123 S. Ct. at 2340–41 (justifying the Court's finding of a compelling interest in attaining a diverse student body on the ground that diversity is necessary "to cultivate a set of leaders" who can compete in the global marketplace and be seen as "legitima[te] in the eyes of the citizenry").

325. On the other hand, the Court was not so openly cynical as to declare the State's policy constitutionally valid because, by providing cosmetic relief from the Nation's still-fester racial wounds, it could serve to palliate the grievances of minorities and so bind them to an elite leadership that, for the foreseeable future, would remain disproportionately drawn from other races.

326. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) ("In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race.").

327. See *Grutter*, 123 S. Ct. at 2332 (describing the law school's diversity policy as "asp[ir]ing] to 'achieve that diversity which has the potential to enrich everyone's education'").

328. See *Croson*, 488 U.S. at 520–21 (Scalia, J., concurring in the judgment) (quoting BICKEL, *supra* note 108, at 133: "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society").

329. See *Grutter*, 123 S. Ct. at 2338–40 (accepting the law school's goal of enrolling a diverse class of students as a "compelling interest").

Diversity, unlike corrective justice, supposes that the legitimate interests of a State in this area are grounded in purely pragmatic, nonmoral goals. The demographic diversity of the leadership class, unlike whether the composition of that class reflects a just society, is an issue that can be considered without appeal to values and norms that, even if widely shared, could prove to be divisive and contentious. As one sympathetic commentator put it, *Grutter* “places us in the Here and Now,” rather than “look[ing] back to . . . slavery and Jim Crow.”³³⁰ But as a more critical view of “diversity” notes,

Diversity is particularly appealing because of what it is not. It is not based on theories of racial responsibility. It is not based on a vision of group rights, or on a theory that proportional racial representation is an end in itself. It is not based on controversial views of compensation for past discrimination. . . . It does not even require a social consensus about the magnitude of present discrimination.³³¹

The reasoning in *Grutter*, therefore, brackets the question of the morality of race-conscious admissions programs—with the apparent but incongruous consequence that acting upon the *morality* of such measures is not within the domain of legitimate State interests.

At the same time, the *Grutter* Court did not disclose what conceivably was, from a more purely instrumentalist perspective, the full measure of its thought. It can be argued with considerable plausibility that the workings of majoritarian democracy—unless effectively constrained by constitutional protections for propertied minorities—will tend to reverse the outcomes produced by markets, in that the markets will normally tend to favor identifiable ethnic minorities.³³² This apparently inescapable tension between democracy and markets can exist, moreover, not only in developing nations, but also in the United States. Left to its own devices and without some form of governmental intervention, American capitalism seems likely to

330. Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 69 (2004) (noting that the *Grutter* decision does not use the effects of past discrimination as a justification for the present use of affirmative action, but rather seeks to use affirmative action to address current problems involving racial relations while ignoring the historic causes of those problems).

331. Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2059 (1996) (criticizing the diversity approach to affirmative action as contrary to the Equal Protection Clause and the Civil Rights Act, which require that a person's race not be considered as a potentially deciding factor in hiring or admissions decisions).

332. See AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 3, 6 (2003) (providing examples of Chinese minorities in the Philippines and Indonesia).

continue to favor and reward certain identifiable ethnic and racial groups disproportionately and to disfavor other identifiable groups. Particularly given the sources of much of this inequality in the nation's history of slavery and discrimination, the persistence (and possible aggravation) of such differences would tend to create sharp and destabilizing conflicts within the American polity. American economic, political, and military élites have a clear interest in abating or suppressing such conflicts. Indeed, they must do so if the American Market State is to remain competitive in the international arena.

The *Grutter* decision can thus be seen as the Court's ratification (in the guise of constitutional adjudication) of the opinion of the dominant élites on how best to address this troubling prospect. The solution preferred by élites surely cannot be to redress the full costs of slavery and discrimination by large-scale compensatory measures. As well as being (arguably) unaffordable, the political efforts required to enact and execute such a program could be even more divisive and destabilizing (at least in the short term) than the inequalities it was designed to eliminate.

More attractive is the kind of cosmetic solution pursued by the State in *Grutter* and upheld, at the behest of élite decisionmakers, by the Court. Selection for élites through modest governmental interventions in the admissions process for public, professional schools would be virtually cost-free to existing élites (if much more so to nonélite whites and Asians). At the same time, it would ensure over time such a *visible* (if perhaps also small) presence of minorities within élite ranks that the great majority of the minority population would be led to accept the continuing legitimacy of the élite's national leadership. Michigan's program was constitutionally valid because it would "cultivate a set of leaders with legitimacy in the eyes of the [minority] citizenry."³³³ From an élite perspective, the *optics*—not the *reality*—of racial equality is what mattered. Social peace could be bought at a low price and without fundamentally disturbing the existing structures of hierarchy.³³⁴

Grutter reflects the Court's deference to élite concerns in yet another way: not so much in forming a national élite that possesses "legitimacy in the eyes of the citizenry" as in meeting

333. *Grutter*, 123 S. Ct. at 2341.

334. As Bobbitt argues, affirmative action, though purporting to promote the equality of "the group that is thought to be in need of assistance," in fact entrenches the hitherto-dominant group's power to "set[] the terms of assimilation," which "implicitly den[ies] equal status" to the assisted group. BOBBITT, *supra* note 22, at 225.

the business needs created by competition in “today’s increasingly global marketplace.”³³⁵ The Court seems to have accepted the elite judgment that in order to remain vigorously competitive in the international arena, American business must select its leadership cadres from the entire range of racial and ethnic backgrounds found within the Nation’s population, so that the increased diversity within those cadres would at least roughly match the diverse population of the “global marketplace” at large.³³⁶ Elite formation would still be conducted in terms of “merit”-based selection principles, but “merit” would now be defined in terms of a competitive advantage in an expanded, more thoroughly globalized, market.³³⁷ Thus, affirmation action, understood and applied in this manner, has fundamentally different goals from the Court’s Cold War-era project of desegregation. Desegregation served the needs of a Nation State that was attempting to be “the provider and guarantor of [individual] equality.”³³⁸ In large part, desegregation was an effort to *assimilate* minorities into the dominant national group, thus forging a national people that could meet the external Communist enemy with a united front, and so denying that enemy any opportunity to exploit potentially dangerous rifts within the Nation. Affirmative action, as upheld in *Grutter*, is also thought to serve the Nation’s strategic needs, but in an international environment that is markedly different from the Cold War.³³⁹ No longer does the Court feel a need to foster a national unity that transcends racial consciousness or to further the assimilation of racial minorities.³⁴⁰ Such strategic needs have

335. *Grutter*, 123 S. Ct. at 2340–41.

336. See *id.* at 2340 (citing amicus briefs from 3M and General Motors to emphasize that the skills needed to compete in the “global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints”).

337. At the same time, the Court was unwilling to depart too far from more traditional criteria of “merit.” As Justice Thomas trenchantly pointed out, the Court refused to require the State’s law school to consider race-neutral selection schemes that would have produced the same amount of “diversity” as before, while also relaxing the school’s demanding academic requirements for admission. See Lund, *supra* note 138, at 281–82 (citing Justice Thomas’s dissent, which argued that the *Grutter* majority’s refusal to require Michigan Law School to consider race-neutral methods was in direct contrast to the Court’s opinion in *United States v. Virginia*, 518 U.S. 515 (1996)).

338. BOBBITT, *supra* note 22, at 225.

339. See *Grutter*, 123 S. Ct. at 2340 (recognizing the opinions of military leaders that a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security”).

