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Nationalized Political Discourse

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I. CURRENT DISINTEREST IN STATE-BASED DISCOURSE

Several prominent efforts to emphasize the importance of the political arena as a forum for constitutional discourse assign little or no role to state institutions. Bruce Ackerman, for example, claims that "the people" have established constitutional meaning while mobilized into extraordinarily intense debate.[1] The interbranch struggle that spawns these "constitutional moments" involves "institutional deadlock in Washington," and the mechanism by which "the people" speak is the national election.[2] Similarly, Robin West's argument for a progressive "reconstruction" of the Fourteenth Amendment asserts that the appropriate forum for this radical reinterpretation is the United States Congress.[3] Indeed, West's book hardly mentions federalism, and one of her main tenets, the "sole-sovereignty principle," appears on its face to be hostile to state authority of any kind, let alone state-based constitutional dialogue.[4] Mark Tushnet's call for constitutional interpretation outside the courts speaks of "the people" as an undifferentiated national entity and does not mention the possibility that their constitutional discourse might be organized within state-based institutions.[5] And, finally, a range of proposals for reining in the Court—from initiating term limits for justices to authorizing congressional override of specific judicial decisions—presupposes increased constitutional deliberation within national institutions.[6]

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1. Bruce Ackerman, We the People: Foundations 6-7 (1991).

2. *Id.* at 48-50.

3. Robin West, Progressive Constitutionalism: Reconstructing the Fourteenth Amendment 219 (1994).

4. *See id.* at 31.

5. Mark Tushnet, Taking the Constitution Away from the Courts (1999).

6. For a useful survey and analysis of such proposals, see Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 Ala. L. Rev. 397, 453-62 (1999). Carrington's own proposals also focus on national institutions: term limits for the justices and a "devolutionary

While on the whole this concentration on national decision-making is not surprising under present circumstances, it should not be taken for granted.[7] State institutions, of course, were a part of the ratification process for the Constitution of 1787 and since then have played their prescribed part in the process for formal amendment. As for interpretation, throughout much of our history state-based decision-makers have played an important role in defining and protecting rights.[8] Even in the recent era of intense nationalization, states have created various pressures that have led the federal courts, despite some caterwauling, to alter their interpretations.[9] From a historical perspective, then, the decision of so many legal commentators to fixate on nationalized constitutional dialogue is a significant departure.

Contemporary fixation on nationalized dialogue is puzzling in at least one other respect. Like just about all other observers, nationalistic legal scholars presumably know about the occasionally low quality of national political discourse. They must notice the simplifications, the exaggerations, and the nastiness of presidential campaigns. They must shake their heads at the insincere posturing that often takes place in congressional committee hearings and the vacuousness that can characterize floor debate. And surely they must view at least some judicial confirmation hearings as jurisprudentially superficial and excessively personal.

There are many possible ways to reconcile a commitment to nationalized constitutional discourse with severe aversion to aspects of nationalized political discourse. It could be, for instance, that the defects in political dialogue that inspire so much disappointment and scorn are in fact the exception rather than the norm. Or maybe the subject matter of constitutional discourse would inspire the public and their political leaders to improve on their ordinary performances. Or, since many legal scholars acknowledge that judicial opinions are often

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amendment" authorizing a congressional super-majority to override judicial opinions that excessively intrude on state and local governments. *Id.*

7. For writings that do not ignore dialogue at the state and local level, see, e.g., Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. Colo. L. Rev. 975 (1993); Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights From the Virginia and Kentucky Resolutions*, 11 Const. Comment. 315 (1994); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410 (1993); Keith E. Whittington, *The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change*, Publius, Spring 1996; Louis Fisher & Neal Devins, Political Dynamics of Constitutional Law (1992).

8. *See* Moore, *supra* note 7, at 353; Whittington, *supra* note 7, at 3-11. More generally, see John J. Dinan, Keeping the People's Liberties: Legislators, Citizens, and Judges as Guardians of Rights (1998).

9. *See, e.g.*, Fisher & Devins, *supra* note 7, at 197-302 (discussing abortion and race).

overstated, confused, and formulaic, perhaps even flawed political debate would be better than the interpretations of judges.

