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### Real Revolution

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# REAL REVOLUTION

Robert F. Nagel<sup>†</sup>

## I.

Despite the erudition and braininess displayed in much constitutional scholarship, an embarrassing and unpleasant possibility lurks in the background like a crazy relative in the attic. This possibility is that, as a general matter, modern academic commentary on constitutional law is not really an intellectual activity. I do not mean that this commentary is, because of its adversarial qualities, a somewhat defective form of scholarship. I mean that those qualities—the mischaracterizations of opposing positions, the argumentative (and sometimes dishonest) uses of history, the shallow doctrinal manipulations, the political partisanship, the exaggeration, and the name-calling—may constitute the primary rules of the game. To the extent that this is so, our work is essentially an exercise, not in the evaluation of ideas, but in will-power.

Even given the existence of important and admirable instances of truly intellectual contributions in our field,<sup>1</sup> others besides me must have dreary moments of detachment when the overall contours of constitutional scholarship threaten to emerge. In such moments, we notice that sometimes positions temporarily shift but that they seldom change fundamentally; we see that critical insights are often acknowledged but are then quickly forgotten or ignored. In short, the same basic debates grind on and no progress is made. No sooner is one brilliant theory fatally undermined than another appears to take its place. One fervent historical claim after another is shown to be simplistic, but the enterprise of generating them goes on. An endless line of ingenious doctrinal arguments are shown to be unsatisfactory, but, like an empty train, they keep clanking down the track.

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1. For an example in the literature on federalism, see DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995).

Thus, constitutional scholarship seems at its core to amount to ceaseless assertion, the more brazen and improbable the better.

What is the purpose of this confident flow of words, this relentless verbal energy? Its most obvious object is to prevail—that is, to drown-out or obliterate or, at least, outlast. To prevail, the basic rule seems to be: begin with the boldest available position and then hold on. Seen in this light, adversarial huffing and puffing is not a deficiency in an otherwise intellectual enterprise; it is evidence that the purpose of the enterprise was not intellectual to begin with.

This depiction no doubt seems excessively dismal, but one purpose of this Essay is to suggest that the current debate on federalism bears it out. The terms of that debate are, appropriately enough, laid out in Charles Fried's 1995 Foreword to the *Harvard Law Review*.<sup>2</sup> This essay is titled *Revolutions?*, and that one-word question itself conveys the structure of the debate. While Fried concludes that the reasoning in the Court's federalism decisions is too closely tied to past cases for the adjective "revolutionary" to be apt, many others claim to see radical potential in them. For instance, Kathleen Sullivan refers to "a dramatic antifederalist revival."<sup>3</sup> Laurence Tribe opines that the Court is approaching "something radically different from the modern understanding of the Constitution."<sup>4</sup> Daniel Farber, while trying hard not to overstate the stakes, unveils something called the "New Federalism" that "broke out" as a movement with general implications in 1995.<sup>5</sup> He attributes to some members of this movement the view not only that states should have attributes of sovereignty but that they are in some measure "independent nations," a charge that is also made by some of the justices on the Supreme Court.<sup>6</sup> Indeed, Farber says that the strongest version of the New Federalism holds that the nationhood of states "is actually primary . . . more fundamental

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2. Charles Fried, *Revolutions?*, 109 HARV. L. REV. 13 (1995).

3. Kathleen M. Sullivan, *Dueling Sovereignties: United States Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 80 (1995).

4. Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1.

5. Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 617, 622 (1995).

6. *Id.* at 625 (citing *United States Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1872-73 (1995) [hereinafter *Term Limits*]).

to the constitutional scheme than the federal government.”<sup>7</sup> An excited Steven Calabresi thinks that *United States v. Lopez* is “revolutionary,”<sup>8</sup> and even the unflappable Fried describes the fact that four Justices signed the dissent in the *Term Limits* case as “startling” and as “coming closest to revolutionary.”<sup>9</sup>

So, while conclusions differ, the debate is about whether the Court’s recent federalism decisions have radical or even revolutionary potential. That the debate should have been structured this way is a testament to audacity. After all, this nation’s two hundred year history can fairly be described as an inexorable march of national power. Moreover, as I will try to demonstrate, this triumph of centralization is so complete that today, even in the legal academy, where unusual ideas might be expected to germinate, there is no important radical or revolutionary antifederalist challenge to our present federal system. It is less surprising, but no less demonstrable, that there is no such challenge from the most nationalized and remote of institutions, the Supreme Court. There is, however, an influential movement in the academy and on the federal bench in favor of continuing the elimination of any remaining significant state authority. As presently structured, the debate is designed not to shed light on our constitutional system, but to assure that this radically nationalist position will prevail. The boldest available strategy is to turn the truth upside down by labeling as constitutionally radical even moderate or marginal reservations about the continuing trend toward centralization.

These claims require that I be able to identify what a constitutionally “radical” or “revolutionary” antifederalist program would look like. The meaning of these words is dependent on some baseline, and I propose as a point of comparison the program of the radical nationalists on the Court and within the academy. I first describe this program and then I compare it to current antifederalist proposals. Finally, I outline what a radical antifederalist program might look like if there were one.

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7. *Id.* at 625.

8. Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In *Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 752 (1995).