340. In a line of cases beginning in 1976, the Court has disapproved lower court decisions to prevent resegregation and has sought to facilitate the transition of public school districts to “unitary” status. See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 489 (1992) (holding that federal courts may relinquish supervision and control of school districts in incremental phases); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247 (1991) (stating that the

passed, together with the passing of the Cold War's chief external threat. Thus the *Grutter* Court could view the prospect of multiculturalism with equanimity despite the fact that, as Bobbitt correctly perceives, multiculturalism makes it "increasingly difficult" for a Nation State "to get consensus on public-order problems and the maintenance of rule-based legal action."³⁴¹ Rather than regarding the rise of multiculturalism as a liability that had the potential to weaken or even fracture the Nation, the Court saw it as an *asset* to be exploited for all the advantages it could bring American businesses in their international transactions.³⁴² And again, race-conscious governmental action is viewed through the prism of its usefulness, not its morality.

In what follows, we build on this analysis of the Court's decisions, including both its rejection of the legitimacy of the States' enforcement of traditional morality and its "pragmatic" deference to elite opinion. Both of these aspects of the Court's jurisprudence follow from its commitment to reorder the Constitution to adapt to the needs of the Market State. Part IV applies the same kind of analysis to the Court's federalism jurisprudence. In particular, the Court's reasoning in *American Insurance Ass'n v. Garamendi*³⁴³ follows directly from the individual rights doctrines discussed here in Part III.

IV. THE NEW FEDERALISM IN INTERNATIONAL CASES

Before situating *Garamendi* in the context of the Court's recent individual rights jurisprudence, three other trends of thought, which have long been at work influencing the development of the Court's theory of federalism, must be discussed.

district could achieve unitary status if it showed that it was compliant with equal protection norms and was unlikely to revert to segregative practices); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434–35 (1976) (disapproving lower court order requiring annual readjustment of school boundaries). That is not to say, of course, that the Court has abandoned all interest in seeking to promote racial integration, and other cases evince its continuing support of that ideal. *See, e.g.,* *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (refusing to allow racial biases to influence the "removal of an infant child from the custody of its natural mother"). But it also seems reasonable to say that the Court is untroubled by the prospect of multiculturalism, with all that that may mean for prolonging and reinforcing the sense that racial differences matter.

341. BOBBITT, *supra* note 22, at 225.

342. *See Grutter*, 123 S. Ct. at 2340 (commenting that "student body diversity . . . 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals'" who will be ready to enter the "global marketplace").

343. 123 S. Ct. 2374 (2003).

First, the Court's federalism jurisprudence arguably carries forward a constitutional revolution initiated by *Erie Railroad Co. v. Tompkins*.³⁴⁴ In *Erie*, the Court rejected the twin assumptions that federal courts may apply law that does not derive from either a State or federal sovereign, and that the common law is discovered rather than made³⁴⁵—thus constitutionalizing legal positivism.³⁴⁶ *Erie* feeds into the Court's later federalism in at least two ways: It (1) supports an understanding that the States are in some respects fully sovereign with reserved spheres of authority that even the federal sovereign must respect, and, more importantly here, (2) encourages the view that law is itself primarily a matter of power relationships, not of objective norms discoverable by reason and reflection.

Second, many courts have followed Professor Brainerd Currie's revolutionary work in conflicts of law analysis,³⁴⁷ which, in drawing on the legal realist movement, supposed that only a State's interests in its own domiciliaries, or in conduct on or affecting its territory, could form the basis of its legislative jurisdiction.³⁴⁸ Currie's theory rested on the view that lawmaking

344. 304 U.S. 64 (1938).

345. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2762 (2004) (noting that pre-*Erie*, the "accepted conception was of the common law as 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute'" (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting))); *id.* at 2764 ("[W]e now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice."); *id.* at 2773 (Scalia, J., concurring) ("The Court recognizes that *Erie* was a 'watershed' decision heralding an avulsive change, wrought by 'conceptual development in understanding common law . . . [and accompanied by an] equally significant rethinking of the role of the federal courts in making it.'" (alteration in original)); see also Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts—Before and After Erie*, 26 DENV. J. INT'L L. & POL'Y 807, 818 (1998) ("[T]he Court in *Erie* rejected . . . the idea that federal courts can apply law not derived from a sovereign source, and the idea that courts merely discover the common law rather than make it.").

346. *But see* Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 674 & n.7 (1998) (citing and criticizing extensive academic commentary arguing that *Erie* constitutionalized legal positivism).

347. See generally BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963) (explaining the instrumentalist nature of lawmaking and the territoriality of Conflict of Law practice). For judicial acknowledgements of Currie's influence, see *Booking v. General Star Management Co.*, 254 F.3d 414, 422 n.7 (2d Cir. 2001) (describing Professor Currie as the most influential critic of the traditional "vested rights" theory of Conflict of Laws), and *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 166 n.63 (3d Cir. 1980) (referring to Currie as the "father of modern governmental interest analysis").

348. CURRIE, *supra* note 347, at 292 (determining that a statute's benefits should "be applied . . . to effectuate [a] community's policy . . . whenever those who are the objects of [the statute's] protection are members of the community—i.e., residents or domiciliaries of the state").

is to be conceived as a merely instrumental activity.³⁴⁹ It intimated a conception of State authority that discounted any role for pursuing the common good or promoting the virtue of the individual.³⁵⁰

Third, the Court's recent federalism case law has often focused on reinforcing the process of political competition between the States and the federal government. Accordingly, the Court has tended to view federalism as a device for perfecting political markets, and has sought to ensure that transparency and accountability facilitate informed choices by political consumers.³⁵¹ In effect, the Court has treated the State political process as though it were chiefly a device for preference satisfaction and welfare maximizing, rather than a means for achieving individual virtue and the common good.

All three of these trends complement the Court's individual rights and equal protection jurisprudence surveyed above. The various strands of thought are knitted together in the Court's "foreign relations federalism" opinion in *Garamendi*.³⁵²

In *Garamendi*, the Court surprised many observers by holding that California's Holocaust Victims Insurance Relief Act of 1999 (HVIRA) had been preempted by executive branch policy reflected in an executive agreement with a foreign government.³⁵³ The HVIRA had "require[d] any insurer doing business in [California] to disclose information about all policies sold in

349. See Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1284-85 (1989) (conveying Currie's theory that "choice of law . . . [i]s simply a tool to effectuate state policy").

350. John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 173-80 (1981) (noting that Currie's reliance on territorial interests, to the abandonment of other considerations, leaves no room for consideration of the virtue of the individual or for pursuing the common good).

351. See, e.g., *Printz v. United States*, 521 U.S. 898, 925-26 (1997) (extending the reasoning of the legislative anticommandeering principle to a refusal to permit the federal government to commandeer State executive officials); *New York v. United States*, 505 U.S. 144, 182-83 (1992) (invalidating federal directive to a State ordering the enactment of particular legislation on the theory that political accountability is a necessary postulate of federalism, because competition between federal and State policymakers requires that individual voters be able to assign responsibility for a policy choice to the author of the policy rather than merely to its agent); see also *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.").

352. See *Am. Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2386 (2003) (stating that there is "no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy").

353. *Id.* at 2379 (declaring the preemption).

