DISAGREEMENT AND INTERPRETATION

ROBERT F. NAGEL*

I

INTRODUCTION

For two decades, political commentators and legal academics have loudly bemoaned the trend toward restrictive definition of constitutional rights. Although the Constitution has not vanished, the Supreme Court has been narrowing rights in important areas such as abortion regulation, criminal procedure, religious freedom, and school desegregation. Much of this constriction has followed the expression of political opposition to earlier, more expansive judicial decisions.[1] No matter what the Justices assert or believe about the legal justifications for recent limitations, it is possible that this opposition has been a significant consideration. The instinctive reaction of many observers, especially those with legal training, is to recoil at the thought of fundamental principles being diluted in response to popular pressure. This article tests this understandable reaction by asking directly whether federal judges should take political resistance into account when interpreting the Constitution.

The instinct to condemn what the Supreme Court has referred to as "compromises with social and political pressures"[2] is strong, but it is, at least superficially, at odds with aspects of our complex traditions.[3] Many eminent jurists, including John Marshall, Oliver Wendell Holmes, and William Brennan, have emphasized that constitutional meaning should have a political component and, at least on occasion, have urged that interpretation be viewed as an institutionally shared enterprise. This tradition has been embraced by statesmen like Jefferson, Madison, and Lincoln, and has been expounded upon by scholars

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* Rothgerber Professor of Constitutional Law, University of Colorado.

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1. In recent years there has been an "ongoing guerilla war against *Roe*." *See* Albert M. Pearson & Paul M. Kurtz, *The Abortion Controversy: A Study In Law and Politics*, 8 HARV. J.L. & PUB. POL'Y 427 (1985). Not too many years ago, political opposition to the exclusionary rule was prominent. *See* John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1035-41 (1974). For a depiction of a "conservative" Court's receptivity to majoritarian politics, see Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 44 (1989).

2. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2814 (1992).

3. *See generally* JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 96-138 (1984); PAUL R. DIMOND, THE SUPREME COURT AND JUDICIAL CHOICE: THE ROLE OF PROVISIONAL REVIEW IN A DEMOCRACY 11-20 (1989); LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988).

such as Thayer, Bickel, and Choper. It is reflected in various deferential standards, most notably the minimum rationality requirement used in equal protection and due process analysis, as well as judicial constructions of the Commerce Clause and section five of the Fourteenth Amendment. Our legal traditions, in short, contain both philosophical and doctrinal strands that involve some degree of political influence over constitutional content. This does not necessarily imply that the national judiciary should consider, let alone yield to, resistance to announced decisional law. But it does suggest that the contrary conclusion may be harder to explain than we expect.

I begin this article with an overview of various forms of resistance and the range of assessments that are commonly made of them. In particular, I discuss the objections that can be made to state and local acts that, while not directly defiant, are premised on disagreements with the Court's decisions, and are designed to obstruct or reverse them. This form of resistance is of special interest because it is most likely to have been influential over contemporary interpretations.

I then examine two judicial practices that are often overlooked, even by those who see constitutional interpretation as a shared, dialogic enterprise. The utilization of received traditions as a basis for defining unenumerated rights is the focus of part III, and the tendency to expand constitutional protections because of anticipated or actual dissension is examined in part IV. My analysis suggests that widespread acceptance of these practices is inconsistent with our usual conclusions about what constitutes inappropriate political influence. Assuming (as many believe) that recent restrictive interpretations of constitutional rights are misguided and that they are, in part, a response to local political dissatisfaction with earlier decisions, the Rehnquist Court may be incorrectly evaluating relevant considerations, but I doubt that the Court is taking into account irrelevant considerations.

II

FORMS OF RESISTANCE AND THE RULE OF LAW

The range of ways in which political influence can be brought to bear on judicial interpretation is wide and varied. At the high end of formality and legitimacy is amendment, which has been used both to overturn specific decisions and to initiate more general changes of direction. At the low end are violent threats and acts intended to intimidate judges or to block implementation of their decrees. In between are an array of devices and behaviors, including: appointment of judges; enactment of federal statutes or use of the presidential veto power; executive rulemaking; impeachment; congressional control over funding, jurisdiction, and other incidents of judicial power; state and local regulations of various kinds; public intellectual efforts, such as academic or journalistic commentary; private intellectual efforts, such as letters to judges and personal conversations; street demonstrations; sluggish compliance with judicial orders; inactivity by those who are yet to be sued; interference by nonparties

with the implementation of a decree; and outright refusal by defendants to comply. Each of these forms of influence has its own set of variations. For example, the objective of an academic article might be to urge the reversal of a specific case or a massive change in basic understanding; street demonstrations can occur before, during, or after formal adjudication. Legislative resistance can be direct, as when an invalidated statute is reenacted, or tangential, as when marginally different statutes are enacted. A letter can be private and substantively relevant to a pending case, or public and a general exhortation about moral "sensitivity."

From a position of pure legalism, it is possible to object to some aspect of even the most accepted forms of political influence. Theoretically, a proposed amendment could be inconsistent with basic constitutional provisions or with some deeper spirit in the overall document.[4] It is difficult to imagine in our system a blunt holding that an amendment is "unconstitutional," but certainly a new provision could, for similar reasons, be emptied of any significant meaning. Although the argument is no longer common, some still urge that the Senate's advice-and-consent function should be limited to consideration of technocratic qualifications, rather than philosophy, ideology, or probable voting patterns.[5] To the extent traditional legal materials and methods are thought to be properly determinative of constitutional meaning, it is regrettable to have influence from any group or institution for which such legal values have low priority.

On the other hand, from a position of pure realism, it is possible to see even the most irregular forms of influence as potentially useful to judicial decision-making. The reenactment of a statute already held unconstitutional can be justified as providing the courts with an opportunity for sober second thought. The prospect of violent resistance to a decree is a relevant consideration if the courts seek to preserve their institutional prestige or to take care of the physical safety of members of the plaintiff class; violence can even be seen as a sign of heartfelt conviction.[6] If practical or political considerations should be an important part of judicial interpretation, disagreement arising from virtually any "real-life" circumstance is relevant and potentially important information.

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4. *Cf.* Geoffrey R. Stone, *Flag Burning and the Constitution*, 75 IOWA L. REV. 111, 124 (1989) (arguing that a proposed constitutional amendment authorizing the protection of the physical integrity of the flag of the United States would "weaken . . . our constitutional order").

5. *E.g.*, Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989).

6. In Alexander Bickel's words,

> [w]hen the law summons force to its aid, it demonstrates, not its strength and stability, but its weakness and impermanence. The mob, like revolution, is an ambiguous fact. The mob is bad when it is wrong; it may be heroic when it is right. It is surely a deeply ingrained American belief that mobs of our people do not generally gather to oppose good laws, and the very fact of the mob, therefore, puts the law in question.

ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 266 (2d ed. 1986).