9. Fried, *supra* note 2, at 14-15.

## II.

The most extreme version of radical nationalism proposes the elimination of the states. This could involve replacing the states with rationally drawn regional districts, a bright idea that is nevertheless impractical because Article IV requires the consent of a state's legislature before its territorial integrity is sacrificed. A fallback proposal is to transform the existing states into administrative units of the national government. If this transformation were complete, it would run afoul of the requirement that the United States guarantee to each state a republican form of government. Perhaps because of the constitutional impediments, there is no substantial academic movement in favor of either method of eliminating the states. Still, the idea in one form or another has had advocates as far back as Alexander Hamilton,<sup>10</sup> and an adventuresome modern thinker occasionally mentions some variation.<sup>11</sup> Such proposals are important mainly in indicating how wide the range of permissible discourse is among radical nationalists.

A somewhat more restrained version of extreme nationalism—the version that Madison emphatically denied was contemplated by the proposed Constitution<sup>12</sup>—would allow states to exist, but would completely subordinate them to the national government. To use Madison's terms, this position would replace the "mixed government" inherent in the Constitution of 1787 with a "national" or "consolidated" government. Under a consolidated system, state authority would be subordinated in three ways. First, the legal authority of the Constitution (including, of course, any amendments) would arise from the consent of the people of the whole nation without any participation by the states. Second, the operating institutions of the national government would not be derived from or dependent on state institutions. Third, the national government would have undefined regulatory power over the people directly.

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10. IV THE PAPERS OF ALEXANDER HAMILTON 211 (Harold C. Syrett ed., 1962). For various interpretations of what he meant in calling for the elimination of state sovereignty, see *id.* at 178, 187, 195, 202, and volume V, at 135, 138-39.

11. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 908-09 (1994) (arguing that states could be replaced by "other subdivisions of the nation" but that the change would be disruptive).

12. THE FEDERALIST, No. 39 (James Madison).

The first proposition—that the Constitution gained its legal authority as an act of the undifferentiated people of the whole nation—is simply at odds with the history of ratification and with the ongoing practice of formal amendment. The proposed Constitution was submitted for ratification to conventions organized within each of the states, and the formal amendments to that document have been submitted to state legislatures or (in one instance) to state conventions. Nevertheless, the claim that the authority of the Constitution arises from the consent of the undifferentiated people has a long pedigree going back at least to Justice Story. It is common in modern academic writings and was embraced by Justice Kennedy in *Term Limits*.<sup>13</sup> Indeed, the Madisonian position that the Constitution would gain legal force through ratification by “[e]ach state . . . as a sovereign body”<sup>14</sup> is today decried by justices and commentators as dangerously radical.

While this accusation is surely a sign of the audacity of today’s radical nationalists, of more practical importance is their disapproval of the role of the states in the amendment process. It might be supposed that since this role is specifically required by Article V,<sup>15</sup> there would be no outright opposition to it or at least that any outright opposition would itself be framed as a proposed amendment under the procedures of Article V. One of the most influential legal books of our time, however, argues that the Constitution can and has been amended without any participation by the states when in “constitutional moments” the people of the nation engage in heightened deliberations.<sup>16</sup> While this idea is taken very seriously, some scholars do reject the thesis as radical. Nevertheless, the underlying impulse to minimize the role of the states in the amendment process has broad support. This support is partially discernible in the common academic position against using the convention option of Article V. It is safer, eminent constitutional scholars frequently and earnestly tell the public, to wait for the national legislature

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13. *Term Limits*, 115 S. Ct. 1842, 1872 (1995) (Kennedy, J., concurring). For an example of academic endorsement see Farber, *supra* note 5, at 639.

14. *THE FEDERALIST*, *supra* note 12, at 244.

15. U.S. CONST. art. V states that “Congress . . . shall propose Amendments to this Constitution, or, . . . shall call a Convention for proposing Amendments. . . .”

16. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

to frame specific amendments than for two thirds of the state legislatures to apply for a convention.<sup>17</sup>

More generally, opposition to state involvement in the amendment process is apparent in the enormous amounts of judicial and academic effort that in recent decades have been expended in trying to fashion justifications for innovative interpretations of various constitutional rights. Given that some of these rights have no specific textual bases, that some arguably reverse intended constitutional meaning, and that some nationalize issues (such as education and family law) that the Court itself depicts as quintessential examples of matters left to the states, it might be that their establishment should have been left to constitutional amendment. Even if judicial interpretation is viewed as a proper vehicle for instituting such basic changes, there can be no doubt that it would also have been legitimate to utilize the amendment process. Justices and scholars, however, have relied almost exclusively on judicial interpretation and in so doing have effectively created an enormously significant alternative to either of the Article V amendment methods.<sup>18</sup> The sustained and aggressive use of this alternative has meant that much of the fundamental law has been established without participation by the states.

The second element of radical nationalism requires exclusion of state institutions from the derivation or operation of national institutions. Much of this exclusion has been accomplished by constitutional amendment and by the relocation of what once were assumed to be political questions to the jurisdiction of federal courts. These massive changes, which include, for example, the exclusion of state legislatures from the selection of senators and the relocation of ultimate responsibility for electoral reapportionment decisions in the federal courts, are not enough for radical nationalists. Highly respected constitutional scholars also rail against the electoral college and, more importantly, want to eliminate the equal representation of each state in the Senate.<sup>19</sup>

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17. See, e.g., Arthur J. Goldberg, *The Proposed Constitutional Convention*, 11 HASTINGS CONST. L.Q. 1 (1983); Laurence H. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 PAC. L.J. 627 (1979).