Europe between 1920 and 1945.”³⁵⁴ This regulatory requirement, the Court said, “threatens to frustrate the operation of the particular mechanism the President has chosen”³⁵⁵ to vindicate the interests of the United States in the resolution of Holocaust survivors’ claims.³⁵⁶ The President’s preferred mechanism was a voluntary body, the International Commission on Holocaust Era Insurance Claims (ICHEIC), established to negotiate and settle unpaid policies.³⁵⁷ The ICHEIC compensation fund for Holocaust victims was created by the 2000 German Foundation Agreement between the United States and Germany.³⁵⁸ In working out this and related agreements, the United States executive branch did *not* stipulate, in terms, that inconsistent State law or policy was to be superseded; rather, the United States agreed only to “use its best efforts, in a manner it considers appropriate,” to persuade the States to treat the German Foundation process as the exclusive method of claim resolution.³⁵⁹

Federal preemption, therefore, could hardly be found in the German Agreement itself. Indeed, the language of the Agreement seemed to imply that the States *need not* regard the Agreement as preemptive. As the United States’ brief in the court of appeals stated, it was a mistake “to suggest that the Agreement by its terms preempts the California statute.”³⁶⁰ Further, the Court did not find any other related agreements or congressional statutes *ex proprio vigore* to preempt³⁶¹ the HVIRA.³⁶² Federal law and federal treaties, as such, accordingly had nothing directly to do with the Court’s result, and indeed nothing in the text of the Constitution’s Supremacy Clause could be said to specify the kind of “law” here that trumped a legitimate exercise of State

354. *Id.*

355. *Id.* at 2392.

356. *Id.* at 2381–82, 2382 n.2.

357. *Id.* at 2382.

358. See Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” U.S.-F.R.G., art. 1, §§ 1–4, Annex A, July 17, 2000, 39 I.L.M. 1298, 1299–1303 [hereinafter German Foundation Agreement].

359. *Id.* art. 2, § 2.

360. Brief for Amicus Curiae The United States of America in Support of Affirmance at 48–49, *Am. Ins. Ass’n v. Garamendi*, 123 S. Ct. 2374 (2003) (No. 02-722).

361. *Garamendi*, 123 S. Ct. at 2388, 2390 (relying on the more general exercise of executive authority in the area of vindicating U.S. claims, rather than on the specific executive authority to make treaties).

362. *Id.* at 2393–94 (rejecting arguments for implicit congressional approval through the McCarran-Ferguson Act, which transferred to States the authority to regulate business of insurance, or based on the more recent Holocaust Commission Act, which merely established a Presidential Commission for record collection and did not purport to approve parallel State efforts to collect records or authorize otherwise unconstitutional State efforts to collect records).

legislative jurisdiction.³⁶³ Moreover, both judicial precedent and scholarly commentary were distinctly unfavorable to the idea that mere executive branch *policy* could have a preemptive effect on State law: Indeed, “the idea that a presidential policy could, in itself, displace a state law seemed barely to have been contemplated.”³⁶⁴

The Court’s conclusion that the executive branch policy, embodied in the German Foundation Agreement, preempted the HVIRA depended on resuscitating and refashioning an isolated, dubious, and over thirty year-old precedent, *Zschernig v. Miller*.³⁶⁵ *Zschernig* itself suffered from numerous analytical deficits³⁶⁶ but, in any event, was misused in *Garamendi*. In brief, *Garamendi* read the German Foundation Agreement in conjunction with *Zschernig*’s doctrine of “dormant [federal] foreign affairs preemption,” a rule of constitutional exclusion that declares States to be incompetent to affect foreign affairs in particular ways, such that the Federal Executive’s foreign policy has a preemptive effect on State law.³⁶⁷

A. *The Pre-Garamendi Allocation of Power Between the States and the Federal Government in Foreign Relations*

Zschernig itself, like *Garamendi*, had come as something of a surprise because it invalidated a State statute similar to one that had previously survived a facial attack in *Clark v. Allen*.³⁶⁸ Both *Zschernig* and *Clark* had concerned the validity of a State probate law that restricted the ability of legatees living in Communist-bloc countries to receive property willed to them.³⁶⁹ Commentators and courts have attempted to distinguish the two cases in terms of the judicial administration of the probate law, which afforded State judges an occasion for casting aspersions on

363. See U.S. CONST. art VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

364. Denning & Ramsey, *supra* note 56, at 863–64.

365. 389 U.S. 429, 441 (1968) (mentioning the danger of a State’s establishing its own foreign policy).

366. See Denning & Ramsey, *supra* note 56, at 855–57 (arguing that *Zschernig* is a questionable precedent because, under it, “in the absence of a treaty provision, a law, or even an executive branch policy, a state law may still be” preempted).

367. See *Garamendi*, 123 S. Ct. at 2400 (Ginsburg, J., dissenting); *id.* at 2387–91 (majority opinion) (holding that the Government demonstrated a sufficient enough interest to require a finding of preemption of the State law).

368. 331 U.S. 503, 517 (1947).

369. *Zschernig*, 389 U.S. at 430–31 & n.1; *Clark*, 331 U.S. at 505–06 & n.1.

the political systems of Communist-bloc countries, thereby potentially complicating the conduct of U.S. foreign relations.³⁷⁰ If so, *Zschernig* might arguably have been best understood as a federalism-grounded, State-law corollary of *Banco Nacional de Cuba v. Sabbatino*,³⁷¹ in which the Court, on the basis of general separation-of-powers principles, refused to enforce a State-law claim grounded on the invalidity of an expropriation of assets in Cuba by the Cuban revolutionary government.³⁷² The *Sabbatino* Court reasoned that a judicial ruling as to whether the Cuban government's confiscation of property on its own territory violated international law would undermine the Executive's conduct of foreign policy in this area, thus transgressing (prudential) separation of powers limits on judicial authority.³⁷³ One might then read *Zschernig* and *Sabbatino* together as a double-barreled effort by the Supreme Court to enable the political branches of the federal government, without interference from either the State courts or the federal judiciary, to manage the Cold War and, perhaps, to seek détente in the face of domestic resistance to any compromises with communism.

The *Garamendi* Court's reliance on *Zschernig* was surprising, not only because the geopolitical circumstances that may have given rise to *Zschernig*'s dormant foreign affairs

370. See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 436–37 nn.64–65 (2d ed. 1996) (discussing both cases and reasoning that the “Oregon [probate] statute introduces the concept of ‘confiscation,’” which would be in conflict with the Just Compensation Clause of the Fifth Amendment). Similarly, courts believed the principles underlying the Court's holding in *Zschernig* to be limited to its particular fact-pattern, which involved judicial statements critical of a foreign legal system. See, e.g., *Gorun v. Fall*, 393 U.S. 398, 398–99 (1969) (indicating that *Zschernig* makes clear that “a state probate judge is not authorized to make or apply a probate rule contrary to . . . federal policy”); *Shames v. Nebraska*, 323 F. Supp. 1321, 1326 (D. Neb. 1971), *aff'd*, 408 U.S. 901 (1972) (stating that *Zschernig* relates only to judicial application of the statute that can complicate foreign affairs).

371. 376 U.S. 398 (1964).

372. *Id.* at 401 (explaining that under the Act of State doctrine, courts may not challenge the validity of acts of other governments committed within their own borders).

373. The Court asserted,

There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.

. . . .

. . . It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations.

. . . .

The dangers of such adjudication are present regardless of whether the State Department has, as it did in this case, asserted that the relevant act violated international law.