My theme here is that these comforting possibilities underestimate the extent to which deficiencies in nationalized political discourse are inherent in modern circumstances. By this, of course, I do not mean that there can never be useful or even inspiring debate at the national level. All that I mean to say is that the kinds of contemporary communicative deficiencies that are commonly seen and decried should be expected to characterize enhanced constitutional dialogue at the national level.

This thesis does not imply that discourse organized around more localized institutions would necessarily be of high quality. Decentralized discourse does, I think, have certain clear advantages over nationalized debate, but these advantages only make admirable dialogue possible, not inevitable. Moreover, one of my central themes is that an important cost of the centralization of political discourse under current conditions is that it impoverishes more localized communication.

I will proceed by first describing and analyzing some rather typical instances of deficient political dialogue. (For my purposes, the decisions of courts are simply additional illustrations of deficient political communication because they are subject to many of the same structural pressures as other forms of public discourse.) I will then attempt to explain why these deficiencies are inherent in nationalized dialogue under modern conditions.

II. THE DISMAYING NATURE OF POLITICAL DISCOURSE

Here, then, is an assortment of rather typical modern political communications—an assortment that at first appears odd and discordant but that, on reflection, forms a coherent and discouraging picture:

During his State of the Union speech, a president looked towards his wife in the balcony and mouthed the words, "I love you."[10] *The same president had on a number of earlier occasions, while embroiled in a very public controversy involving his sexual infidelities, been filmed leaving church prominently carrying a Bible.*[11] *This president is without doubt a brilliant communicator with almost movie star charisma, and both his speech and his public religiosity were widely regarded as political successes.*

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10. *See* Thomas L. Friedman, *The Grand Bargain*, N.Y. Times, Jan. 22, 1999, at A25.

11. *See* N.Y. Times, Dec. 21, 1998, at A1 (photograph and caption).

During his State of the State address a governor of Alabama stated as follows:

> *[W]hen a state or federal court—a part of the non-lawmaking judicial branch of government—rules that an establishment of a national religion has occurred by posting the Ten Commandments on a courtroom wall... or presenting a nativity scene in school... or offering a pre-game prayer by coaches and players or praying for the safety of our soldiers in harm's way by a class at school, or acknowledging God at a graduation ceremony... such court has violated the U.S. Constitution to which you and I and all the Judges have taken an oath of office to uphold.... Today, across this land governors, U.S. Congressmen, U.S. Senators, State legislators, legal scholars, and the people are deeply concerned over reckless, illegal, and arrogant rulings by our imperial judiciary. I will be true to my conscience and my oath of office and resist illegal usurpation of authority by any court with all legal and political means I can muster.*[12]

These words, despite being supplemented with historical and legal documentation, were greeted by commentators with open derision. The governor who spoke them lost in the next election.

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In 1989 the Pennsylvania House of Representatives was debating a bill that would impose a number of restrictions on the right to abortion—restrictions that would eventually be litigated before the United States Supreme Court in Planned Parenthood v. Casey[13] *and would elicit from that Court cries of anguish about political attacks on the legitimacy of its decisions. One of the chief proponents of the bill rose to say as follows:*

> *Remember what* Roe v. Wade *said, and what it said was that abortions which are necessary are permitted. So the issue comes down to, what is a necessary abortion? It strikes me, for example, that even the old court would find that it is not a necessary abortion to have sex selection; that it was not an infringement on an abortion to have informed consent; that in fact an abortion after 24 weeks, except to save the mother's life or to avert substantial and irreversible impairment of major bodily function, can never be considered necessary. So there is a framework there right now where in fact each provision could be ruled constitutional. Remember this, however: Simply stated, when you cut to the chase, constitutionality is what five*

12. Gov. Fob James, State of the State Address (Jan. 13, 1998) (transcript available in Alabama Department of Archives and History, Alabama Governors Press Secretary Subject File, Montgomery, Alabama) [hereinafter James, State of the State Address].

13. 505 U.S. 833 (1992).