Because our interpretative practices are both legalistic and realistic, incongruous positions on political influence are always starkly evident.[7] Many will agree, with a knowing wink, that courts must follow the election returns and react to other significant signs of the times; indeed, it is commonplace to assert that judges should have "a decent regard for public opinion."[8] We fear, however, for the rule of law when masses of people march in front of a judicial building. Observers believe it is sensible for the Senate to guess how judicial nominees are likely to vote by asking about their personal lives, their political philosophies, and their opinions on famous cases, but most disapprove when senators ask directly how a hypothetical case should be decided.[9] Jurists who would be offended by a personal letter about a pending case take home law review articles that are, in effect, extended briefs. Judges who would never dream of utilizing out-of-court evidence do not hesitate to rely on extra-judicial experiences or on conversations with a clerk. Justices prophesy that overruling the "central holding" in *Roe v. Wade*[10] while "under fire" would endanger "the character of a Nation of people who aspire to live according to the rule of law."[11] The same Justices working under the same political circumstances see no threat to the social fabric in tossing out *Roe*'s famous trimester scheme.

Observers, of course, have offered some explanations for these kinds of apparent incongruities. Refinements, distinctions, and theories exist in abundance. Some of these have provided considerable comfort but, nevertheless, are not persuasive upon careful examination. Others have force in the abstract but do not explain very much about actual practices.

Consider our attitudes toward what I will refer to as "local recalcitrance"—the kind of resistance that occurs when state authority is exercised in ways premised on disagreement with the Court's reasoning or conclusions, but is not directly defiant. A prime example is the "fire" directed at the Court's

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7. Some of these are described and some are demonstrated in papers delivered at the *Ira C. Rothgerber, Jr., Conference on Constitutional Law: Constitutional Law and the Experience of Judging*, 61 U. COLO. L. REV. 681, 685-735 (1990). A graphic example can be found in Paul Gewirtz's detailed and thoughtful article on resistance to school desegregation. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983). Although he makes an otherwise thoroughly realistic argument for taking resistant behavior into account, he inexplicably assumes that if white attitudes represent "blunt opposition to the right," they should be "completely unrecognizable as an independent interest." *Id.* at 615.

8. *E.g.* William J. Brennan, Jr., *Why Have a Bill of Rights?*, 9 OXFORD J. LEGAL STUD. 425, 434-35 (1989).

9. This limitation is criticized in Grover Rees, III, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 932 (1983); The ambivalence is so acute that during confirmation hearings intellectually rigorous nominees slide back and forth from moment to moment, first loftily denouncing questions that call for judgments about how cases should be decided and then matter-of-factly volunteering such answers. *Compare Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary United States Senate*, 100th Cong., 1st Sess. 105 (1987) [hereinafter *nomination of Robert H. Bork*] (statement of Bork asserting that he would not commit himself as to how he might vote on any particular case) *with id.* at 114, 279, 288, 327, 428, 829 (Bork committing himself).

10. 410 U.S. 113 (1971).

11. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2815-16 (1992).

abortion decisions—the enactment over the course of two decades of legislation that burdens the right to abortion.[12] Some of these restrictions, while significantly different from the criminal prohibitions invalidated in *Roe v. Wade*, are nevertheless hostile to the spirit of that decision. They implicate state interests that were not explicitly considered in *Roe*, or they attach somewhat different weights to individual and state interests than did the Court. They are arguably inconsistent with the "law" of *Roe*'s trimester system. These laws are aimed at limiting the right first announced in *Roe*, and can be seen as efforts to obstruct, and eventually reverse, that decision.

Local recalcitrance, obviously, has been a widespread and significant form of resistance to the Court's decisions. It can be seen at the street level when police officers give *Miranda* warnings in a hurried, mechanical tone. It can be seen in the grudging responses of many school boards to desegregation decrees; these responses are not necessarily segregative, but they do slow or complicate the achievement of a full remedy. It can be seen in various subtle strategies for encouraging prayer and other religious activities in the public schools. In each of its legal settings, local recalcitrance consists of acts aimed at legitimate objectives: protecting parental authority over minor children, securing confessions to crimes, accommodating the exercise of religion, or providing neighborhood schools. Nevertheless, these acts reflect a different, and arguably inconsistent, set of priorities from those that underlie judicial decisions.

Sometimes the Court uses local recalcitrance as an unexceptional opportunity to define the limits of a prior holding.[13] Under certain assumptions this certainly makes sense. After all, it is at least possible that, in some circumstances, judges might have something to learn from local officials, even concerning traditional aspects of legal interpretation.[14] For example, authoritative judicial constructions, prior to 1937, of the text "commerce . . . among the several States"[15] were not necessarily more sophisticated than the competing interpretations common in the political arena. Similarly, the historical claim that the Establishment Clause was intended to create a high and impregnable wall between church and state was received with justifiable skepticism by many outside the judicial system.

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12. For a description, see Pearson & Kurtz, *supra* note 1.

13. *See, e.g.*, *Planned Parenthood*, 112 S. Ct. at 2815 (abandoning trimester system as not being part of the "core" of *Roe*'s holding); Webster v. Reproductive Health Serv., 492 U.S. 490 (1989) (applying trimester system flexibly); Dayton Bd. of Educ. v. Brinkman (*Dayton I*), 433 U.S. 406 (1977) (modifying "root and branch" desegregation remedy by adding significant requirement of causality); Milliken v. Bradley (*Milliken I*), 418 U.S. 717 (1974) (modifying "root and branch" remedy by need to preserve school district boundaries).

14. This possibility was one of the assumptions behind then Attorney General Edwin Meese's notorious argument for political correction of decisions that do not conform to the Constitution. Edwin Meese, III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987). Although it is axiomatic among lawyers that judges are especially competent to examine historical materials and to parse text, this confidence may be more a function of professional bias than of the Court's actual record.

15. U.S. CONST. art. I, § 8, cl. 3.

More importantly, formal legal materials are not sufficient bases for interpretations involving matters like abortion, police practices, school prayer, and school desegregation. Decisions in these areas, as in much of modern constitutional law, are thought to be appropriately influenced by judgments about such matters as political and social history, moral philosophy, psychology, education, organization theory, medical science, sociology, and so on.[16] State legislatures, police departments, and local school boards undeniably have access to information and experience relevant to such issues. The political response to *Roe*, for instance, provided a troubling rebuttal to the Court's initial itemization and evaluation of possible state interests in the regulation of abortion. The Court's refusal to note and consider such reactions would amount, under the realist view, to willful blindness.

Sometimes, however, the Court treats local recalcitrance as irrelevant or illegitimate. This assessment is often announced as if its bases were self-evident. It is occasionally accompanied by loose analogies to violent defiance and embellished with expansive bromides about the meaning of *Marbury v. Madison*.[17] Given the highly political nature of the considerations relevant to modern constitutional interpretation, unrefined arguments based on legal formalism are plainly unsatisfactory. But more promising justifications can be pieced together.

A relatively sophisticated "rule-of-law" justification begins with some structural principles. Resistance from state and local officials is different from disagreement that is manifested by the political branches at the national level.[18] Under the theory of separation of powers, consideration of both Congress's and the President's constitutional judgments is the natural inference from their coordinate status. This inference is especially strong when authority over a specific area is textually committed to one of those branches, as is the case with respect to the enforcement of the right to equal protection or the regulation of commerce. It is primarily in such areas that the Court has shown a willingness to consider resistant judgments of the other branches.