Id. at 428–32.

doctrine had long vanished, nor because *Zschernig's* doctrine had been searchingly criticized by legal scholars,³⁷⁴ but also because nothing in recent jurisprudence of the Court suggested that *Zschernig* might be revived.³⁷⁵ Moreover, the Court's post-*Zschernig* cases have not otherwise suggested that bare executive branch policy could have a preemptive effect on an otherwise valid State law.³⁷⁶

For example, the Court in *Dames & Moore v. Regan*³⁷⁷ relied on (1) the Algiers Accord, a sole Presidential agreement settling U.S. claims against the Government of Iran in return for the repatriation of American hostages and (2) congressional acquiescence in the longstanding practice of sole executive-claims-settlement agreements, to trump State-law claims sounding in contract.³⁷⁸ Unlike the executive policy pronouncements that *Garamendi* held to preempt State law, the pronouncements at issue in *Dames & Moore* were Presidential (rather than being authored by lower level Executive officials).³⁷⁹ Further, unlike *Garamendi*, the State law at issue in *Dames & Moore* was inconsistent with the *express terms* of the relevant executive agreement.³⁸⁰ Further still, in *Barclays Bank PLC v.*

374. See, e.g., Bradley, *supra* note 88, at 285–88 (arguing that neither the dormant foreign-affairs-preemption doctrine nor the federal common law of foreign-relations doctrine is a necessary “reading of the Constitution, federal statutory law, or Supreme Court precedent”); Ramsey, *supra* note 60, at 356–57 (opining that the Court’s decision in *Zschernig* was based on assumptions and intuitions rather than constitutional text or structure or original intent regarding the powers of States relating to foreign affairs).

375. See, e.g., Bradley, *supra* note 88, at 286 (stating that “[t]he Supreme Court has not applied this doctrine in the thirty-three years since *Zschernig*”). Further, as Justice Ginsburg noted in her *Garamendi* dissent, the Court had never based another decision on *Zschernig's* dormant foreign affairs preemption doctrine. *Am. Ins. Ass’n v. Garamendi*, 123 S. Ct. 2374, 2400 (2003) (Ginsburg, J., dissenting). She also argued that *Zschernig* was readily distinguishable in that it only involved State policies that either criticized foreign governments or intruded deeply into foreign affairs—neither of which was true of the HVIRA. *Id.*

376. See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 385 (2000) (finding both executive opinion and reactions of foreign powers irrelevant to “congressional intent because Congress had taken specific actions rejecting the positions both of foreign governments and the Executive” (internal citations omitted)).

377. 453 U.S. 654 (1981).

378. *Id.* at 675–83.

379. *Id.* at 660.

380. *Id.* at 666–67 (discussing Executive Order No. 12294 and its suspension of all “claims which may be presented to the . . . Tribunal” and mandating that any such claims “shall have no legal effect in any action now pending in any court of the United States”). As noted, the documents associated with the German Foundation Agreement had consciously withheld any declaration of preemptive effect. See *Garamendi*, 123 S. Ct. at 2387–88 (“[I]f the agreements here had expressly preempted laws like HVIRA, the issue would be straightforward.”).

Franchise Tax Board,³⁸¹ the Court declined to find that executive branch policy pronouncements, relevant to the interpretation of the U.S.-U.K. tax treaty, gave rise to a foreign-affairs preemption barring California from using the so-called “worldwide combined reporting” methodology to determine a U.K. firm’s corporate franchise tax.³⁸² Finally, the Court’s last pre-*Garamendi* encounter with foreign-relations federalism, *Crosby v. National Foreign Trade Council*,³⁸³ did not rely in the least on *Zschernig*’s doctrine of dormant foreign-affairs preemption.³⁸⁴ Rather, in *Crosby*, the Court found that a Massachusetts ban on certain State contracts with entities doing business in Burma was preempted by a federal statute authorizing the President to impose—or withhold—sanctions against a narrower class of businesses and investors dealing with Burma.³⁸⁵ The *Crosby* Court reasoned that preemption arose because Congress had manifested its intention to limit sanctions aimed against the Burmese régime to those which the President deemed necessary after seeking to coordinate policy with Japan and the European Union.³⁸⁶ The federal statute was construed to have given the President the authority to decide *for the Nation as a whole* what types and what level of sanctions (within the limits prescribed by Congress) were appropriate to achieve the goal of improving human rights conditions in Burma.³⁸⁷ The *Crosby* Court seemed willing to adopt a strained construction of the federal statute in order to preempt State law, rather than to make use of *Zschernig*’s doctrine of dormant federal-foreign-affairs power to achieve that result.

381. 512 U.S. 298 (1994). Justice Ginsburg’s *Garamendi* dissent relied, as had her opinion for the Court in *Barclays Bank*, on the lack of precedent for finding foreign affairs preemption based on mere sub-cabinet level, executive branch policy statements. *Garamendi*, 123 S. Ct. at 2400–01.

382. *Barclays Bank*, 512 U.S. at 324–31 (noting that this question is best left to Congress and not to the courts).

383. 530 U.S. 363, 366 (2000).

384. *See id.* at 385–86 (finding that “repeated representations by the Executive branch supported by formal diplomatic protests and concrete disputes” provided evidence for congressional intent to preempt).

385. *Id.* at 366, 376–78 (finding that the State law is in clear conflict with congressional intent).

386. That is to say, the Court read the federal statute as enabling the President to protect the ability of American corporations to do business in Burma, even at a cost to human rights, if their competitors refused to boycott the Burmese régime. *Id.* at 380–82. Thus, as a result of *Crosby*, control over the U.S. sanctions policy towards Burma effectively lay with Japanese and European multinationals. *See id.* at 383 & n.19 (revealing that the European Union intended to begin new World Trade Organization proceedings if the injunction on the State law was lifted).

387. *Id.* at 374–77.

Thus, recent pre-*Garamendi* precedent had suggested that foreign-affairs preemption requires either (1) an Act of Congress that could (more or less plausibly) be read to oust conflicting State policy, or else (2) some overt act of constitutional authority by the President—in the form of an executive agreement, ideally coupled with congressional sanction or ratification (or a pattern of acquiescence)—whose express terms were clearly at odds with the State's statute.³⁸⁸ In other words, some reasonably explicit action, transparent to the electorate, would have been required from one or both of the federal political branches, operating at the appropriate constitutional level, before the courts could be invoked to overturn a State law on bare constitutional foreign-affairs grounds.³⁸⁹ At a minimum, the Court, following *Barclays Bank*, could have been expected to hold that mere policy statements emanating from sub-presidential executive branch officials could not trump State statutory law.³⁹⁰

Therefore, the Court's choice of a different and ill-precedented course is a fact requiring an explanation. This Part argues that the explanation lies in the Court's changing understanding of federalism, read together with its new-found individual rights libertarianism. Section B explains the linkage

388. See *Am. Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2394 (2003) ("Indeed, it is worth noting that Congress has done nothing to express disapproval of the President's policy. Legislation along the lines of HVIRA has been introduced in Congress repeatedly, but none of the bills has come close to making it into law.").

389. See The Supreme Court, 2002 Term, *Leading Cases*, 117 HARV. L. REV. 226, 231 (2003) ("*Garamendi* failed to resolve the tension between, on the one hand, the Court's recent retreat from dormant foreign commerce preemption, and on the other, the expansive foreign affairs preemption adopted in *Zschernig* . . .").

390. However, the *Garamendi* majority did seek to distinguish the Court's refusal in *Barclays Bank* to give effect to executive branch policy pronouncements on two grounds: First, in *Barclays Bank* the executive branch pronouncements were in the area of the Foreign Commerce Clause, a matter expressly granted to congressional jurisdiction; and second, in *Garamendi*, there was no suggestion that the sub-Cabinet level policy pronouncements did not reflect the views of the President himself, so that there was no need to apply a requirement for express presidential policy pronouncements in this case. *Garamendi*, 123 S. Ct. at 2391 nn.12–13.