> *or more Justices of the United States Supreme Court at any given time say it is.*[14]

Proponents of the Bill also insisted that their legislation was consistent with other Supreme Court precedent and, indeed, that to the extent that the Bill might alter existing case law, justices on the Court had effectively invited an opportunity to rethink their earlier decisions.[15]

For their part, opponents argued that the Bill would be unconstitutional under existing case law and that this fact precluded enactment:

> *So . . . we will pass today an unconstitutional act, in violation of our oath, in the hopes that perhaps, by inferences, some members of the Supreme Court may change their minds . . . . Right now the law of the land is the Supreme Court's current determination. That is what we are bound to abide by.*[16]

* * * *

During his confirmation hearing on his nomination to the Supreme Court, a nominee is asked whether "there is a core of political speech that's entitled to greater constitutional protection than other forms of speech". The nominee, a former professor and judge, replied by referring to "what I think of as dialogue in a civilized society." He went on:

> *Actually, it is Michael, my son, who really gave me a good compliment once that set me thinking about this.*
>
> *What he said was, well, we used to argue a lot at the dinner table, I mean discuss, and he said, "You know . . . I always felt you were listening to me." That, of course, doesn't always mean we agree. But, you see, there is something in that idea of listening that promotes the dignity of the person who is listened to.*
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> *I have noticed . . . [that if a judge listens to both sides in court] it promotes a good feeling, because people feel they have been listened to, even if you disagreed with them . . . .*[17]

Similar episodes in confirmation hearings are now legion. An earlier nominee to the Court, for example, replied to a question about his understanding of a woman's position in facing an unwanted pregnancy by recalling that twenty-four years earlier as a dormitory proctor he had

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14. Pa. House of Representatives, 173d Sess. 1989 Leg. J. of the House 1755 (1989) (statement of Mr. Freind).

15. *Id.* at 1756.

16. *Id.* (statement of Mr. Itkin).

17. *Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 103d Cong. 160 (1994) (statement of Judge Stephen G. Breyer).

had a conversation with a young pregnant woman who was uncertain and upset. This nominee did not reveal the content of that conversation, but he did mention that it took two hours, was held in the most private place he could find, and that he had counseled her. He concluded by saying, "And I think the only thing I can add to that is I know what you [Senator Howard Metzenbaum] are trying to tell me, because I remember that afternoon."[18]

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During joint Senate/House committee hearings on the "Partial-birth Abortion Ban Act," the Legislative Director of the National Right to Life Committee quoted a physician who had performed the procedure as follows:

> *With a lower fetal extremity in the vagina, the surgeon uses his fingers to deliver the opposite lower extremity, then the torso, the shoulders and the upper extremities. The skull lodges at the internal cervical os, the opening to the uterus.... At this point, the right-handed surgeon slides the fingers of the left hand along the back of the fetus and "hooks" the shoulders of the fetus with the index and ring fingers (palm down).... The surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger.... The surgeon then forces the scissors into the base of the skull.... The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull content.*[19]

Shocking descriptions, of course, are used by both sides of the abortion debate. In defending the proposed Freedom of Choice Act of 1992, a senator stated, "When abortion was illegal... [t]housands of women died at the hands of back alley butchers... " and he quoted a physician as saying:

> *I have seen firsthand the horrors of illegal abortions.... I know of women who were blindfolded and alone, moved by total strangers from place to place before they were brought to a secret place where the abortion was performed and then left on a street corner to find their way home.*[20]

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18. *Nomination of David H. Souter to be an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. 115 (1990) (statement of Judge David H. Souter).

19. *Partial-Birth Abortion: The Truth, Joint Hearing before the Senate Comm. on the Judiciary and the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 39 (1997) (statement of Douglas Johnson) (brackets and ellipses omitted) [hereinafter *Joint Hearing*].

20. 138 Cong. Rec. 5813 (1992) (statement of Sen. Cranston).

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The voice that comes over my National Weather Service radio is oddly mechanical. It has no normal cadence or inflection or accent, and it mispronounces local place names. One morning it delivered a lengthy warning about the onset of tornado season in my home state of Colorado. The voice advised that people should not try to outrun a tornado, that in an emergency they can seek shelter in a ditch, and that if someone does lie in a ditch it is important to watch out for running water. Despite its solicitous (not to say, condescending) advice, the voice is not human. It is a computer-generated voice that is used throughout the country.