18. For a straightforward acknowledgment that interpretation has been used as a substitute for amendment, see Cass R. Sunstein, *Making Amends*, NEW REPUBLIC, Mar. 3, 1997, at 38.

19. See Akhil Reed Amar, *A Constitutional Accident Waiting to Happen*, 12 CONST.



Under Article V, the elimination of equal representation in the Senate cannot be accomplished without the consent of every state. This might seem to be an insurmountable obstacle, but the ceaseless urge toward consolidated government is not to be deterred. While the role of the states in choosing national representatives cannot be eliminated, nationalists can attempt to reduce it to a formality. A majority of the Supreme Court has repeatedly and authoritatively asserted that representatives to the national legislature "owe their allegiance to the people, and not the States."<sup>20</sup> Senators "become, when elected, servants of the people of the United States."<sup>21</sup> Thus, although presumably the framers made equal representation in the Senate a virtually unamendable part of the Constitution for some serious reason, radical nationalism posits that senators are to serve only the national interest and assumes that this interest is definable without reference to state interests. As legally improbable as this position may be, modern consolidationists not only assert it but, characteristically, describe those who disagree as dangerously radical. The Court's claim that national representatives should serve only the national interest cannot, of course, displace political realities, but it can reinforce more general psychological and cultural influences that encourage members of Congress to cut their state-based roots as they live and work in Washington.

The Court's impact on the political culture has undermined state influence over national institutions in another and even more fundamental way. Since *Marbury*,<sup>22</sup> the Court has insisted that the federal judiciary is the authentic voice of "the people" who enacted and amended the Constitution.<sup>23</sup> In this century, the national judiciary has emerged in the public's understanding as the pre-eminent enforcer of limitations on the national government. In theory, if not in operation, judicial review has replaced political pressure from the states as the primary check on federal overreaching. In the process, state-based political activity expressing disagreement with the constitutional claims of

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COMMENTARY 143 (1995); William N. Eskridge, Jr., *The One Senator, One Vote Clause*, *id.* at 159; Suzanna Sherry, *Our Unconstitutional Senate*, *id.* at 213.

20. *Term Limits*, 115 S. Ct. 1842, 1855 (1995).

21. *Id.* at 1871.

22. *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803).

23. See CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 126 (1996).

national institutions has been burdened by an extra measure of perceived illegitimacy.<sup>24</sup>

The third element of a fully nationalized government, according to Madison, is the generalized authority to regulate the conduct of the people. This element requires no extended discussion. That the central government's regulatory power is effectively unlimited was conventional academic wisdom until *Lopez*,<sup>25</sup> and calls for a return to this state of affairs are frequent and vociferous.<sup>26</sup>

Let me briefly recapitulate: Madison (and other proponents of the proposed Constitution) specifically and unequivocally denied that the new system would create either a confederated or a consolidated government. These arguments (not to mention the plainest possible constitutional text and enduring political practices) indicate that ours is a mixed form of government. Nevertheless, radical nationalists in the academy and on the Court insistently push for the central government to have, in effect if not in form, all the elements of an unmixed system. It would, of course, be one thing for these strong nationalists to acknowledge that our present government is and was meant to be mixed and then to argue that a consolidated system would be an improvement. But, instead, they usually insist that a consolidated national government is what our present Constitution creates.

What is more difficult to convey is the tenor of many of the arguments made on behalf of an unmixed national system. As a convenient illustration, consider an essay by the respected scholar Daniel Farber.<sup>27</sup> This article, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, is by current standards serious and moderate. Farber's argument is that George Washington's letter to Congress on behalf of the Constitutional Convention demonstrates several important aspects of intended constitutional meaning.

Farber claims that Washington's letter demonstrates that the Constitution was to gain its authority from the whole people, not

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24. See ROBERT F. NAGEL, JUDICIAL POWER AND AMERICAN CHARACTER: CENSORING OURSELVES IN AN ANXIOUS AGE 61-80 (1994).

25. *United States v. Lopez*, 115 S. Ct. 1624 (1995).

26. See, e.g., *id.* at 1651 (Souter, J., dissenting); Farber, *supra* note 5, at 642.

27. See Farber, *supra* note 5.

the people in the states. He infers this in part from Washington's references to "our country" and "our Union."<sup>28</sup> Since these words seem to assume the existence of a country before ratification, Farber concludes that Washington believed Americans were "in some sense already one people."<sup>29</sup> A second point is that Washington's letter "does not say a word about the importance of maintaining the states as a check on the federal government."<sup>30</sup> Although Farber uses the observation for a somewhat different purpose, his interpretation is consistent with the familiar consolidationist view that state institutions should not serve as a constituent part of—and therefore not as a check on—national institutions. The third argument made by Farber is that because the letter does refer to "fully and effectively vesting" important powers in the new government, the regulatory powers of Congress were meant to be so large as to be capable of becoming general in all practical effect.<sup>31</sup>

In Farber's essay, then, can be seen all three elements of the consolidationist position as defined by Madison. These elements are asserted to be the law of the land simply because of Washington's letter. Although the argument is made confidently, a moment's reflection shows it to be as light as smoke. To begin with, Washington's use of the word "our Union," while interesting, could not have meant that a legitimate political union already existed inasmuch as the announced purpose of the new Constitution was to create such a union. Indeed, the purpose of the letter was to introduce and recommend the instrument that would accomplish this change. Moreover, supposing that a unified nation somehow could have predated its own founding, it would not necessarily follow that the people in that union were organized independently of the states in which they lived. In fact, whether that kind of unification was even created by the new Constitution is today a controverted question.<sup>32</sup> Perhaps sensing these kinds of difficulties, Farber shifts quickly (as if it were the same point) to the much more realistic possibility that Washington meant that Americans were "in some sense already

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28. *Id.* at 627-28.