Neither of these distinctions seems persuasive. They depend on the characterization of issues as falling either under the "Foreign Commerce Clause" or within the "field of foreign policy" when these areas in fact frequently overlap. Furthermore, whether the President approves a particular statement of an executive branch official is simply a matter of fact that cannot be determined by the judiciary in the absence of discovery—as the Court appears to have done, one way in *Barclays Bank* and the other way in *Garamendi*, to suit its preferred outcome. Compare *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329–30 (1994) (stating that "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting"), with *Garamendi*, 123 S. Ct. at 2381–82 (finding preemption of State law based on the formation of a voluntary international organization that was never officially mandated by the President).

between the Court's foreign-relations-federalism jurisprudence and the conceptual underpinnings of the Court's new individual rights jurisprudence.

B. *The "New Federalism" in Foreign Relations*

Garamendi has two limbs. Section A considered the first limb—the existence and effect of federal (especially executive branch) power in foreign affairs.³⁹¹ Section B considers the second—the Court's finding that California had no significant interest in legislating the HVIRA.³⁹²

Foreign relations federalism, like domestic-federalism cases, can be reconceptualized in ways that link it closely to the Court's individual liberties cases. If foreign relations matters now include questions that historically were within the province of the States, then the inability of States to articulate a legitimate interest in such matters would, under individual rights limitations, also disable the States from legislating on them. Under this approach, it would be unnecessary to resort to any supposed structural limitations in order to hold a State incompetent to legislate on matters that were exclusively within the ambit of federal regulatory authority. Accordingly, as this subsection explains, the underlying premises of *Lawrence* and *Grutter* are useful, perhaps indispensable, in explaining the outcome in *Garamendi*.

1. *Legitimate State Interests in Foreign Affairs.* The Court's analysis of California's interest in the HVIRA can be understood as an alternative holding, complementing its conclusion that the nature of the federal interest alone was sufficient to trump any State interest.³⁹³ But even if the analysis of the State's (lack of) interest were considered dictum, the Court seems to have gone out of its way to address that subject.³⁹⁴ Seemingly, the Court wanted to emphasize that the State's authority to legislate, with respect to moral questions, was meager, exactly as the State's authority had been determined to be in *Lawrence* and other substantive due process cases.³⁹⁵

391. *Garamendi*, 123 S. Ct. at 2386.

392. *Id.* at 2393.

393. *See id.* at 2392 ("The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield.")

394. *See id.* (addressing the State's interest even though the Court declared that the "clear conflict" between the State law and federal policy was enough to find preemption).

395. *See id.* at 2393 (stating that "the humanity underlying the state statute could not give the State the benefit of any doubt in resolving the conflict with national policy").

The Court reached the question of the strength of the State's interest in an oblique and roundabout way—by eliding (while also purporting to respect) the distinction between “conflict” and “field” preemption of State law.³⁹⁶ It is useful to disentangle that part of the Court's reasoning before addressing its overall evaluation of the State's claimed interest.

Writing for the *Garamendi* majority, Justice Souter characteristically purported to rely on Justice Harlan—particularly Justice Harlan's concurrence in *Zschernig*.³⁹⁷ In that opinion, Justice Harlan had refused to join the *Zschernig* majority's claim that the federal government's supremacy in foreign affairs operated to preempt State law in the entire “field” of foreign relations, even when the federal government had disclaimed any interest in barring the State's action.³⁹⁸ Instead, Harlan opined that the Court should determine whether there was an *actual* conflict between State and federal policy.³⁹⁹ Justice Souter merged Harlan's conflict-based analysis into what he considered to be applicable dormant Commerce Clause precedent, stating that “it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted.”⁴⁰⁰ By that move, conflict preemption was collapsed (by way of the kind of interest-based analysis appropriate to a conflicts-of-law case) into field preemption.

The precise basis for Harlan's concurrence in the *Zschernig* result was his conclusion that—contrary to the Court's earlier holding in *Clark*—the Oregon probate statute at issue in both cases was indeed “preempted by a 1923 [U.S.] treaty with Germany.”⁴⁰¹ The *Zschernig* case then fell, in his view, under the “actual conflict preemption” rubric.⁴⁰² Justice Harlan, therefore, was far from endorsing the *Garamendi* Court's view “that state laws not in conflict with any law, treaty, or executive agreement

396. *Id.* at 2389 & n.11.

397. *Id.* at 2388–89.

398. *Zschernig v. Miller*, 389 U.S. 429, 458–59 (1968) (Harlan, J., concurring) (indicating that prior Court decisions “have established that in the absence of a conflicting federal policy . . . the States may legislate in areas of their traditional competence” regardless of the effect on foreign relations).

399. *Garamendi*, 124 S. Ct. at 2388–89 (discussing Justice Harlan's concurrence in *Zschernig*).

400. *Id.* at 2389.

401. *Id.* at 2389 n.10.

402. *Id.* at 2389 (stating that when there is a conflicting federal policy the “state law[s] must give way if they impair the effective exercise of the Nation's foreign policy” (quoting *Zschernig*, 389 U.S. at 440)).

were nevertheless preempted on the strength of executive branch [policy] statements.”⁴⁰³

By contrast, *Garamendi*'s dormant foreign affairs preemption approach treated the question of whether the (more expansive) field or the (more restrictive) conflict preemption should be employed as simply a variable dependent on the weight of the underlying State interest—with field preemption operative “[i]f a state were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility,” and with conflict preemption analysis applicable when a State acted within an area of its “traditional competence.”⁴⁰⁴ Thus, where Justice Harlan would have looked to the intentions of federal treaty-makers to decide whether a State law was preempted, the *Garamendi* Court characterized the State's interest, evaluated it, and, after finding it insufficient, allowed a (latent) Presidential foreign affairs authority to preempt it.⁴⁰⁵ That was emphatically *not* following Harlan's lead.⁴⁰⁶

In any event, the Court scrutinized carefully the strength and legitimacy of the interest asserted by California. The Court questioned whether California's putative interest—“knowing which insurers have failed to pay insurance claims”—was its actual motive because “quite unlike a generally applicable ‘blue sky’ law, HVIRA effectively singles out only policies issued by European companies, in Europe, to European residents, at least

403. Denning & Ramsey, *supra* note 56, at 878.

404. *Garamendi*, 123 S. Ct. at 2389 n.11 (internal quotation marks omitted).

405. *See id.* at 2392–93 (finding that federal policy preempted State law because the State's interest was not sufficient).

406. Another (albeit lesser) analytical flaw mars Justice Souter's opinion. He failed to explain why the determination of whether a State was acting in an area of its “traditional competence” for purposes of assessing the potential implications for State law of the Intrastate and Foreign Commerce Clauses should be translated automatically into dormant foreign-affairs-power preemption. It is at least arguable that “tradition,” with respect to one of these allocations of authority, is *not* dispositive with respect to the other: The States might conceivably have more authority to act in foreign affairs (despite the acknowledged supremacy of the federal government in that area) than they do in regulating foreign or interstate commerce. Justice Souter's answer to that suggestion might be that the formation of an American Nation after the Revolutionary War in and of itself nationalized all responsibility for the conduct of foreign affairs; thus, there was no power left to be reserved to the States under the Tenth Amendment. *See United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) (“The powers to declare and wage war, to conclude peace, . . . to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.”). Notwithstanding the apparent category error, the Court sought to characterize the nature of the State and federal interests in *Garamendi* for the purposes of implementing a dormant foreign affairs constitutional preemption analysis. *Garamendi*, 123 S. Ct. at 2393.