In contrast, the formal acts of state and local governments are, of course, inferior to federal law. The substance of certain constitutional provisions may require consideration of state legislative activity, but in these instances state actions are relevant merely as an objective measure of some social fact. For

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16. *See* Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643, 661-62 (1989).

17. 5 U.S. (1 Cranch) 137 (1803). *See, e.g.*, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 771 (1986); Powell v. McCormack, 395 U.S. 486, 549, 552 n.4 (1969); Cooper v. Aaron, 358 U.S. 1, 19 (1958).

18. Occasionally, academic writers suggest that state actions should have some authoritative force. *See, e.g.*, Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1186-87 (1977). Most proposals, however, single out congressional action as the appropriate way to revise the Court's decisions. AGRESTO, *supra* note 3, at 135; DIMOND, *supra* note 3, at 13-20; Daniel O. Conkle, *Nonoriginalist Constitutional Rights and the Problem of Judicial Finality*, 13 HASTINGS CONST. L.Q. 9, 37 (1985); Henry P. Monaghan, *The Supreme Court*, 1974 Term—*Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

example, the pattern of state capital punishment laws is relevant to whether a penalty is "unusual" under the Eighth Amendment, and customary expectations about a particular form of privacy are relevant to the meaning of "search" under the fourth amendment. But as judgments, as acts of disagreement with interpretations of the Supreme Court, it is argued that state laws are, at best, irrelevant and, at worst, illegitimate. They are illegitimate, according to the structural argument, not only because of the supremacy principle, but also because of the nature of constitutional limitations and judicial review. Constitutional principles are necessarily checks on momentary majoritarian pressures; the advantage of judicial enforcement is that federal judges are insulated from, rather than responsive to, politics. To surrender to disagreement, then, would defeat the entire enterprise.

These structural claims are supplemented by a pragmatic argument about the role of courts in maintaining the legal system. This part of the rule-of-law justification asserts that, even at the national level, resistance to authoritative judicial determinations is permissible only for practical issues surrounding the choice of means, not for ultimate judgments about legal meaning. In explaining its decisions allocating authority to enforce the Constitution, the Court has rather consistently adhered to this distinction.[19] Significant justifications can be asserted for this version of the "myth" of judicial finality. If dialogue theory were extended to legitimate political efforts to curb or overrule judicial decisions concerning constitutional meaning, every defiant official act would have something like the effect of a petition for rehearing. Acts prompted by disagreement would be rewarded by judicial attention. Every decided case would invite a cycle of resistance and revision.

The pragmatic argument emphasizes that the function of adjudication is to resolve disputes, not to engender endless controversy and uncertainty. Moreover, the purpose of judicial review in constitutional cases is partly to articulate clear and enduring principles. Ultimately, the rule of law itself requires more than official compliance with judicial decrees; it requires widespread habits of mind that conceive of the announced law as authoritatively

19. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1985); Fullilove v. Klutznick, 448 U.S. 448 (1980); City of Rome v. United States, 446 U.S. 156 (1980).

settled even as it evolves.[20] For all these reasons, it is claimed that recalcitrance should be excluded as a consideration in legal interpretation.

The second component of the rule-of-law argument does not depend on the assumption that courts should refer only to traditional legal sources or that they should monopolize the interpretive function. It acknowledges that legitimate political influence can occur, but insists that, generally, it should occur when legislative and executive officials act in advance of adjudication. At this stage, political officers must, as a part of their duties, say "what the law is"; these decisions should be respected by judges.[21] Comity at this stage does not reward disagreement or destabilize judicially announced law. Thus, in separation of power cases, it is appropriate for courts to consider prolonged executive and legislative practices.[22] But, once the Court has, for example, invalidated the legislative veto, continued resort to this practice by Congress should not count in subsequent adjudication.[23] Still less should courts consider local recalcitrance on abortion and desegregation.

The realist critique of judicial finality is largely based on the observable fact that written opinions and decrees are neither the only nor the last source of constitutional law. The rule-of-law argument sketched above acknowledges that the law develops from many sources and that it continues to develop after each judicial decision. The argument, which is based on constitutional structure and text, as well as on practical claims about the functions of adjudication, purports to be consistent with actual practices. It asserts both that judges normally do not treat local recalcitrance as legitimate interpretative consideration and that they should not.

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20. An extravagant version of this argument can be found in *Casey*. There the Court asserted:

> [The American people's] belief in themselves . . . as a people [who aspire to live by the rule of law] is not readily separable from their understanding of the Court invested with the authority to . . . speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals.

112 S. Ct. at 2816. Here, and in related passages, the connections between closure, principle, and the appearance of imperviousness are made explicit. The Court's rather romantic claims, however, purport to be specific to *Brown* and *Roe*, where the Court supposedly called "the contending sides of a national controversy to end their national division . . . ." *Id.* at 2815. This limitation is unconvincing and perhaps disingenuous. Neither the Burger nor Rehnquist Court has explicitly overruled *any* major rights decision (although, as in *Casey*, many have been whittled away). This record strongly suggests that what is at stake is generalized unwillingness to invite disagreement by appearing to have rewarded recalcitrance. In any event, it does not seem likely that the social importance of the Court's role as expositor of law is implicated in an altogether different, and lesser, way in such cases as Miranda v. Arizona, 384 U.S. 436 (1966), New York Times v. Sullivan, 376 U.S. 254 (1964), and Texas v. Johnson, 491 U.S. 397 (1989), than in *Roe* and *Brown*.

21. An early and influential argument for shared interpretive authority emphasized that legislative determinations precede judicial ones. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135-36 (1893).

22. *See* Dames & Moore v. Regan, 453 U.S. 654, 678-82 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

23. For an account of congressional resistance to I.N.S. v. Chadha, 462 U.S. 919 (1983), see Louis Fisher, *Separation of Powers: Interpretation Outside the Courts*, 18 PEPP. L. REV. 57 (1990).

The remainder of this article describes how the judiciary uses "tradition" to define due process rights and how it expands its definitions of rights in reaction to popular resistance to prior rulings. These interpretive practices are so widespread as to be responsible for a great part of modern constitutional law. I will argue that these practices cannot be reconciled with the rule-of-law argument, and that, to the extent they can be justified, judicial consideration of local recalcitrance is justified too, even when rights are narrowed as a consequence.

III

LEGAL TRADITIONS AND RIGHTS

The use of tradition to define constitutional rights has been effectively criticized, but it remains a major tenet of modern jurisprudential orthodoxy. Judge Robert Bork's objections to it were one major reason that hundreds of law professors opposed his nomination to the Supreme Court.[24] It was said that Bork's position set him "apart from the entire 200-year-old tradition of thought about rights that underlies the American Constitution."[25] Whether or not this sweeping claim is accurate, the range of Justices who in modern times have relied on tradition to define rights is impressive; it includes Earl Warren, William Douglas, William Brennan, Arthur Goldberg, John Marshall Harlan, Warren Burger, Lewis Powell, Thurgood Marshall, Harry Blackmun, William Rehnquist, Antonin Scalia, Anthony Kennedy, Sandra Day O'Connor, and John Paul Stevens.[26] The thinking of many authoritative jurists, eminent scholars, and important politicians converges on the ideas that the Constitution protects implied rights and that these rights should be defined in significant part by judicial examination of our traditions.