29. *Id.* at 638-39.

30. *Id.* at 644.

31. *Id.* at 640-42.

32. For a balanced discussion of the competing arguments, see SHAPIRO, *supra* note 1, at 14-26, 58-63.

one people."<sup>33</sup> It does seem quite likely that before ratification Americans could have had a sense of historical or cultural identity or of some form of incipient political identity. (Indeed, the government created by the Articles of Confederation was sometimes referred to as a "union."<sup>34</sup>) What Farber does not explain is his conclusion that Americans were already one people *in the sense* that they had authority to ratify a new constitution independently of the sovereign will of the people within existing states. If they had believed themselves to be one people in that sense, presumably they would have attempted to ratify the Constitution by a national convention. They did not do so; moreover, even under the Constitution that "the people" were establishing and Washington was introducing, a national convention can be used to propose, but not to ratify, constitutional text.<sup>35</sup>

Farber's essay sails briskly along, ignoring these and other difficulties. The most general difficulty, however, is not ignored, but it is not taken seriously either. All three of Farber's arguments are obviously subject to the objection that Washington's brief letter is neither the text of the Constitution that was eventually ratified nor is it a faithful summation of the rich historical record that exists concerning the intentions of the framers and ratifiers. For instance, what justifies Farber's conclusion that the failure to mention the role of states as checks on the national government is significant—any more significant than, say, Washington's failure to mention that the Constitution did not contemplate a king? To know what to make of omissions or of vague terminology like "fully vesting," it is necessary to know something about the rest of the debate over ratification. Of course, Farber knows this full well,<sup>36</sup> and it is here that his essay descends to the level of parlor game. To the presumably conclusive objection that a single, brief letter is far too little to resolve fundamental questions about intended constitutional meaning, Farber asks us to "look at how conservative theorists define the proper role of intent."<sup>37</sup> His analysis purports to show

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33. Farber, *supra* note 5, at 639.

34. See DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 26 (1990). In contrast, the Constitution itself in places refers to the United States with the plural "them." U.S. CONST. art. III, § 3.

35. U.S. CONST. art. V.

36. See Farber, *supra* note 5, at 628-35.

37. *Id.* at 631.

that these conservative theorists should, if they are consistent, treat Washington's letter as the authoritative statement of intended meaning.

Now, Farber may have check-mated Judge Easterbrook and the other "conservative theorists" (although I somehow doubt it), but he has not given any argument that would convince someone who does not accept these conservatives' (putative) theory of historical intent. And into the category of the unpersuaded would have to go a good many of the strong nationalists who are presumably eager to develop some real justification for their consolidationist positions. In short, Farber's essay not only contains much of the substance of the standard nationalist argument, but also conveys the sense of audacity and brazenness that tends to characterize conventional constitutional scholarship. If the consolidationists are clever enough and daring enough, their ideas, even if wrong, will be the last ones standing.

I do not want to leave the impression that strongly nationalistic positions go so far as to favor formal consolidation. Most proposals for further centralization stop short of that extreme. They do go very far, however, in calling for effective consolidation. For example, despite the general tendency in the academy to support the institution of judicial review (and despite the related but more specific tendency to criticize the political question doctrine), a prize-winning book argues that the federal judiciary should altogether drop any effort to protect the states from federal over-reaching.<sup>38</sup> It is not at all uncommon to see arguments to the effect that federalism serves no important values or that it is entirely obsolescent.<sup>39</sup> Even if states should continue to exist, a standard academic position is that their operations should be subject to direct national regulation.<sup>40</sup> These positions are all radical in the sense that they assign little or no value to a structural principle that was undeniably central to the constitutional design and that continues to play an important part in the regular operation of American governance.

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38. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980).

39. *Id.*; see also Rubin & Feeley, *supra* note 11.

40. See, e.g., Farber, *supra* note 5, at 643.

## III.

While, of course, by some measure there may today be a radical antifederalist agenda, I think it is clear that there is no antifederalist program equivalent to the radical nationalist position that dominates the case law and the academy and is taken for granted. As a preliminary matter, recall that it is at least not entirely beyond the pale for nationalists on occasion to consider abolishing the states outright. An equivalent antifederalist discourse is imaginable. The corresponding antifederalist proposal would be to abolish the national government and return to the kind of confederation that preceded unification. Such a return would involve abolishing the House of Representatives, the Presidency, much of the Judicial Branch, the Bill of Rights, national taxation, and all commerce clause regulation. As far as I know, no one on the Court or in the academy even mentions, much less supports, any of these changes.