55 years ago.”⁴⁰⁷ The Court concluded that “[l]imiting the public disclosure requirement to these policies raises great doubt that the purpose of the California law is an evaluation of corporate reliability in contemporary insuring in the State.”⁴⁰⁸ Such reliance on a finding of such substantial under-inclusiveness would be of significance in an equal protection or substantive due process context only under an intermediate or strict scrutiny standard of review. Thus, the Court’s rejection of the State’s articulated interest—a justification that would appear to be sufficient under any rational-basis test for legislation affecting only economic interests, as well as even the Court’s putatively analogous Dormant Commerce Clause jurisprudence⁴⁰⁹—indicates that the Court was scrutinizing the State’s claim under a more demanding standard of review—but without acknowledging that it was doing so.

After excluding the possibility of a State interest focused on the protection of consumers generally, the Court went on to exclude the possibility of a State interest in benefiting a specific group of State domiciliaries.⁴¹⁰ It asserted that “there is no serious doubt that the state interest actually underlying HVIRA is concern for the several thousand Holocaust survivors said to be living in the State.”⁴¹¹ That the State had such an interest, however, “does not displace general standards for evaluating a State’s claim to apply its forum law to a particular controversy or transaction, under which the State’s claim is not a strong one.”⁴¹² In other words, the Court applied a conflict-of-laws-based “interest” standard, in which post-occurrence change of domicile did not, of itself, give the State an interest in applying its law to nondomiciliaries with respect to facts and circumstances outside its jurisdiction.⁴¹³ The logic of the reasoning appears to prohibit

407. *Garamendi*, 123 S. Ct. at 2392.

408. *Id.*

409. *See, e.g., Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981) (plurality opinion) (accepting Iowa’s claimed interest in health and safety as legitimate, notwithstanding the under-inclusiveness of the means it chose to advance that interest, and balancing that interest against the federal interest of trucking-regulation uniformity in interstate commerce).

410. *Garamendi*, 123 S. Ct. at 2393 (denying that the State had a sufficient interest in protecting Holocaust survivors domiciled in the State).

411. *Id.*

412. *Id.*

413. *Id.* (requiring that traditional standards be applied to determine the forum law despite the fact that thousands of Holocaust survivors reside in the desired forum State); *see Allstate Ins. Co. v. Hague*, 449 U.S. 302, 311 (1981) (indicating that post-occurrence change of domicile to the forum State in itself is an insufficient basis to justify applying the forum law).

States from legislating on the basis of universal jurisdiction to vindicate the rights or interests of humanity.⁴¹⁴

More sweepingly, the Court appeared to find the morally-based interests of States to be constitutionally insufficient to enable them to legislate in the broad field of foreign-relations matters. It concluded that, “against the responsibility of the United States of America, the humanity underlying the state statute could not give the State the benefit of any doubt in resolving the conflict with national policy.”⁴¹⁵ Thus, the State’s moral interest—what Justice Souter called the “humanity underlying the state statute”—weighed little in the Court’s calculus.⁴¹⁶ The State’s interest was insufficient to let the law stand, even though neither the federal executive nor the federal legislature had spoken in a way that clearly invoked the Supremacy Clause’s requirement that only the federal Constitution, federal treaties, or federal statutory law trumped State law.⁴¹⁷

The Court’s approach in *Garamendi* cannot be dismissed as an isolated example. In fact, *Garamendi* reveals a new understanding on the Court’s part of the limits of State competence with respect to moral issues in foreign relations. For example, in *Nike v. Kasky*,⁴¹⁸ two “centrists,” Justice Breyer joined by Justice O’Connor, dissented from the Court’s dismissal of the writ of certiorari as improvidently granted, on grounds that revealed a similar depreciation of State competence to pursue moral interests.⁴¹⁹ *Nike* involved an attempt by a California resident to rely on California Unfair Competition Law to seek civil damages against Nike for unfair and deceptive trade practices through allegedly making false statements and omissions of fact concerning Nike’s practices with respect to foreign labor in the manufacture of its products overseas.⁴²⁰ As the case came to the Court, the question was whether Nike’s advertising involved “commercial speech,” subject to an

414. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402 cmt. k, 404 n.2 (1987) (raising the question whether States may exercise prescriptive jurisdiction at least with respect to a limited class of offenses and arguing that, under the Supremacy Clause, universal jurisdiction is a question of federal law).

415. *Garamendi*, 123 S. Ct. at 2393.

416. *Id.*

417. See *id.* (refusing to find a sufficient State interest and allowing State law to be preempted based on conflicting national policy).

418. 123 S. Ct. 2554, 2559 (2003) (per curiam) (Breyer, J., dissenting).

419. See *id.* at 2560 (arguing that the Court should have granted certiorari because the State law, which discouraged certain kinds of speech, would cause “injury in fact”).

420. *Id.* at 2554–55 (Stevens, J., concurring).

intermediate standard of review, or speech that was fully protected by the First Amendment.⁴²¹ In dissenting from the denial of certiorari, Justice Breyer was ready to reach the merits and sustain Nike's claim that it was entitled to First Amendment protection.⁴²² Together with other opinions of the Court,⁴²³ Justice Breyer's dissent suggested that, had the Court reached the merits, a majority could have been found to vindicate Nike.⁴²⁴

The rationale that Justices Breyer and O'Connor offered says more about foreign-affairs federalism than it does about the First Amendment. Justice Breyer simply argued that California's Unfair Trade Practices law could not be applied to create a private right of action because no "economic interest" was implicated in the matter; rather, "ideological" plaintiffs, such as the one in this case, should pursue their "political battles" in "other forums."⁴²⁵ In short, he found that California's legitimate interest was merely "to maintain an honest commercial marketplace. It thereby helps that marketplace better allocate private goods and services."⁴²⁶ This interpretation of the State's law—identifying economic efficiency and consumer welfare maximization as the only legitimate State interests implicated in

421. *Id.* at 2555.

422. *Id.* at 2564 (Breyer, J., dissenting) (opining that, if Nike could prove that its statements were not "unfair" under California law, it would prevail on nonfederal grounds).

423. Justice Stevens, explaining the denial of the writ as improvidently granted, not only focused on jurisdictional issues as a ground for denial, *id.* at 2555–57 (Stevens, J., concurring), but also explained that the novelty of the First Amendment issues raised warranted restraint in adjudication before a full factual record through a trial on the merits was developed by the California courts. *Id.* at 2558. Justices Souter and Ginsburg concurred with Justice Stevens, but felt compelled to suggest that some kind of First Amendment protection for corporate speech, relating to matters of public concern, might ultimately be warranted, observing that "[k]nowledgeable persons should be free to participate in" the debate about important public issues that was concerned not only with Nike's labor practices, but with similar practices used by other multinational corporations "without fear of unfair reprisal." *Id.* at 2559.

424. *Id.* at 2568 (Breyer, J., dissenting).

425. *Id.* at 2567. Justice Breyer also addressed the "pragmatic" dangers that might hamper the efficiency of government by turning public functions to private persons:

The delegation of state authority to private individuals authorizes a purely ideological plaintiff, convinced that his opponent is not telling the truth, to bring into the courtroom the kind of political battle better waged in other forums. Where that political battle is hard fought, such plaintiffs potentially constitute a large and hostile crowd freely able to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks that tend to keep the energies of public enforcement agencies focused upon more purely economic harm.

Id.