This consensus coexists with the broad agreement that judges should not constrict rights in response to local political recalcitrance. Of course, it is impossible to assert that exactly the same people hold both views, but there is little doubt of substantial overlap.[27] It is not too much to say that these are two of the dominant tenets of our legal culture.

At least superficially, these tenets involve opposite evaluations of the status of local lawmaking in constitutional interpretation. This is true despite the fact

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24. *Nomination of Robert H. Bork, supra* note 9, at 1336 (letter to chairman Biden and Senator Thurmond from 100 law professors opposing Judge Bork's confirmation as Associate Justice of the Supreme Court, Sept. 22, 1987).

25. *Id.* at 1278 (statement of Laurence H. Tribe).

26. *See infra* notes 28 and 29.

27. Justice Blackmun (who in *Roe* examined state laws, the positions of professional organizations, and various religious and philosophical writings) has vigorously protested judicial responsiveness to political influence. *See, eg.*, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 759, 771 (1986). Other Justices, who think that political traditions are relevant, have also objected to political pressure. *See, e.g.*, Brennan, *supra* note 8, at 425; William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV., 1175, 1179-80 (1989).

that there is wide variation in how judges define our national traditions. They have examined everything from Greek and Roman beliefs, to the positions of the American Public Health Association, to recent changes in social morality and private behavior. But judicial descriptions of our traditions virtually always take into account local positive law.[28] Hence, one of the important tenets of constitutional adjudication—that judges should consider local lawmaking when identifying those traditions that define constitutional rights—appears to be in considerable tension with a second tenet, which holds that in defining constitutional rights judges should not consider local lawmaking if it expresses strong disagreement with prior judicial decisions.

Perhaps this tension does not involve real contradiction. Certainly, the pragmatic argument for interpretive stability suggests some reasons for differential treatment. When the positive law is used in defining constitutional traditions, there can be little risk of engendering a chaotic cycle of revision. Although there is always a remote chance that statutory changes may be encouraged by the knowledge that courts pay attention to them when interpreting the due process clause, this possibility is attenuated. After all, changes in the law are motivated by many factors; these changes would influence the courts only as a single part of a long history. By definition, however, recalcitrant governmental actions express dissatisfaction with specific case outcomes. Therefore, anticipated judicial receptivity is likely to encourage recalcitrance. Moreover, public officials whose actions were motivated by disagreement with the courts may be inclined to overestimate the impact that their recalcitrant decisions have had. Thus, any acknowledged consideration of these decisions in a judicial opinion may promote additional resistance.

Furthermore, to the extent the objective is stability, or apparent stability, in announced meaning, there is a relevant difference between federal and state recalcitrance. Although stability can certainly be undermined by revisions initiated by congressional or presidential actions, the institutional sources for this instability are at least limited to two branches of government. In contrast, the innumerable jurisdictions at the state and local level provide a vast reservoir for recalcitrant action. These disparate authorities are not disciplined by the institutional and political checks that exist for the national government. Therefore, it may be that the practical need to foster compliant mental habits and to articulate clear, lasting principles is especially great when federal courts review the actions of state authorities.

The need for interpretive stability, however, is not the only consideration. The reasons why traditions are relevant to constitutional interpretation are, to some extent, also reasons for considering recalcitrant local lawmaking. Judges refer to tradition, including the positive law, in part because their task is to

28. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 124-25 (1989); Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986); Roe v. Wade, 410 U.S. 113, 138-41 (1973).

identify liberties that are especially important or "fundamental."[29] Tradition represents an accumulation of public and private judgments about the moral or political significance of a particular freedom and is, therefore, relevant to the substance of the decision facing the judge. It is always open to question whether any particular aspect of received tradition represents wise moral choice, but it is not necessary that an interpretative source be infallible for it to be worth consulting. Moreover, even morally doubtful traditions have the advantage of expressing continuing consent—of representing "the Constitution" as actually understood and lived by the people.[30]

In using tradition, judges also aspire to make differentiations between ordinary rights and fundamental rights on some basis other than their own personal predilections;[31] they intend to give assurance that judicial determinations are bounded (by the external standard that has been consulted) and authoritative (or, at least, of greater weight than a personal opinion, impulse, or emotion). Traditions, at least, are constituted by the behavior and thought of many people aside from the judge.

These justifications suggest that patterns of local lawmaking should be relevant even when they are recalcitrant. Nevertheless, it is possible to insist that official acts in response to, and in disagreement with, judicial decisions do not represent deeply embedded judgments about wisdom or morality. They can be described as sudden and untested reactions to current controversies. Recalcitrant lawmaking, that is, might be simply too new to be included as a component of tradition. This is unconvincing for at least two reasons. First, there is no reason to exclude the possibility that recalcitrant acts are efforts to reconstitute some version of older understandings and practices. Indeed, much of the popular dissatisfaction with the Court's modern decisions has been based on deeply traditional notions about such matters as family values, sex roles, educational methods, religion, and neighborhood life.[32]

Second, it is an obvious oversimplification to conceive of tradition as unchanging. Experience accumulates by way of experimentation and adaptation. Contemporary political behavior, including official recalcitrance, is a part of our collective life and is relevant to understanding our underlying traditions. Presumably, this is why Justices as different as Brennan, Blackmun, and Scalia have all examined patterns of modern statutory change when depicting legal traditions.[33]

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29. Griswold v. Connecticut, 381 U.S 479, 493-94 (1965) (Goldberg, J., concurring); Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923).

30. A theme developed in ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (1989).

31. *Griswold*, 381 U.S. at 493 ("Judges are not left at large to decide cases in light of their personal and private notions.") (Goldberg, J., concurring).

32. For a wide-ranging description of the traditional "world view" that underlies opposition to *Roe v. Wade*, see KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984).

33. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 125-28 (1989) (Scalia, J.); Roe v. Wade, 410 U.S. 113, 138-41 (1973) (Blackmun, J.).

To the extent judges use tradition in constitutional interpretation as a way of assuring some degree of democratic consent, the exclusion of recalcitrant acts is counterproductive. Whether political traditions are static or changing, recalcitrance suggests that an earlier judicial decision is contradictory to the understanding of some segment of the public. In a particular case, there may be reasons why a wave of resistance does not indicate any lack of deeper consent, but these reasons will be offered only in response to candid consideration of the extent and significance of local recalcitrance.