A more realistic possibility is that, just as modern nationalists support all three elements of what Madison called consolidation, modern antifederalists might support what he termed confederation. Certainly, much of the outcry against the "new federalism" asserts precisely that it favors replacing the present system with a "league" or a "confederation of nations."<sup>41</sup> At least in Madisonian terms, this charge is false. In a confederation, the unanimous consent of the states would be required for constitutional amendment, each state would be required to have equal representation in the House of Representatives as well as in the Senate, and the national government could have no direct regulatory authority at all. If any one of these proposals has been made by a reputable scholar or jurist, I have not seen it. In contrast to the fact that it is not uncommon to find writers like Farber who matter-of-factly recommend all three elements of an unmixed national government, I am confident that no serious modern writer has proposed all three elements of confederation.

Of course, there might well be antifederalist proposals that are radical even though they fall short of favoring formal confederation. It might be, for instance, that in the same way that many strong nationalists see virtually no value in residual state sovereignty, some modern antifederalists may see no value

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41. *Id.* at 625, 638; *Term Limits*, 115 S. Ct. 1842, 1855 (1995).

or almost no value in the national government. Merely stating this possibility outright suggests its outlandish implausibility. Needless to say, many antifederalists, including, for example, Professor Fried and Justice Scalia, have written specifically and sometimes movingly about the values of nationhood.<sup>42</sup> It is safe to say that every significant antifederalist on or off the Court understands the need for potent national powers like defense and taxation. While Justice Thomas and Professor Epstein (among others) have argued forcefully that national power must be specifically authorized,<sup>43</sup> the various arguments for a restrictive definition of "commerce" do not suggest that it was inappropriate or unwise to authorize national power over that set of activities conceded to constitute commerce among the states. Similarly, not a word in the notorious *Term Limits* dissent implies that states could impose any qualification for national representatives specifically prohibited by either the Constitution or a federal statute. In short, modern antifederalists are questioning how much power the Constitution grants the national government, not whether a national government serves vitally important purposes.

Despite their occasionally loose rhetoric, in sober moments strong nationalists might be inclined to admit all this and yet still insist that the modern antifederalists are dangerously radical. They could claim—indeed, some do claim<sup>44</sup>—that the antifederalist program is radical by a different measure altogether. That is the measure of proposed deviation from the status quo. Radical nationalism, by this argument, may be constitutionally radical, but it is largely an accomplished fact. The antifederalist agenda, conversely, may be legalistically moderate, but it proposes very significant changes from what has become the accepted norm.

In evaluating this claim, it is important to note that its apparent empiricism is illusory. Suppose that in the past fifty years the American government had gradually developed into a presidential dictatorship. Under that circumstance, calls for a

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42. Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J.L. & PUB. POL'Y 19, 22 (1982); Fried, *supra* note 2, at 13; see also Calabresi, *supra* note 8, at 780.

43. *United States v. Lopez*, 115 S. Ct. 1624, 1642-50 (1995); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); see also Calabresi, *supra* note 8.

44. See, e.g., Rubin & Feeley, *supra* note 11, at 944-52.

return to republican arrangements would entail very large changes from the established norm. Presumably, however, such calls could not be dismissed as radical for that reason. Whether a large change in existing practices is "radical" or not must depend in some degree on how far existing practices depart from legal and moral norms. To the extent that the empirical claim assumes, as a benchmark, the existence of a consolidated government, that claim evades or begs the question whether consolidation is constitutionally radical.

But even on its own terms the empirical claim is doubtful because it depends on exaggerating the degree to which our political practices are nationalized. Although strong nationalists see states as anachronisms and favor a program of consolidation, state governments continue to exist and to exhibit important elements of sovereignty. They organize governance at the local level, they regulate the lives of their citizens, they participate in the amendment process, and so on. It is true that by and large people have come to expect the national government to regulate without conceptually-based limitations, but they still assume that much of this national power will be employed against a background of normal and pervasive state regulation. Certainly it would be a major jolt to established expectations if the national government were to displace (rather than supplement) state institutions in the routine operation of public schools or criminal law enforcement. In some measure, then, the antifederalist program seeks only to preserve the status quo or to change it at the margin. Consider the three cases that are the most important constituents of that program:

(1) Despite the furor over the dissent in *Term Limits*, the most that can be said with any certainty about its implications is that those who joined it would approve of other state-imposed qualifications.<sup>45</sup> This power, however, would be limited by explicit constitutional limitations, such as the equal protection clause, and also, presumably by the power of Congress under Article I, Section 4 to override state decisions.<sup>46</sup> Moreover, the significant role the states generally play in operating and regulating national elections is not foreign to our experience. In fact, as the dissent points out, before 1913 when the Seventeenth

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45. See Robert F. Nagel, *The Term Limits Dissent: What Nerve*, 38 ARIZ. L. REV. 843, 845-47 (1996).

46. U.S. CONST. art. I, § 4.



Amendment was enacted, state legislatures had “virtually unfettered” discretion to adopt rules narrowing their choice for United States senator.<sup>47</sup> Perhaps most fundamentally, even today, after the *Term Limits* decision, the voters in every state have, as a practical matter, the power to decide what should be a disqualification for national office, even including insufficient commitment to that state’s interests. If the voters in the states want a “patchwork” of parochial representatives, they can—and do—elect such people now. If they want representatives who look to “the national interest,” nothing in the dissent could prevent them from realizing that either.