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The impersonality of this expression of governmental concern may be extreme, but less stark examples are commonplace. For instance, a television advertisement sponsored by the Department of Health and Human Services shows a series of photographs of a charming child while a voice intones: "His father left today. Forever. He'll be twice as likely to drop out of high school. Thirty percent more likely to attempt suicide. Even if you don't live with your kids, your emotional and financial support gives them a better chance." The screen fades to black behind these words: THEY'RE YOUR KIDS BE THEIR DAD. The child, of course, is an actor. The voice belongs to no one in particular and is reading from a script.

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One of the most intellectually formidable federal judges in the country faced the question whether nude dancing "of barroom variety" is speech protected by the First Amendment.[21] *The judge's opinion contains references to the satyr plays of the ancient Greeks, the Folies Bergère, the Dance of the Seven Veils in Richard Strauss' opera Salome, Diaghilev's L'Après midi d'un faune, Isadora Duncan, Les Ballets Africains de Keita Fodeba, Richard Strauss' Ein Heldenleben, Gustav Holst's The Planets, and Debussy's La Cathédrale engloutie as well as to several important treatises on the history of dance and eroticism, including Sachs, World History of the Dance (1937).*[22] *It also contains the judge's evaluation of the actual dances at issue in the case: "The dancers are presentable although not striking young women.*

21. Miller v. Civil City of S. Bend, 904 F.2d 1081, 1082, 1089 (7th Cir. 1990) (Posner, J., concurring).

22. *E.g., id.* at 1089, 1090, 1093.

They dance on a stage, with vigor but without accomplishment . . . ."[23] *It notes that the goal of erotic dancing is to "express erotic emotions, such as sexual excitement and longing" and attempts a brief explanation of how striptease accomplishes this goal: "Nudity is the usual state in which sexual intercourse is conducted in our culture, and disrobing is preliminary to nudity . . . . [The dance] make[s] plain that the performer is not removing her clothes because she is about to take a bath . . . or undergo a medical examination . . . ."*[24]

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Some years ago the Minnesota Supreme Court faced the question whether a drunk driving suspect has the right under the state's constitution to consult a lawyer before taking a breath test.[25] *The court referred to previous cases where it had adopted a requirement that the state demonstrate a "compelling state interest" for vehicular safety rules and that the rules were the "least restrictive alternative."*[26] *It then adopted something called the "critical stage" test for the right to counsel and went on to say that the denial of access to counsel had to "be weighed against the state's interests."*[27]

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No doubt it is possible to select from the world of contemporary political communications—from the misleading political ads, the windy legislative debates, the hysterical Internet messages, the mindless shouting on televised talk shows—more spectacular illustrations than I have chosen. Indeed, some of my examples, such as the Minnesota Supreme Court's use of federal doctrinal language in interpreting state constitutional provisions, or the computer-generated voice used by the National Weather Service, may seem unexceptionable. And all of my examples have some redeeming aspects. Even President Clinton's public displays of affection and religiosity may have represented, under the circumstances, a limited kind of symbolic moral leadership. Certainly, an understanding of the concrete effects of both abortions and abortion bans is highly relevant to moral deliberation. Upon consideration, however, each of my illustrations is dismaying in important and depressingly familiar respects.

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23. *Id.* at 1091.

24. *Id.*

25. Friedman v. Comm'r of Pub. Safety, 473 N.W.2d 828 (Minn. 1991), *discussed in* Intellect and Craft: The Contributions of Justice Hans Linde to American Constitutionalism 92 (Robert F. Nagel ed., 1995) [hereinafter Intellect and Craft].

26. *Friedman*, 473 N.W.2d at 833 n.4.

27. *Id.* at 832-34.

An obvious problem with Clinton's actions, for example, is that they substituted gesture for substance. The public, of course, is well aware that national politicians routinely stage events and that some part of the resulting "message" may well be substantively false. This knowledge can produce cynicism, or it can produce a limited suspension of disbelief whereby the audience treats political gestures as a part of the game, like a literary convention, to be taken seriously at the same time they are understood to be fictional. Public discourse based on gesture, then, tends to lead to either of two characteristically modern developments: political withdrawal or shallow, play-like participation.