Needless to say, it is highly controversial whether resorting to tradition can provide authoritative standards that are bounded and external to the judge. Nevertheless, our current practices commit us to hope that tradition can provide at least some objectivity. One would think that to the extent any legal justification, including tradition, effectively constrains judges and commands general respect, reconsideration ought to be proportionately less risky both institutionally and intellectually. Possibly, embattled judges who ignore dissent could appear to be faithful and impersonal expositors of the law, but they are at least as likely to appear to be arbitrary and willful. In the original abortion decision, Justice Blackmun's lengthy description of our legal and moral traditions was an earnest endeavor to "resolve the issue by constitutional measurement, free of emotion and predilection."[34] Ironically, however, nothing undermined and unmasked this effort at objectivity more than his later venting of personal outrage at decades of local recalcitrance, which he could see only as illegitimate defiance.[35] Calm deliberation about disagreement, on the other hand, can convey a sense of confidence consistent with the ideal of objectivity.

In short, the reasons usually offered for using tradition in constitutional interpretation also support considering local recalcitrance. More importantly, those reasons seriously undermine the structural aspect of the rule-of-law argument. Recall that this part of the argument contrasts recalcitrant acts of the coordinate branches of the national government with local recalcitrance. The argument concedes that judicial deference is often appropriate to federal decisionmakers (because of their assigned duties under the Constitution) but denies that deference is appropriate to state authority (because it is exercised subject to the Supremacy Clause). Even if state and local acts can sometimes be relevant as independent data, they are not relevant as expressions of judgment about constitutional law, which should be defined independently of majoritarian pressures.

Our practice of using tradition, including local positive law, to define constitutional rights is at odds both with this sharp distinction between federal and state authority and with strict counter-majoritarianism. In this practice, state laws are consulted because they represent a cumulative view about what

34. *Roe*, 410 U.S. at 116.

35. *See, e.g.*, Webster v. Reproductive Health Serv., 490 U.S. 490, 538, 556-58, 560 (1989); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 759, 771 (1986).

freedoms are fundamental; thus, the judgments of state authorities are relevant on the constitutional issue itself. Indeed, Justices sometimes describe traditional unenumerated or implied rights as predating, and underlying, the written Constitution. Justice Douglas, for instance, found the constitutional right to use contraceptives in "a right to privacy older than the Bill of Rights."[36] Plainly, this approach assigns to state and local decisionmakers a direct role in giving meaning to the Constitution.

Contemporary judges and scholars who approve of this role must believe it is consistent with separation of powers and the Supremacy Clause. As a matter of logic, it is certainly possible for the exercise of state authority to be inferior to federal law and, yet, still be a constituent element of that superior law. If it is correct, as our use of tradition in due process cases assumes, that both official and private actions at the local level should make up some part of the fundamental law, federal judges are obligated to give effect to those local actions as a part of their obligation to give effect to the Constitution itself. Under this view, the Supremacy Clause actually requires consideration of, and even deference to, the exercise of state and local authority. Moreover, constitutional limitations are not to be defined entirely independently of majoritarian preferences; indeed part of the judicial function is to understand how those preferences bear on our deeper political traditions.

This logic is borne out by the distribution of authority in the text of the Constitution. The rule-of-law argument is wrong in its assumption that only the coordinate branches of the national government are assigned duties that necessarily involve constitutional judgment. Just as Congress is assigned the power to regulate commerce among the states and the President is given limited authority over foreign affairs, the text delegates some national duties to state governments and to the people. State legislatures, for example, have final authority to determine "the Places of choosing Senators."[37] The states appoint presidential electors "in such Manner as the Legislature thereof may direct."[38] States must decide, as an initial matter, what it means to give full faith and credit to the official acts of other states.[39] The exercise of state regulatory power can require legal judgments by the states and their people about what powers were "not delegated" to the United States.[40] In fact, one fundamental purpose of state governments in the constitutional scheme is to provide a "counterpoise" against federal officials when they ignore limitations in their assigned roles.[41] Finally, the people, who retain rights that are not enumerated,[42] must continue to decide what it is they have retained. In sum, the use of state and local laws to help define constitutional traditions is fully consistent with the constitutional

36. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).
37. U.S. CONST. art. I, § 4, cl. 1.
38. *Id.* art. II, § 1, cl. 2.
39. *Id.* art. IV, § 1.
40. *Id.* amend. X.
41. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1500 (1987).
42. U.S. CONST. amend. IX.

structure. It thus severely undercuts a significant part of the argument against judicial consideration of local recalcitrant acts.

Of course, it does not follow that federal courts should treat local recalcitrance as an interpretive consideration. It does not even follow that they should consider recalcitrance at the local and national levels as legal equivalents. The pragmatic component of the rule-of-law argument may satisfactorily explain why judges should view recalcitrant laws differently from other political acts and why they should discourage recalcitrance by state officials more than recalcitrance by federal officials. There is, however, another widespread modern judicial practice that throws the pragmatic argument for stability into doubt: the strong tendency of courts to expand rights in the face of actual or anticipated disagreement. I turn next to an examination of this practice.

IV

RESISTANCE AND THE EXPANSION OF RIGHTS

The prevalent instinct to condemn the Rehnquist Court for narrowing rights in reaction to political resistance is not disturbed by extensive reflection about how those rights came to be widened in the first place. The truth, which is well known but usually left unspoken, is that the constitutional rights that are now being constricted were once enlarged as a judicial response to local recalcitrance. When this fact is raised to the surface, it presents several difficult questions. What justification might there be for judges treating official disagreement as a reason to expand the definition of rights? And, if such a justification exists, does its logic imply that sometimes disagreement can also be a reason to restrict the definition of rights? Before addressing these questions, I shall explain how we can identify recalcitrant local action as one significant interpretive consideration behind the modern "rights explosion."

A. The Practice of Expanding Rights

It sounds odd to say that judges have enlarged rights because public officials have disapproved of these rights. Widespread approval of a decision, of course, might be a reason for augmentation, just as it might be prudent to back away from a decision in the face of disagreement. The judgment of others is always relevant as a form of validation, but it would seem perverse to be fortified by dissension. Perversity, however, is sometimes rewarded. Many of the modern Court's most admired decisions have met resistance that was eventually discredited. Southern opposition to *Brown v. Board of Education*, now part of our national folklore, was fervent and sometimes ugly, but was largely overcome.[43] Initial indications that President Richard Nixon would defy a

43. How much *Brown* itself contributed to desegregation is a more complicated question than is usually admitted. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE (1991). The mythology, especially within the legal profession, however, is that courageous judges gradually faced down the opposition.

grand jury subpoena for the Watergate tapes caused serious concern, but he finally complied with the decision in *United States v. Nixon* and turned over the tapes.[44] It is hardly implausible to think that people, including judges, want to be admired for their courage and morality. Consequently, it is not unlikely that many federal judges aspire to use the superior virtues thought to be represented by the Constitution to confront some aspect of the general culture and to transform it.[45]

Engendering and surmounting disagreement have, in fact, become significant aspects of the judiciary's role. The conception of the judge as heroic social reformer has not been left to the private imaginings of jurists. This ideal has been portrayed in admiring biographies and has been rationalized in elaborate academic commentary.[46] It is embodied in the achievements and the reputations of people like Frank Johnson, Frank Bazelon, William Wayne Justice, Earl Warren, William Brennan, Harry Blackmun, and Thurgood Marshall. The allure of heroism may be obvious, but how is it possible to know that in specific cases judges have expanded rights in reaction to official disagreement? The answer in at least some classes of cases lies in the Court's own explanations. These types of cases are not minor or aberrational. Together they have been and continue to be a significant factor in our modern constitutional jurisprudence.