(2) On the basis of both the *Term Limits* dissent and the majority opinion in *Lopez*<sup>48</sup> it is obviously fair to conclude that some important antifederalists generally favor construing enumerated national powers restrictively. Given the number and range of existing statutes based on the commerce power, theoretically this position could eventually result in a significant change in the status quo. By now, however, every first-year law student knows the various ways the *Lopez* majority indicated that Congress can get around its ruling. True, Justice Thomas’ concurring opinion proposes a more sweeping reappraisal of modern commerce clause decisions based on a historical and narrow understanding of the word “commerce.”<sup>49</sup> However, Thomas denies that his attack on the “substantial effect” test should lead to a wholesale repudiation of the modern cases.<sup>50</sup>

Naturally, skeptics might wonder about this reassurance. But, even the narrowest meaning of “commerce” extends to commercial sales and transportation undertaken in connection with those sales. Under this definition, perhaps Congress could not regulate “local” activities, like manufacturing, directly, but I can see no convincing reason why it could not regulate the same subjects indirectly by prohibiting interstate shipment of goods produced in violation of whatever standards Congress imposed. As Epstein notes, various doctrinal limits on this indirect form of national regulation are conceivable, but they require

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47. *Term Limits*, 115 S. Ct. 1842, 1893 (1995).

48. *Lopez*, 115 S. Ct. at 1624.

49. *Id.* at 1642-51. Judge Thomas’ concurring opinion is supported by noted scholars. See RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987); Epstein, *supra* note 43.

50. *Lopez*, 115 S. Ct. at 1650-51.

justifications that go well beyond a historical understanding of the commerce clause.<sup>51</sup> These supplementary doctrines, which include judicial investigation of congressional motives, have been firmly repudiated by the Court and are not even mentioned in Thomas' concurrence. In short, standing alone, the most that even Thomas' definition of commerce would accomplish would be to force increased reliance on what is already one of the major techniques for the exercise of the commerce power. More frequent resort to the devise of regulating goods at the point of inter-state shipment would hardly qualify as a radical change from present practices.

(3) In *Seminole Tribe of Florida v. Florida*,<sup>52</sup> the Court said that the commerce power does not authorize Congress to subject nonconsenting states to suits by private parties. Several commentators have pointed out, however, that the decision does not affect *Ex parte Young*,<sup>53</sup> so federal laws can still be enforced prospectively against states in federal court by the expedient of naming as defendants the appropriate state officers rather than the state itself. As Henry Monaghan concluded, *Seminole Tribe* "will prevent a federal forum only in rare situations . . . in which Congress has provided a remedy against the state but not against the state officials."<sup>54</sup> Only in that situation would enforcement of a federal rule be relegated to state courts.

Even if none of the three major "antifederalist" opinions threatens any important change in the status quo, it might be that an important antifederalist movement exists that is energetically engaged in fomenting ideas that will eventually lead to such changes. I cannot entirely disprove this claim, but I can indicate why it is unlikely.

When antifederalists propose ideas that might have potential for radical decentralization, in significant instances they specifically argue against any real-world change. For example, in an article arguing flatly for the proposition that "the post-New Deal administrative state is unconstitutional,"<sup>55</sup> Gary Lawson asserts just as flatly that the administrative state "has been

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51. Epstein, *supra* note 43, at 1421-32.

52. 116 S. Ct. 1114 (1996).

53. 209 U.S. 123 (1908).

54. Henry Paul Monaghan, Comment, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 132 (1996).

55. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994).

accepted by all institutions of government and by the electorate."<sup>56</sup> He devotes the concluding section of his essay to a brooding meditation on the possible responses to "the enormous gap between constitutional meaning and constitutional practice."<sup>57</sup> The option he seems to favor is to accept the modern state as a fact and to reconsider whether a constitutionalism of historically intended meaning should carry any normative weight.

In a similar vein, H. Jefferson Powell offers an extensive exploration and partial defense of the immunity for state decision making processes created in *New York v. United States*.<sup>58</sup> As one aspect of his analysis, Powell hits upon the kind of insight that often causes constitutional scholars to embark on excited flights of doctrinal prescription. He notes that the *New York* opinion is inconsistent with *Martin v. Hunter's Lessee*.<sup>59</sup> That is, he finds a plausible modern argument for immunizing the decisions of state supreme courts from compelled entry of judgment by the U.S. Supreme Court. Now, there is an idea with the potential for radical alteration in the status quo. Moreover, Powell is respectful of the original arguments against *Hunter's Lessee*, and he is sympathetic to the *New York* Court's intuitions about federalism. He does not, however, propose using *New York* as a fulcrum to dislodge the accepted practice of the Supreme Court commandeering state courts to implement its judgments. On the contrary, he observes that Justice O'Connor, the author of *New York*, "assuredly does not question the holding of *Martin v. Hunter's Lessee*," so Marshall's opinion "must raise questions about the coherence of Justice O'Connor's federalism."<sup>60</sup> He goes on to try to rescue a modest version of O'Connor's federalism—a version that does not challenge "the substantive scope of federal power"<sup>61</sup> and does not succumb "to the impractical desire to repudiate the modern federal government."<sup>62</sup>

When modern antifederalist scholars draw back from or repudiate altogether the operational implications of their

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56. *Id.* at 1254.

57. *Id.* at 1232.

58. H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993); *New York v. United States*, 505 U.S. 144 (1992).

59. Powell, *supra* note 58, at 678-81.

60. *Id.* at 677.

61. *Id.* at 687.

62. *Id.* at 689.

arguments, they may be exhibiting nothing more than a begrudging recognition of political reality. But they may also be exhibiting the virtually universal consensus that I referred to earlier; that is, they may be demonstrating their own recognition that a strong national government is morally and politically essential.