426. *Id.*

*Nike*⁴²⁷—suggests a highly restrictive view of the legitimate goals of the State with respect to the exposure of (conceivably) unjust and exploitative foreign-trade practices. The conclusion that facilitating the production of information relating to such unjust enrichment is *not* a legitimate State interest seems predicated—like the Court’s holdings in *Garamendi*⁴²⁸—on a conception of the role of the State as limited to pursuing economic efficiency without regard to the community’s moral commitments.

In sum, the *Garamendi* Court conceived of the States’ interests in terms that would generally disable States from pursuing the moral values of their communities in relation to many practices characteristic of multinational corporations. *Garamendi*, read together with Justices Breyer’s and O’Connor’s reasoning in *Nike*, suggests that, just as under *Lawrence*, States may not enforce moral values to limit individual liberty, so States’ moral values may not be codified in ways conflicting with executive branch policies favoring economic globalization.⁴²⁹

2. *The Role of Élite Opinion in Garamendi.* *Garamendi* also displays an undue deference to international decisionmaking when the latter does not have the effect of controlling law.⁴³⁰ This deference is made clear by the Court’s discussion of the federal interest in the case, which the Court held to be sufficient to trump the State law.⁴³¹

Relying on the fact that seeking “restitution for Nazi crimes has in fact been addressed in executive Branch diplomacy and formalized in treaties and executive agreements over the last half century,” the Court minimized the novelty of the international agreement before it, arguing that “[v]indicating victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of foreign policy in which national, not state, interests are overriding.”⁴³² In fact, these claims are far from being traditional subject matter of international law, which in general has neither treated

427. *Id.* at 2566–67 (opining that unethical and immoral trade practices do not serve as an appropriate basis for a private right of action by an uninjured plaintiff).

428. *See* *Am. Ins. Ass’n v. Garamendi*, 123 S. Ct. 2374, 2392–93 (2003) (contending that morality is not a sufficient State interest to preclude preemption).

429. *See id.* at 2393 (allowing federal preemption of State law regardless of the State’s interest in morality).

430. *Id.* at 2392 n.14 (allowing preemption even though the President “is acting without express congressional authority, and thus does not have the ‘plentitude of Executive Authority’ that control[s] . . . preemption”).

431. *See id.* at 2392 (“The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield.”).

432. *Id.* at 2390.

multinational corporations as the bearers of legal personality⁴³³ nor held them accountable for violations of international law.⁴³⁴ Moreover, as made clear by even the Court's own description of the international process, based on executive agreements and executive branch policy statements, the ICHEIC was an entirely "voluntary organization formed in 1998 by several European insurance companies, the State of Israel, Jewish and Holocaust survivor associations, and the National Association of Insurance Commissioners, the organization of American state insurance commissioners."⁴³⁵ This public-private partnership was neither a creature of, nor subject to, international law under any conventional criteria. Its creation reflected a political process generated by elite interest groups, who worked in coordination with interested governments to resolve a legal and political problem that, given the existence of Holocaust litigation in the United States, would otherwise have been resolved in unforeseeable ways by U.S. courts.⁴³⁶ Indeed, *Garamendi* subordinated the characteristically American policy of favoring disclosure to the values of an institutional elite, primarily a European elite,⁴³⁷ that favored individual and corporate privacy. Thus, elite bargaining, supported by governments on both sides of the Atlantic, removed the moral issue of restitution for Holocaust victims from State governance and prevented disclosure of the possible culpability of corporations either through American-style judicial discovery or through the transparency and public accountability mandated by State regulatory law.⁴³⁸

433. Multinational corporations "are not international legal persons in the technical sense" and "are not generally subject to obligations and generally do not enjoy rights under international law." LORI FISLER DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 421 (4th ed. 2001). *But cf.* Case Concerning the Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 4, 35–36 (Feb. 5) (establishing that the State of incorporation, rather than the corporation in its own right, may assert the right of diplomatic protection with respect to the expropriation of corporate property by a host State).

434. See generally Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *YALE L.J.* 443, 488 (2001) (arguing for the development of an international human rights norm under which corporations, like States, would be held responsible under international law for violations of internationally recognized human rights).

435. *Garamendi*, 123 S. Ct. at 2382.

436. See generally MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS* (2003) (explaining Holocaust restitution litigation, and cited in *Garamendi*, 123 S. Ct. at 2380).

437. See *Garamendi*, 123 S. Ct. at 2392 (stating that "California's indiscriminate disclosure provisions place a handicap on the ICHEIC's effectiveness (and raise a further irritant to the European allies) by undercutting European privacy protections").

438. See *id.* at 2393 (rejecting State interest in morality as sufficient to avoid

3. *Summary.* The logic that undergirds the Court's substantive due process and equal protection cases—denying the States any legitimate interest in enacting communitarian moral judgments with respect to private conduct—is congruent with the Court's holding in *Garamendi* that the State could not deploy its traditional regulatory powers over domestically operating insurance companies to help secure restitution and justice for Holocaust survivors.⁴³⁹ The “humanity underlying the state statute” proved to be an insufficient State interest to withstand the Court's heightened scrutiny. Although neither Congress nor the President had demonstrated a clear intent to preempt the State's law (indeed, the contrary was true), the Court determined that its unilateral constitutional intervention was necessary to protect the political branches from a State's putative encroachment on their generalized “foreign affairs” powers.⁴⁴⁰ The Court offered no argument that its intervention was needed to rectify some structural defect in the political process, such as an inherent vulnerability in the federal political branches that the State was exploiting in order to usurp an authority that the Constitution had located elsewhere.⁴⁴¹ Rather than allowing the normal political process to decide the fate of the State's law, the Court deferred to the wishes of corporate and governmental leaders in Europe in order to remove what it perceived as a likely source of friction in dealings between them and our own national leadership.⁴⁴² Moreover, the Court's deference to the consensus views of international élites may have been misplaced: It was not clear how far the object of that consensus was to secure a long-overdue measure of corrective justice, as opposed to avoiding embarrassing publicity and shutting down public conversation on the nature of corporate responsibility for human rights violations. Therefore, in foreign affairs as well as domestic ones, the Court's “new federalism” leaves the States largely denuded of the power to legislate and enforce moral opinion. By limiting the States to the instrumental role of promoting economic efficiency,

preemption by national policy).

439. *See id.* at 2392–93 (characterizing the State's interest in securing justice for Holocaust survivors as insufficient).

440. *See id.* at 2391–92 (explaining that allowance of the State law would compromise the President's capacity to “speak for the nation with one voice” when dealing with other countries) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000)).

441. *Id.* at 2386 (basing its decision on the premise that uniformity in dealing with foreign nations requires that at some point State law “must yield to the National Government's policy”).

442. *Id.* at 2390 (finding in favor of the Executive's policy because allowance of the State law could generate “sources of friction”).

Garamendi further entrenches the constitutionalization of the Market State.

V. WHITHER?

Our review of the Court's decisions should have made it clear that fundamental premises of constitutional law are undergoing a tectonic shift. These judicial developments can be attributed to the perceived need to reorient the Nation's constitutional structures in the aftermath of the Cold War and the emergence of a radically different international strategic environment.⁴⁴³ What is happening in the case law reflects, on the judicial plane, the processes by which the Nation State is steadily yielding its place to a new order, differing from the older both in the ways the State relates to those it governs and in the ways it relates to other international actors.⁴⁴⁴ The Court is more or less self-consciously engaged in the project of adapting and restructuring the Constitution so that it can be made to fit the perceived requirements of the multicultural, value-free, libertarian Market State whose emergence Professor Bobbitt envisages and describes. The Court's individual rights, equal protection jurisprudence, and federalism jurisprudence converge to serve the same transformative end.