1. *Impermissible Motivation.* In some constitutional decisions disagreement is cast as an illicit motive and, thus, is explicitly treated as an interpretive consideration. The Court, for instance, has long said that under the Establishment Clause state statutes must have a secular legislative purpose. Consequently, it has been an important (and sometimes determinative) consideration whether laws were motivated by a desire to foster religion. One of the Court's duties is to determine what particular governmental actions impermissibly foster religion. When local authorities desire to induce a reversal of any such determination, their motive can be said to be, by definition, the fostering of religion. This means that a law *not otherwise in violation* of the Establishment Clause can be found to be invalid on the ground that it was motivated by disagreement with an earlier judicial determination.

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44. This case apparently had a major positive impact on the Court's public image. Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U. L. REV. 985, 1006-07 (1990).

45. I developed this theme in my book. *See* NAGEL *supra* note 30, at 1-4, 23, 153-55.

46. For two examples, see BERNARD SCHWARTZ, SUPER CHIEF—EARL WARREN AND HIS SUPREME COURT (1983) and TINSLEY E. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA (1981). For one egregious effort to characterize questionable tactics as "judicial statesmanship," see Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977). In this regard, it is worth noting the dedication page of what is probably the most admired recent book on constitutional law:

> For Earl Warren
> You don't need many heroes
> if you choose carefully.

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

This logic is illustrated in *Wallace v. Jaffree*,[47] where the Court invalidated an Alabama statute that authorized public school teachers to announce periods of silence "for meditation or voluntary prayer." The Court said that the state's actual purpose had been "to characterize prayer as a favored practice" and "to return prayer to the public schools."[48] The terms of the statute neither endorsed prayer nor returned official prayers to public schools. In fact, what the statute itself permitted—for students to meditate or pray during a moment of silence—was not unconstitutional. The Court in *Wallace* was quite clear about this, as it had to be, since to allow all thoughts except prayerful thoughts would itself be unconstitutional. Thus, if the effect of the statute was to permit something that is perfectly legal, why should the motives of the legislators have mattered?

One possible answer is that motivation changed the effective meaning of the statute. It is true that, if communicated to students, legislative intentions could have converted permission into endorsement. Certainly the literal message "You may pray," can be understood to mean "You should pray." For example, if the speaker has just finished a sermon, the permissive words could convey something even stronger than encouragement. The words alone, if uttered with a certain intonation, could also be received as an endorsement. Consider, however, the evidence the Court offered about legislative motivation. Senator Donald Holmes, a sponsor of the bill, inserted in the legislative record a statement that it was an "effort to return voluntary prayer" to the public schools.[49] This same Senator later confirmed in sworn testimony before the federal district court that this was his objective. Moreover, an earlier piece of legislation had already required a moment for "meditation." Since, according to the Court, "meditation" includes prayer, the later addition of the words "or voluntary prayer" could only have been intended to send the "message of State endorsement and promotion of prayer."[50]

It may be safely assumed that neither school students, nor their teachers, normally study official legislative records or the transcripts of trials in federal court. Any student who read the words of the 1984 statute and then carefully compared them with the language in previously existing legislation is surely to be identified as exceptional. Therefore, even if the Court was correct in its claims about the motivations of the state legislature, it was not correct in assuming that the basis for those claims had been communicated along with the statutory language itself. The Court, in short, failed to explain why students or teachers would understand the 1984 provision as an endorsement of religion.

In what sense, then, were legislative intentions relevant? Perhaps they were constitutionally impermissible, but why? Putting aside the possibility that disagreement with the Court's school prayer decisions is per se improper, the

47. 472 U.S. 38, 61 (1985).
48. *Id.* at 59-60.
49. *Id.* at 43.
50. *Id.* at 59.

most likely answer is that the Court acted preemptively. Because the members of the Alabama legislature wanted to circumvent or reverse *Engel v. Vitale*,[51] the Court understood the moment of silence statute as the first step in a campaign that could eventually lead to an unconstitutional result. This, however, is to say that lawful action, if motivated by disagreement, can become illegal.

The case of *Wallace v. Jaffree*[52] is not unusual. In the murky judicial business of characterizing official motivation, disagreement with the courts can often be discerned as one indicator of illicitness. For example, in *United States v. Eichman*,[53] which re-affirmed and extended the year-old holding that flag protection laws violate freedom of speech, the Court treated the political groundswell that preceded Congress's action as evidence that the purpose of the law was to suppress unpopular messages.[54] Similarly, in *Thornburgh v. American College of Obstetricians & Gynecologists*,[55] the Court alluded to the history of recalcitrant state abortion regulations as evidence that the purpose behind one state's "informed consent" rules was to "intimidate women" and "to deter" abortions. Moreover, in cases like *Columbus Board of Education v. Penick*,[56] local school boards around the country have been found guilty of "segregative intent" because they had "failed to heed their duty" to achieve racial balance after *Brown v. Board of Education*.[57] In each of these cases, rights were extended into new territory. Flag desecration laws became invalid even when they did not single out offensive conduct. The freedom to decide whether to have an abortion grew to include a right to have physicians decide when to withhold unpleasant, but truthful, information. The right to attend schools on a nondiscriminatory basis expanded to overlap substantially with a right to attend racially balanced schools. Perhaps these extensions were wise; certainly, the dominant opinion in the practicing bar and the legal academy supported them. We should, then, face up to the implications of the fact that these decisions were justified in part by reference to official disagreement with prior judicial decisions.

2. *Risk Valuation.* Lawyers tend to project the perspective of the time of adjudication backward onto the time of action. We are in the habit of saying

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51. 370 U.S. 421 (1962).
52. 472 U.S. 38 (1985).
53. 110 S. Ct. 2404, 2409 (1990).
54. The Court stated,

> We decline the Government's invitation to reassess this conclusion [that the public interest in "national unity" was sufficiently important to satisfy "the most exacting scrutiny"] in light of Congress' recent recognition of a purported "national consensus" favoring a prohibition on flag-burning. Even assuming such a consensus exists, any suggestion that the Government's interest . . . becomes more weighty as popular opposition to that speech grows in foreign to the First Amendment.

Id. (citations omitted).
55. 476 U.S. 747, 759-64 (1986).
56. 443 U.S. 449, 463 (1979).
57. 347 U.S. 483 (1954).

that official acts were either constitutional or unconstitutional because a judge later found them to be so. From the perspective of the governmental decision-maker, however, it would often be more accurate to speak in terms of risk of illegality. This is not a reference to the vagaries of trying to predict a judge's eventual decision, but instead to the fact that often "unconstitutionality" is a compound condition so that no single official is in control of all the components of that condition.