Participation in such a consensus would also explain why so many proposals for decentralization are designed, both in their content and their style, to preserve national power. Two leading defenses of the limited state immunity created by *United States v. New York*, for example, emphasize that process immunities can protect democratic values without diminishing the power of the national government to regulate any aspect of private behavior.<sup>63</sup> Moreover, several of the commentaries on the re-emergence in *Lopez* of a distinctive legal concept of commerce emphasize didactic, rather than operational, objectives, as does Monaghan's effort to explain *Seminole Tribe*.<sup>64</sup> Even where *Lopez* is defended on instrumental, doctrinal grounds, the emphasis often is not on the development of rules that would have far-reaching consequences.<sup>65</sup> For instance, Deborah Merritt defends a "fuzzy" method of distinguishing "commerce" from other activities and praises the Court for leaving prior Commerce Clause decisions untouched.<sup>66</sup> Finally, Lynn Baker has recently mounted an extended argument for limiting Congress's spending power in light of *Lopez*, but her rather conventionally doctrinal proposal is carefully hedged with important presumptions added for the specific purpose of "preserving for Congress a power to spend that is greater than its power to regulate the states directly."<sup>67</sup>

All of these examples of prescriptive modesty might, I suppose, be dismissed as crafty but insincere reassurances. But if modern antifederalists covertly favored dramatic alterations in present

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63. Deborah J. Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1576-77, 1584 (1994); see also ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 76 (1989); Powell, *supra* note 58, at 687.

64. See, e.g., Deborah J. Merritt, *Commerce!*, 94 MICH. L. REV. 674 (1995); cf. Monaghan, *supra* note 54, at 121; NAGEL, *supra* note 63, at 81-83.

65. See Epstein, *supra* note 43 and Calabresi, *supra* note 8, for exceptions.

66. Merritt, *supra* note 63, at 750.

67. Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1989 (1995).

political practices, presumably they would not rely on reform through the very national institutions that can be expected to protect the national government from radical disempowerment. Most antifederalist proposals, however, do rely on national decisionmakers. Robert Bork, for instance, advances a broad-gauged attack on federal judicial power, but his radical solution is to amend the Constitution to allow the national legislature to override Supreme Court decisions.<sup>68</sup> This is a prescription for change, but not for change that radically redistributes power to the states. (Indeed, Bork's proposal would authorize Congress to reverse decisions of state supreme courts.) Similarly, the various commentators who recommend restrictive definitions of "commerce among the states" would trust the national courts to see that these definitions are not evaded or subverted. John Yoo's argument that institutional injunctions lie outside the meaning of "judicial power" in Article III relies for implementation partly on the Court's sense of self-restraint and partly on Congress.<sup>69</sup> Stephen Gardbaum's interesting idea that federalism has principled application even in the area of concurrent powers is to be implemented by the Supreme Court "policing Congress's deliberative processes."<sup>70</sup>

Intellectual fixation on nationally-imposed solutions to problems of federal over-reaching is not, of course, surprising or necessarily inappropriate. But it does emphasize the extent to which even proposals for significant change assume the legitimacy and importance of national institutions.

Modern antifederalists do not want to abolish the national government. They do not argue for confederation. By and large, they do not even argue for significant changes in current political practices. The most that can be said is that they do not accept the view that states are of no value in our political system. Therefore, these modern antifederalists want to preserve and strengthen elements of our existing mixed system. In short, modern antifederalism is radical only on the assumption that the positions taken by modern consolidationists are noncontroversial

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68. ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 117 (1996).

69. John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996).

70. Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 799 (1996).

both descriptively and normatively. All of which raises the question: given the modest and equivocal nature of antifederalists' objectives, what would a radical antifederalist agenda, if one existed, look like?

#### IV.

It is possible—but fanciful—to imagine a strong antifederalist movement mirroring the tactics of the modern consolidationist movement. Radical antifederalists might exploit all available historical and philosophical materials to urge that state sovereignty is not simply useful or even important but that it is absolutely foundational to all other constitutional values.<sup>71</sup> Building on Epstein's arguments about the reach of the Commerce Clause, they could offer one imaginative doctrinal formulation after another in a short-run effort to prevent all evasions of conceptualistic limitations on the enumerated powers. They could argue audaciously and relentlessly for reading the Necessary and Proper Clause as a mere truism that adds nothing to Congress's authority. They could insist that the inner logic of *United States v. New York* requires that it be extended to protect the integrity of state judicial proceedings from the United States Supreme Court. Arguing against empty formalism and from the assumption that the meaning of the Eleventh Amendment must adapt in response to unforeseen modern conditions, they could seek to reverse *Ex parte Young*. They could not only propound but also seek to implement a definition of "the judicial power" under Article III that is as restrictive as the current judicial role is expansive. Antifederalists could, in short, ape strong nationalists by exploiting all the wide opportunities afforded by the conventions of constitutional interpretation.

As unlikely (or unattractive) as this version of modern antifederalism might be, it would in some respects not really be radical. It would depend almost entirely on the exercise of national judicial power.<sup>72</sup> A more truly radical program would

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71. One scholar does argue that federalism is more important than other values protected by the Court. Calabresi, *supra* note 8, at 756-79. Compare *id.* with Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) and NAGEL, *supra* note 63, at 73-74.