Governor Fob James' challenge to Supreme Court interpretations of the religion clauses was in the abstract both substantive and important.[28] It sounded like a foolish joke, however, partly because governors, especially southern governors, do not have the intellectual or moral stature to question a respected national institution like the Court and partly because the political hopelessness of his cause made his threat to "resist . . . with all . . . means I can muster" sound like yet another empty gesture.[29] By way of contrast, the Pennsylvania legislative debate achieved some respectability but only by minimizing substance. The disturbing jurisprudential and institutional questions arising from the Court's abortion decisions were not explored. Indeed, in graphic contrast to the *Casey* Court's later charge that political "fire" was threatening its authority and the rule of law,[30] the legislative debate actually reinforced the legitimacy of the Court's role. All sides used as touchstones for the propriety of their positions strained interpretations of existing cases or predictions about how the Court might rule in the future. As so often happens, a potentially profound political and constitutional debate was reduced to crass legalistic analysis.

Judicial nominees Breyer and Souter used personal anecdotes to evade answering questions. Senators and their constituents could read whatever answer they wanted into their meandering stories. Moreover, reliance on autobiographical details, while probably interesting and sometimes revealing, has the unfortunate consequence of moving significant political events in the direction of soap opera. The substitution of the personal, the simplistic, and the sentimental for the political—a trend that increasingly dominates presidential

28. The scholarship that sharply questions the Court's Establishment Clause jurisprudence is, of course, voluminous. For a specific effort to evaluate Governor James' constitutional claims, see Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does not Incorporate the Establishment Clause*, 24 Ohio N.U. L. Rev. 1 (1998).

29. James, State of the State Address, *supra* note 12, at 86.

30. Planned Parenthood v. Casey, 505 U.S. 833, 867 (1992).

politics and now can be commonly found even in the judicial nominating process—infantilizes public debate.[31]

The testimony in the hearings of abortion legislation is nothing if not substantive. But both the clinically cruel description of the so-called "partial-birth abortion" procedure and the highly emotional claims about "back-alley butchers" and blindfolded women are, like Breyer's and Souter's testimony, efforts to personalize policy debate.[32] Moreover, like televised pictures of the return of dead soldiers in bodybags, this kind of information is in some ways too powerful. It is so urgent and one-sided as to leave no room for broader perspective or compromise. It makes opponents into enemies and thus induces both hatred and a sense of futility. Worse, these defects are progressive, for extreme moral claims of this kind can be answered only by ratcheting up the intensity of argumentation. As charges fly back and forth, even the very basic inhibition against using falsehoods begins to drop away.[33]

The computer-generated voice of the National Weather Service is in many ways the opposite of the legislative debates on abortion. The subject matter is benign and non-controversial; this is the government as concerned friend rather than moral arbiter. Moreover, the voice has no individuality and no regional associations, and it can be heard all across the country. Thus, it reinforces the sense that we are one people without potentially divisive variations. Nevertheless, *especially* because the government is speaking to its citizens out of concern for

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31. *See supra* text accompanying notes 17-18. Especially egregious in this regard was the confirmation testimony of Ruth Bader Ginsburg. Asked what in her own experience led her to devote so much of her career to breaking down the legal barriers "to the advancement of the women in our society," she replied with a series of personal stories. *Nomination of Ruth Bader Ginsburg to be an Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, 103d Cong. 134-35 (1993) (statement of Judge Ruth Bader Ginsburg). There was a story about when Ginsburg as a female law student was denied access to a room in the law library. Her account was made more vivid by this detail:

> [I]t was quite late at night, and I wanted to make sure I got home by midnight. My daughter, the professor (now) was then fourteen months old—no, that was my second year, so she was a few months over two years old. And I wanted to look up the citation, report back, and return home.

Id. There followed stories about the exclusion of her mother-in-law from a Harvard Law Review banquet, about dormitory rules at Cornell and Harvard, and about a conversation with a waitress about a "most adorable steward" encountered on a transpacific flight. *Id.*

32. See *supra* notes 19-20 and accompanying text.

33. During the congressional debate over the Partial Birth Abortion Ban Act, Douglas Johnson asserted that opponents of the Bill had lied on a number of issues, including when Ron Fitzsimmons, Executive Director of the National Coalition of Abortion Providers said that the procedure was used less than 500 times a year. Joint Hearing, *supra* note 19, at 38. According to Johnson, Fitzsimmons admitted that this was a lie and explained, "I just went out there [before various media outlets] and spouted *the party line*." *Id.* Johnson claimed that the correct number was 2,000. *Id.* at 46. For other alleged falsehoods, see *id.* at 41-53.

health and safety, it is jarring to hear a voice that is a rather perfect expression, disembodied and rote, of impersonal bureaucracy. Moreover, the message establishes an inappropriate relationship between government and citizen inasmuch as the government seems to be assuming that its citizens are unaware of the most obvious dangers and, like children, require the most elementary advice.