Consider, for example, a school board in a district that at one time segregated its students. As indicated in the preceding section, it would violate the Equal Protection Clause for such a board to perpetuate racial imbalance by adopting a neighborhood school policy if the motivation for this decision were to resist the goal of integration.[58] Suppose that board members vote for a neighborhood placement plan and do so with the expectation that continued racial imbalance will result. Can they know that this conduct is unconstitutional as the vote is cast? Although they can know something about their own motivations, they cannot be sure whether the expectation of racial imbalance will turn out to be fulfilled. This will depend on the decisions of others, including zoning officials, real estate agents, and parents. The most that can be said is that the vote helps to create a risk of a constitutional violation.

Obviously, public officials who disagree with a judicial decision will be relatively likely to make decisions that create a high risk of violation. They may value certain countervailing considerations more highly than did the judge; they may have greater tolerance for factual uncertainties; they may hope that any unconstitutionality that does result will lead to a re-interpretation; or they may simply care little about obedience to a legal principle that seems incorrect. In any event, judges faced with this form of recalcitrance have a strong incentive to broaden the range of prohibited behavior so as to reduce the risk of violation.

This dynamic has been an explicit factor in the modern judiciary's expansion of rights.[59] The most famous and clearest examples have arisen in the context of criminal law enforcement. For example, because police need to be deterred from illegal searches and interrogations, judges must exclude from criminal trials illegally seized evidence and confessions not complying with the requirements of *Miranda*.[60] These requirements rest heavily on the need to instill "respect" for the constitutional value and to assure full compliance.[61] The problem, as recounted in great detail in *Miranda*, is not merely that the police are likely to coerce confessions in the "traditional sense," but that they skate too close to the edge, engaging in tricks and strategies that can turn out, in particular circum-

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58. *Id.* at 461-63.

59. *See* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 203 (1988) (arguing that a common feature of constitutional interpretation is to "take into account institutional limitations and propensities").

60. United States v. Calandra, 414 U.S. 338, 348 (1974) (enunciating the exclusionary rule); Miranda v. Arizona, 384 U.S. 436, 467 (1966).

61. *See* Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1118-20 (1978).

stances or with particular suspects, to be coercive.[62] Police, in short, take unacceptable risks. That is a major reason why custodial interrogation is "inherently" coercive and why prophylactic warnings are necessary.

The criminal procedure cases provoked attention because the decisions themselves specifically distinguish between the substance of the constitutional rights involved and the instrumental measures that the Court was proposing as useful in protecting those rights.[63] It is especially clear in these cases that the area of proscribed conduct has grown larger than what the Constitution itself requires. In masses of more ordinary cases, however, the dynamic of risk management can also be seen at work. In virtually every area of modern constitutional law, principles are made operational with easily remembered aphorisms, bright-line rules, hard categories, illustrative dicta, or elaborate doctrines.[64] These everyday judicial techniques are employed in order to educate, inspire, intimidate, and control. This is thought to be necessary for many reasons. The basic one is that the public and its officials do not sufficiently appreciate the Supreme Court's enunciated constitutional values and are—if left to their own devices—likely to take unacceptable risks with those values.

Built into modern interpretive methods, then, is a strong hedge against disagreement. If judicial decisions are believed to represent the substance of "the Constitution," this hedge is, by definition, also part of that substance.[65] Viewed this way, it is not possible to say that otherwise legal behavior is being proscribed due to disagreement. Unlike the illicit motivation cases or the prophylactic criminal procedure cases, there are no independent standards acknowledged in the Court's own opinions by which the behavior can be termed "constitutional." However, opinions typically distinguish ultimate principles, values, or objectives from implementing rules and doctrines. Indeed, reference to the former justifies the latter. Thus, it is the objective of robust public debate that justifies the "actual malice" standard in certain classes of defamation cases;[66] it is the importance of the value of personal autonomy that once explained why restrictions on abortion must serve "compelling governmental interests"[67] and now explains the "undue burden" standard.[68] Even within the terms of the judiciary's interpretations, there is slippage between constitutional and judicial standards. Some part of this gap consists of proscribed behavior that is held unconstitutional only because of anticipated disagreement.

3. *Motivated Incompetence.* One of the most striking and far-reaching aspects of the modern rights explosion is the extent to which the Constitution has been

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62. *Miranda*, 384 U.S. at 448-57.
63. *See* Monaghan, *supra* note 18, at 3-10.
64. *See* NAGEL, *supra* note 30, ch. 7 (describing the modern trend toward greater instrumental control).
65. *Cf.* Monaghan, *supra* note 18, at 23.
66. *See* New York Times v. Sullivan, 376 U.S. 254 (1964).
67. *See* Roe v. Wade, 410 U.S. 113 (1971).
68. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

construed to require complex regimes of governmental initiatives. Courts have ordered that prisons be built, that new mental health programs be implemented, and that school systems be transformed. Not only have federal judges controlled a spectacular range of governmental decisions, they have done so often and in jurisdictions across the country.[69] The phenomenon has formed a central part of the public experience of modern judicial power.

From the beginning of the debate over these institutional injunctions, it has been noted that the Constitution itself does not require many of the specifics in the decrees.[70] No one thinks that our fundamental compact establishes, either directly or impliedly, the right of inmates to have their food prepared by cooks with bachelor's degrees in dietetics or the right of school students to have petting zoos and swimming pools.[71] Such requirements are remedial rather than substantive, and they are justified as means toward constitutional ends.

The connection between institutional injunctions and local resistance is well known.[72] The courts, it is often said, are forced to take over an expanding set of functions and to make increasingly detailed decisions because the responsible government officials are responding slowly, inadequately, or not at all. This general account lumps together many forms of behavior that can result from disagreement, treating them all as failures that justify further judicial intervention.

Somewhere within this set of resistant behaviors is the category referred to here as "recalcitrant."[73] A warden might, for example, hire new prison guards in compliance with the terms of a decree, but then not train them properly. Or a school board might reassign teachers without anticipating the need to counteract a drop in their morale. These lapses can be described as motivated incompetence. By "motivated" I do not mean defiant. Creating change in complex institutions requires more than submission. It requires will, foresight, enthusiasm, and energy. An official who disagrees with a court's interpretation of the Constitution will naturally tend not to be fully enlisted in the court's project. Although disagreement can motivate a person's oversights and although such mistakes can undermine the objectives of the decree, they do not necessarily interfere directly or intentionally. In any particular setting, the forms of resistance to judicial orders are varied and they are matters of degree. Judges

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69. There have been, for example, "major court orders" on prisons and jails in forty states. Malcolm M. Feely & Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature, in* COURTS, CORRECTIONS, AND THE CONSTITUTION 13 (John J. DiIulio, Jr., eds., 1990).

70. *See, e.g.*, Ira P. Robbins & Michael B. Buser, *Punitive Conditions of Prison Confinement: An Analysis of* Pugh v. Locke *and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893, 917-19 (1977).

71. *Id.* (on prisoners); Missouri v. Jenkins, 495 U.S. 33, 77 (1990) (Kennedy, J., concurring in part) (on schools).

72. For a discussion concerning the relationship between expansive injunctive relief and local disagreement, see Robert F. Nagel, *Controlling the Structural Injunction*, 7 HARV. J.L. & PUB. POL'Y. 395, 400-01 (1984) and sources cited therein.