The Court seems to believe that the liquidation of the States as moral communities—a role that American federalism, with its roots in the Central Tradition, has traditionally assigned to them, and that they have consistently exercised throughout American history—is essential to the emerging constitutional order of the Market State.⁴⁴⁵ The Court increasingly perceives the States as serving only instrumental purposes within a globalized market. The States' differing regulatory, tax, and labor policies offer packages that can attract and provide incentives to different demographic groups, stimulate external investment, and lead to the discovery of useful social innovations. Thus far, the States may find an acceptable place within the overarching Market

443. See Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1015–16 (2004) (contending that the end of the Cold War marked an irreversible change in the way the Court interpreted the Constitution regarding separation of power and individual rights).

444. See John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 903–04 (1996) (opining that “[b]ecause of regional and global trade and open financial markets, nation states no longer exercise as substantial control over their internal economic affairs as they once did”).

445. See *Garamendi*, 123 S. Ct. at 2393 (illustrating the Court's refusal to recognize morality as a legitimate State interest sufficient to avoid preemption).

State Constitution. But should the States attempt to enact laws for noninstrumental, *normative* purposes—most especially, for the sake of upholding traditional moral judgments—they would risk subordinating economic imperatives to noneconomic ones, and must thus be deemed to have no “legitimate” interest in the legislation. In particular, the Supreme Court has emphatically (if unthinkingly) barred the States from playing active, influential and humane roles in an emerging “global civil society” and from taking any significant part in the process of “globalization-from-below.”⁴⁴⁶

Will the Court’s constitutional innovations succeed—where “success” is primarily measured in obtaining elite and popular acceptance within the United States? And will the Court also be successful in securing for the United States competitive advantages against its strategic rivals? The answers cannot yet be known. In attempting to assess the likely outcomes, however, we think that it is useful to press the question whether the Court’s project is not likely to encounter at least three major difficulties.

First, the Court’s conception of federalism seems to require that society’s most searing and divisive social problems be decided by the federal judiciary and at the national level. The Court’s reasoning appears to be that such an approach is most likely to lead to a stable, peaceable, national consensus. Yet the Court’s own intervention in the national debate on abortion—despite the Court’s expressed wish that it be otherwise—has only exacerbated, embittered, and prolonged that controversy.⁴⁴⁷ Similarly, the rash and ill-considered intervention of the Massachusetts judiciary into the question of same-sex marriage,⁴⁴⁸ in an opinion that repeatedly cited and relied on the Supreme Court’s *Lawrence* decision, inflamed rather than quieted public opinion.⁴⁴⁹ A federalism that does not acknowledge

446. See RICHARD FALK, *PREDATORY GLOBALIZATION: A CRITIQUE* 130–31 (1999) (depicting “globalization-from-below” as “the linking of knowledge and political action in hundreds of civil initiatives”); see also RICHARD A. FALK, *THE DECLINING WORLD ORDER: AMERICA’S IMPERIAL GEOPOLITICS* 87–88 (2004) (defining and characterizing “global civil society”).

447. The Court’s attempt in *Casey* to quiet the national controversy over abortion has been no more successful than its earlier effort in *Dred Scott* to take the issue of slavery in the territories “out of politics.” *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403 (1856) (deciding whether a descendant of a slave could become a member of the political community); see ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 193 (1992) (arguing that the *Dred Scott* decision “only provoked heightened disobedience and ignited more violence”).

448. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

449. See *id.* (recognizing that many people hold strong convictions regarding same-

the need for settlements of refractory social issues both democratically and at the State level—even at the expense of securing nation-wide uniformity—will be notably less “pragmatic” than a more traditional kind of federalism.

Second, the very libertarianism that the Court seems intent on weaving into constitutional law may well prove to damage the United States’ position in international rivalry rather than to enhance it. Since President Bush first raised the question in the immediate aftermath of September 11,⁴⁵⁰ Americans have asked, “Why do they hate us?”⁴⁵¹ The answer must be, in part, that aspects of our moral practice and culture have become increasingly unattractive to hundreds of millions of people worldwide—many of whom happen to live in areas that are likely to generate grave strategic threats to the United States.⁴⁵² Although it is true that Osama bin Laden rarely indicts popular American morality, he has on occasion done so;⁴⁵³ and it seems safe to say that the contempt and loathing he expresses resonate with millions of others.⁴⁵⁴ Apologists for the moral order and practice of the emerging American Market State—what they usually characterize as “liberal values”—appear to acknowledge that our course of conduct may well involve us in a civilizational “war with Islam.”⁴⁵⁵ But such a war, if it comes, would be devastating even to the victor; and its final issue would be uncertain.

sex marriage).

450. See Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of Sept. 11, 2 PUB. PAPERS 1140 (Sept. 20, 2001).

451. *Id.* at 1141.

452. For a penetrating study of these perceptions, see MEIC PEARSE, WHY THE REST HATES THE WEST: UNDERSTANDING THE ROOTS OF GLOBAL RAGE 11–13 (2004) (discussing other cultures’ perceptions of today’s American society and the potential threats that those perceptions pose).

453. In his letter to America dated November 24, 2002, Osama bin Laden said, “We call you to be a people of manners, principles, honour, and purity; to reject the immoral acts of fornication, homosexuality, intoxicants, gambling’s, [sic] and trading with interest. . . . It is saddening to tell you that you are the worst civilization witnessed by the history of mankind.” Letter from Osama bin Laden to America (Nov. 24, 2002), available at <http://observer.guardian.co.uk/print/0,3858,4552895-110490,00.html> (last visited Oct. 1, 2005). Bin Laden’s aversion was anticipated by Sayyid Qutb, the Egyptian thinker who was one of the intellectual fathers of radical Islam. See PAUL BERMAN, TERROR AND LIBERALISM 99–100 (2003) (stating that Qutb’s vanguard would foreshadow a Muslim rebellion “against the liberal values of the West”).

454. See Daniel Pipes, *Who Is the Enemy?*, CAPITALISM MAGAZINE, Feb. 20, 2002, available at <http://CapMag.com/article.asp?ID=1427> (last visited Oct. 1, 2005) (estimating that 10% to 15% of the world Muslim population, or about 100 million to 150 million persons, are sympathetic to al Qaeda’s vision).

455. See, e.g., SAM HARRIS, THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON 109–10 (2004) (claiming that we are or may be at war with Islam).

Finally, the Court's adventures in constitution-making may not recommend themselves to the American people at large (however much they may gratify the élites who form the Court's most sympathetic audience). Perhaps the entrepreneurial Market State does indeed best serve the interests of the American people at this juncture in history; perhaps no other form of constitutional order—including other variants of the Market State, like Europe's or Japan's—is realistically available to us now. History throws up new possibilities, but it also limits them. Conceivably, therefore, the Court might be rendering the American people an unavowed service by practicing "the subtle politics of men like [the Roman emperors] Augustus and Tiberius who likewise allowed the forms of the preceding constitution (a republic in that instance) to subsist while the thing itself existed no longer and could not possibly be brought back."⁴⁵⁶ Even so, the American people might not welcome the favor. As Hegel also pointed out, even though the constitution that Napoléon imposed on "the Spaniards was more rational than what they had before, . . . they recoiled from it as from something alien."⁴⁵⁷

The choice of our constitutional fate should rest with the American people, not with our courts.

456. G.W.F. HEGEL, *Proceedings on the Estates Assembly in Würtemberg*, in HEGEL'S POLITICAL WRITINGS 246, 250 (T.M. Knox trans., 1964).

457. G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 287 (T.M. Knox trans., 1962).