The public service advertisement about the importance of fatherhood is bothersome for similar reasons. To be advised by the government that it is important to be "your kids' dad" is only slightly less insulting and a good deal more vacuous than to be instructed to watch out for water while lying in a ditch during a storm. What exactly is the government telling us about fatherhood? Children are better off if "dads" don't leave home, apparently, but the ad does not even advise fathers to stay at home; instead, it encourages "emotional and financial support"—and not on the ground that this will avoid the distressing outcomes that are itemized but because this will give the child "a better chance." The Department of Health and Human Services believes that citizens are so bankrupt and yet so malleable that they will be able to benefit from this brief and vapid piece of advice. And the messenger, this time a real voice, is actually as impersonal as the Weather Service's announcer. The speaker is unidentified and, like the computer, is not using his own words; despite his earnestness, he is generating lines that have been written for him. This charade is all the worse because it trivializes something—the importance of family ties—that relates to the deepest instincts of the individual and the strongest interests of society. Advice on the significance of fatherhood from a family member or a friend or even a physician can have great importance precisely because it is the opposite of the public service message: it comes from someone who is known and trusted, it is heartfelt, and it arises out of two-way conversations that are grounded in experience and as detailed as necessary.

Judge Posner's voice, in one way the opposite of the public service ad, is strong and substantive.[34] But to whom is all this erudition being addressed? Surely not to the owner or patrons of the Kitty Kat Lounge, where the expressive activity had taken place, and surely not to practicing lawyers, and—one supposes—not to the public generally. Each of those groups knows perfectly well that nude dancing is expressive, and each knows what it expresses. Like the Weather Service warning and the public service ad, Posner lectures as if the public were ignorant. And, even assuming that somewhere there is an audience in need of basic instruction on the erotic nature of nude dancing, what can account for Posner's embarrassingly lavish

34. *See supra* notes 21-24 and accompanying text.

commitment of intellectual resources? His opinion is the voice of a government that is at once superior and ridiculous.

The Minnesota Supreme Court's opinion has none of Posner's force or individuality.[35] It is in fact, as Judge Hans Linde has demonstrated, a weak and inappropriate imitation.[36] A state constitution, which has its own text and history and authority, is interpreted as if it were a knock-off of the federal Constitution. Worse, the words that are being appropriated are not the impressive words of the original text but the stilted and clumsy doctrinal formulations of U.S. Supreme Court Justices interpreting their text. Like the unexpressive computer-generated voice of the Weather Service, the words of the formulaic constitution can be heard all across the country.

III. CENTRALIZATION AND DEFICIENT DIALOGUE

The empirical hypotheses that emerge from these observations are that, on the one hand, political dialogue at the state level probably tends to be bland, insubstantial, derivative, and unserious and, on the other, that political dialogue at the national level may often be spectacular, extreme, dishonest, personalized, polarized, and staged. These hypotheses are, I think, consistent with common impressions. More importantly, they are consistent with the basic conditions under which modern political dialogue is conducted.

Those conditions are matters of common knowledge and elementary inference. First, the range of subject matter that is relevant to national political discourse includes not only issues, like foreign policy, that are not ordinarily relevant to state-based discourse but also virtually everything, including safety and health care and education, that is discussed within state-based venues. Second, the potential audience for national political discourse is, by definition, far larger and more varied than for any state-based discourse. This means that even when the issues under consideration are held constant, national decision-making will be more complex because (if for no other reason) the scale is greater. It also means that, again, if the issues are identical, the potential consequences of national decision-making are more significant than for more localized decision-making. Third, while electronic forms of communication are used at both levels, nationalized discourse is relatively distant and, therefore, is characterized by a lower proportion of personalized contact and a higher proportion of remote or abstract communication.

One of the consequences of these conditions is to create what might be called a "winner-take-all" political market.[37] Just as a few top

35. *See supra* notes 25-27 and accompany text.

36. *See* Intellect and Craft, *supra* note 25, at 92.