73. *See* discussion *supra* at part II.

cannot be expected to sort out precisely what causes failure. Motivated incompetence, like other forms of local recalcitrance, is therefore treated as one more reason to control an ever-widening complex of otherwise legal conduct. As remedies expand, rights are redefined to be vague enough, or broad enough, to be commensurate with the orders. Therefore, like statutes that are unconstitutional because enacted with "illicit" motivation and like the prophylactic measures used to prevent dissenting officials from risking constitutional values, institutional injunctions demonstrate that federal judges have responded to officials' disagreement by expanding rights.

B. The Justifications for Expanding Rights

The various ways in which courts expand rights in reaction to disagreement are all questionable. For example, why, as a matter of substantive constitutional law, should it have mattered that Alabama legislators wanted to endorse prayers in the public schools if all they did was authorize private moments for meditation or prayer? Similarly, even if local officials are putting constitutional rights at risk, by what authority does a court try to prevent constitutional violations before they have occurred? After violations have occurred, are there *any* limits on the authority of federal judges to take over local governmental functions in a potentially endless quest for full correction? These are difficult questions, but one basic answer is offered to each: The constitutional obligations of public officials may be expanded in order to vindicate rights as defined by the judiciary. State authority is displaced when its exercise threatens federal constitutional values—that is, when legislation is designed to subvert an announced constitutional value, or when discretionary acts create a risk of constitutional violations, or when local decisionmaking is ineffective in correcting violations. In essence, this answer is the structural part of the rule-of-law argument; it asserts that state authority must be subordinated to the supreme law as enunciated by the federal courts. Whether or not the answer is fully satisfactory in this context, the practices that it justifies are solidly entrenched and widely accepted.

As a justification for expanding judicial protections, the answer is familiar. But why would it not also justify constricting the constitutional obligations of public officials? If, for example, the objective is to prevent the return of official prayers to public schools, it may be that religiously motivated legislation should be permitted as long as it stops short of accomplishing that return. Such legislation could make the exclusion of official prayers more acceptable and, thus, might reduce outright defiance. If the objective is to prevent the risk of involuntary confessions and illegal searches, it could be that the widest possible range of investigatory techniques should be allowed. Broad local discretion, if effective in securing convictions, might reduce the pressures and frustrations that lead to unconstitutional abuses. If the objective is full implementation of complex institutional reform, it might be that the will and initiative of local leaders could best be enlisted by insulating them from detailed oversight and the threat of displacement.

These possibilities, of course, are doubtful under some assumptions and in some circumstances. The same, however, can be said of the opposite strategy. Expanding obligations can vindicate underlying constitutional rights on certain assumptions and under some circumstances. The expansion technique apparently strikes many jurists and academics as being more sound.[74] This judgment is defensible, but it hardly justifies the harsh condemnations of judicial retrenchment that coexist with a generally uncritical acceptance of the established practice of judicial aggrandizement. What is at stake, it turns out, is not the principle of supremacy, but the relative efficacy of two different protective strategies.

What can account for the doomsdayish terms in which objections to retrenchment are often expressed? Why do scholars fear that rights are being "destroyed" and that the Constitution is "vanishing"?[75] Why do Justices brood about undermining "the character of a Nation of people who aspire to live according to the rule of law"?[76] These terms are suggestive of deep anxieties about the durability of our constitutional system, which is portrayed as being in disarray and under ferocious attack. A second justification for the expansion strategy, then, is the openly pragmatic part of the rule-of-law argument. The point is not that expanding rights assures their actualization as required by the principle of federal supremacy. Rather, expanding rights in the face of disagreement prevents chaotic cycles of revision in the announced law. It creates respect for courts as the expositors of law, promotes clarity of principle, generates public understanding and, eventually, agreement. Under this view, what is at stake is not merely the implementation of preferred judicial policies, but the fragile social and psychological supports for the rule of law itself.

How, exactly, might expanding constitutional obligations in reaction to local recalcitrance be expected to accomplish these deeply reassuring goals? The most obvious answer emerges from contrasting the consequences of the two strategies, retrenchment and expansion. Constricting rights (and correlative legal obligations) rewards disagreement and, thus, invites further recalcitrance. In contrast, expanding rights increases the costs of recalcitrant action by increasing the obligations of public officials. Disagreement is thereby discouraged. The announced law is protected from further political pressure, and the public is encouraged to develop respectful and compliant attitudes.

The difficulty is the implicit assumption that there will be no cycle of revision caused by mounting displeasure. It is certainly possible that as unpopular constitutional meaning is expanded, political dissent will be provoked, triggering more expansion and more disagreement. As a matter of recent history, not to mention common sense, this possibility is quite real. The *Roe*

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74. *See* Gewirtz, *supra* note 7, at 617-24 (advancing the position that, at least in school desegregation, less control can sometimes lead to more compliance).

75. *See* Chemerinsky, *supra* note 1, at 96-98 (defending the use of the word "vanishing"); Schrock & Welsh, *supra* note 61, at 1159 (referring to the "annihilation of rights").

76. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2816 (1992).

trimester scheme can be understood as an effort to forestall recalcitrant state legislation by predetermining the outcome of many possible future cases. This expansive strategy provoked especially intense opposition.[77] Subsequent efforts to expand on *Roe*—including the invalidation of parental consent requirements and informed consent laws—only made the effective meaning of the right to privacy even more unacceptable to segments of the public. The result has not been stability or respect for the rule of law.

As a matter of political prediction, the strategies of expanding and restricting rights both have some potential for discouraging local recalcitrance, but also for encouraging it. It may be that lawyers tend to overestimate the extent to which the rule of law depends on respect for courts and on stability in announced constitutional meaning. The history of judicial review in the United States is remarkable for the amount of political opposition engendered by the courts' decisions and for frequent, significant variations in announced doctrine. Stable understanding of constitutional values and popular commitment to those values is probably a function far more of social and political life than of judicial interpretation.[78] Judge-made constitutional law may have more to do with change than with durability. At any rate, the common and accepted practice of expanding rights in reaction to official recalcitrance severely undercuts both the structural and pragmatic components of the rule-of-law argument.

V

CONCLUSION

Two prevalent judicial practices—the use of tradition in defining due process rights and the expansion of rights in reaction to political disagreement—make it difficult to explain why, in deliberating on constitutional questions, courts should not consider local recalcitrance. By insisting that judges should never take local political decisions into account, it is possible, of course, to reject these two practices and, thus, to avoid the problems they raise. Some, for example, argue that rights should be defined simply according to what the Constitution itself mandates.[79] The proponents of this position must identify the kinds of knowledge that are properly relevant to this determination and explain why the experience and understandings of local officials are irrelevant to that knowledge. Those who are unwilling to take this walk back down the road of legal formalism can, perhaps, construct a better version of the rule-of-law argument than the one examined in this article. Otherwise, the safest conclusion seems to be that, while recalcitrant officials may be wrong, they are not irrelevant.

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77. *See* LUKER, *supra* note 32, at 137-44 and ROSENBERG, *supra* note 43, at 185-89.
78. NAGEL, *supra* note 30, at 2.
79. *See* Schrock & Welsh, *supra* note 61, at 1171-76.