37. This phrase and much of the ensuing analysis is adapted from Robert H. Frank & Philip J. Cook, The Winner-Take-All Society: Why the Few at the Top Get

performers in professional sports or fiction-writing can now dominate entire national (and, indeed, international) economic markets, a relatively few leaders can now dominate a vast political market. Once a certain level of prominence is achieved, the words and images and policies of these leaders can be communicated across the whole nation. As Robert Frank and Philip Cook say of economic markets, "What is new is the rapid erosion of the barriers that once prevented the top performers from serving broader markets."[38]

"Winner-take-all" markets have many advantages, but one disadvantage is what the sociologist William Goode termed "[t]he failure of the somewhat less popular."[39] Just as the dizzying returns available to the few who attend elite law schools creates hyper-competition for admission to those schools,[40] the astonishing power and prestige available to the few who become national leaders means that the somewhat less important state institutions, like second-tier law schools, suffer a disproportionate loss of attention and prestige. The bland, derivative quality of political discourse at the state level, then, is a predictable result of the demise of any real limitation on national regulatory power combined with the modern information revolution.

In contrast, the hyper-competition for national power naturally will tend to produce leaders, like President Clinton, who are enormously skilled and colorful. Because the issues that these leaders confront are massive in scale and complexity and because the leaders must communicate from a relatively remote stage, it is predictable that they should personalize issues and resort to symbolic gestures. Personalization allows a large and uneasy public to focus on what they can easily understand and ultimately allows for trust in the leader to substitute for substantive evaluation of complex issues. Gestures of the sort that Clinton made, moreover, are reassuringly simple and can be efficiently communicated.

Governor James' ill-fated effort to challenge the Court's Establishment Clause cases was in part a "failure of the somewhat less popular." His effort appeared even more pathetic than it was because the prestige and power of the Court dwarfed the status of a state officer. The fact that his analysis might have been as good as the Court's meant no more than the fact that a relatively unknown writer's novel is as good (or almost as good) as a recognized best-selling author's when both compete for a publisher or a reviewer.[41] As this dynamic continuously plays out, it becomes obvious to all that the quality of state-level arguments challenging decisions of august

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So Much More Than the Rest of Us (1995).

38. *Id.* at 45.

39. *Quoted in id.* at 3.

40. *Id.* at 11-14.

41. *Id.* at 192-93.

national institutions will be discounted or ignored. Consequently, even those who have powerful objections to the decisions of national institutions often attempt to frame their positions as if they were consistent with or even derivative from the very decisions they condemn. Like the Pennsylvania legislators proposing a law aimed at overturning *Roe v. Wade,* such critics end up reflexively reinforcing the prestige of national institutions.

Federal judicial nominees resort to sentimental anecdotes for many of the same reasons that President Clinton told the nation that he loves his wife. But this device is responsive to another aspect of nationalized communication as well. The larger and more diverse the audience and the more significant the issue, the more the leader faces the likelihood of deeply offending some significant segment of the public. The potential rewards of gaining national office are extraordinary but the danger of infuriating opponents is almost unavoidable. One solution is to tell vague or sentimentalized autobiographical stories into which each segment of the public can read acceptable morals.

Paradoxically, when salient issues cannot be evaded or personalized, the incentives of nationalized discourse encourage stark, exaggerated, and dishonest claims. This is so because, first, in a "winner-take-all" competition the difference between first and second place is the difference between day and night and because, second, each contestant knows that the other will be tempted to resort to extreme measures.[42] National political discourse on issues like abortion moves quickly to extreme and divisive charges for the same reason that professional athletes are tempted to take steroids and televised sit-coms get ever raunchier. There are, of course, limits on this kind of competitive degeneration. Personal ethical standards, group pressures, and cultural expectations all set boundaries. The speakers strutting on the national stage are by definition, however, relatively distanced from the types of primary associations that create and enforce such constraints. Moreover, the members of these associations feel distanced from the national leader as well. The national leader, having become larger than life is presumably subject to pressures and rules that do not apply to everyday people. Hence, even those primary associations that do manage contact with the national leader may be uncharacteristically restrained and ineffectual.

Since one key to being a winner-who-takes-all is to utilize inexpensive communication that reaches a very wide audience, nationalized debate depends heavily on quick visual symbols, sound bites, and other highly economical methods.[43] The Weather Service replaced its human announcers with a single computer-generated

42. *See id.* at 127, 195-96.
43. *See id.* at 196.

voice in order to save the costs of printing out and reading forecasts and warnings. This change has the disadvantage of making the national government seem even more remote and faceless, a difficulty that might well encourage the agency to compensate by issuing ever more messages of concern. These messages are often so strikingly condescending partly because the national government is in fact relatively remote from, and out of touch with, its audience and partly because in so large an audience there are bound to be measurable numbers of risk-takers and incompetents.

The Health and Human Services admonition to "be your kids' dad" is not only condescending but also inappropriately familiar and empty. Vacuousness, like condescension, is a predictable result of the size and heterogeneity of the national audience. After all, this country contains many subgroups that hold strikingly different views about parental roles and responsibilities. It would be profoundly threatening to have the distant and uncontrollable national government seeking to improve childrearing practices unless that government's influence came in the form of ostensibly chummy advice rather than coercive rules and unless the advice itself were so vague as to be compatible with virtually any conception of fatherhood.

Judge Posner's lavish opinion on the erotic messages conveyed by nude dancing is precisely the kind of excessive investment to be expected from the winner-take-all contests spawned by a vast political market. As Frank and Cook point out, the differences in skill between a championship tennis star and a second-tier player may be so slight as to be imperceptible to all except experts and fanatics.[44] Nevertheless, the few who reach star status will have their matches broadcast around the world while the players just below the top play in relative obscurity. Posner is one of the few federal judges not on the Supreme Court who can compete for national recognition and influence. His judicial decisions get attention from other jurists and from professors at elite national law schools, and his books, which are published by eminent presses and reviewed in places like the *New York Review of Books*, affect the thinking of national opinion leaders. The extravagance of his writing in the nude dancing case, then, is designed to display his learning and his intellect, especially as against Judge Frank Easterbrook, who wrote an elaborate dissenting opinion[45] and who is, of course, another intellectually prominent conservative. Championship matches are better than they have to be—sometimes ridiculously good.

Those who toil in relative obscurity, like the Minnesota Supreme Court, suffer the consequences of over-investment at the top.

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44. *Id.* at 24.

45. Miller v. Civil City of S. Bend, 904 F.2d 1081, 1120 (7th Cir. 1990) (Easterbrook, J., dissenting).

Original, thoughtful research into the specific circumstances and history of a state constitution will not get the national limelight. Most of the best clerks, who might have helped with that research, attended elite national law schools, not the state law school, and went to clerk for someone like Posner or Easterbrook. Indeed, even the faculty at the state law school is unlikely to concentrate much on state constitutional law or the state legal system generally. If consulted by the Minnesota jurists, their writings will probably point right back to the doctrines of federal constitutional law. These doctrines do not have the flair and power of a Posner opinion, but they are fairly easy to find and to utilize. The voices of state institutions begin, like the voice of some vast bureaucracy in Washington, to sound mechanical and homogenized.

CONCLUSION

Given the current eclipse of state institutions, which have suffered the sad fate of "the somewhat less popular" in a winner-take-all society, state-based constitutional dialogue, if it somehow could be instituted, might be dull or indirect. Nevertheless, those who favor politicizing constitutional discourse might usefully give state institutions more consideration. If constitutional discourse could be moved from the federal courts to state institutions, politics at the state and local level might well gain in significance and dignity. Some of the intellectual and personal resources now so committed to the national stage might begin to disperse. In short, state participation in constitutional interpretation might be a partial solution to the unhealthy communicative dynamics now in place.

If this happened, localized constitutional discourse would have certain inherent advantages over nationalized discourse. Participants would be more likely to have had some personal contact with one another. They could draw more on common experience. There might be less need for gestures and evasions. Debate might be less personalized, less extreme, and less threatening. Issues examined at a smaller scale might be more understandable, and words might be used to convey more content.

On the other hand, it may not be possible—or for some reason it may be thought undesirable—to include state-based dialogue in political debate about the meaning of the Constitution. In this event, proponents of non-judicial interpretation should, at the least, confront the likelihood that constitutional discourse will often be carried on in ways that are just as cheap and demeaning as much of the rest of our national political life.