72. Even one of the most forceful modern antifederalists sees this as an advantage because it assures that national functions will be protected. Calabresi, *supra* note 8, at 800, 806-10.

aim at making national power dependent on state institutions rather than the reverse. This version of antifederalism might, for instance, support repeal of the Seventeenth Amendment so that the Senate would again be directly responsive to state legislatures. It could also favor repealing those parts of Article V that give Congress a role in the amendment process, and it would propose replacing them with populist or state-based procedures.<sup>73</sup> It could support an amendment allowing state legislatures to overturn certain classes of Supreme Court decisions. These kinds of ideas are certainly radical in one sense, but in another they are not. Unlike, for instance, the nationalists' use of expansive judicial review to supplement or replace the provisions of Article V, these proposals all docilely accept the amendment process, a process that is itself controlled by national institutions.

This suggests that, like strong nationalists, antifederalists could rely on a strategy of directing inventive and insistent constitutional arguments at institutions that have a stake in accepting those arguments. Radical antifederalism might, therefore, turn to some form of nullification or interposition.

Insofar as nullification entails outright defiance of national authority, it would certainly be radical but it would not be modern antifederalism. In the extremely unlikely event that states prevailed against national authority, the "people in the states" would have become sovereign over the Constitution that they ratified. Just as judicial review effectively replaces the sovereignty of the people with judicial discretion, defiant nullification replaces the foundational document with local political judgment. In seeking to mimic the tactics of the consolidationists, antifederalists would have transformed themselves into confederationists.

Interposition, however, does not necessarily require outright defiance. Variations of this doctrine can be and have been used simply as devices for registering official disagreement with constitutional claims made by the national government.<sup>74</sup> At least in combination with other forms of pressure, this tactic

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73. For one such proposal, see WILLIAM J. QUIRK & R. RANDALL BIRDWELL, *JUDICIAL DICTATORSHIP* 52 (1995).

74. See Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions*, 11 CONST. COMMENTARY 315 (1994).

seems to me to hold some radical potential and also to be consistent with the principles of modern antifederalism.

Using interposition for communicative and organizational purposes does not presume ultimate sovereignty for the states, but can it be expected to induce any significant change in the status quo? After all, even the Virginia and Kentucky Resolves opened debate on the Alien and Sedition Acts only to produce support for the nationalist position.<sup>75</sup> Moreover, as the history of abortion regulation between *Roe* and *Casey* demonstrates, states already "talk back" to the national government through various official actions that effectively challenge national policy. Even when they are partially effective, however, such recalcitrant actions are typically framed and understood as policy disagreements. Since the Court has pre-empted the high ground of constitutional interpretation, dissent based on moral or pragmatic considerations is widely viewed as improper.<sup>76</sup> A certain kind of radical potential, therefore, could arise from the possibility that responsible and sustained use of the communicative versions of interposition might help to persuade the public that the "people in the states" do have a legitimate role in enforcing constitutional limits.

This kind of change in public understanding and attitude could have far-reaching practical ramifications. While it is common to complain that the habitual, inexorable resort to national solutions reduces the moral status of state and local governments, it is also true that nationalization is a result of this loss of moral status. States still exist and function in significant ways, but they do so without any strong underpinnings of political morality. Consolidationists are right in claiming that, as a people, we have largely lost any sense for why limited state sovereignty might be, not just a familiar, but a desirable state of affairs. Hence the existence of independent power centers within the states can provide only a weak drag on regulatory centralization. If states were self-consciously to take on the role of helping to enforce the Constitution, they might earn some of the stature presently monopolized by the judiciary. They might, that is, provide the public with some affirmative reason—beyond occasional self-interest—for loyalty to state institutions.

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75. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1519 (1994).

76. See NAGEL, *supra* note 24.



At least in contrast to the kinds of specific and limited changes that might be expected from, say, a few judicial decisions extending *United States v. Lopez*, an increase in the moral status of state institutions would amount to a cultural change to which the word "radical" might actually apply. The federal system of government that we have today is defined and maintained by thousands of decisions that result every day from the understandings and relationships existing within legislatures, government bureaucracies, and political parties.<sup>77</sup> To influence the attitudes that underlie these decisions could have pervasive and significant effects.

If the states were established as limited but legitimate contributors to the process of determining constitutional meaning, renewed realism and maturity could be injected into American political thought. Institutionalized competition to protect constitutional values could promote the recognition that here sovereignty resides in a complex, indeterminate process, not in a king or a court. It could vividly hold out the paradoxical idea that the national interest cannot be determined wholly apart from local interests. It could instill a deeper understanding that there are degrees of political unity and limits on loyalty. All of which is to say that in practice a vibrant form of federalism requires and might promote a capacity for independence, for ambivalence, for incompleteness, and for qualification.<sup>78</sup> Thus, a radical effort to reinvigorate the moral status of the states would have as one of its ambitious purposes the promotion of certain attractive but precarious intellectual qualities.

The intellectual climate that exists in any polity is, of course, the product of history, and it can be doubted that this climate would be altered much, even by such a significant change as the re-introduction of a responsible version of interposition. Moreover, it can be doubted that the doctrine of interposition could be re-introduced in any responsible form under current conditions. It is certain that these matters are mostly out of the hands of law professors.

Nevertheless, what ought not to be unrealistic is that those who study the constitutional system be willing to consider *the idea* of using interposition to reinvigorate the federal

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77. See Kramer, *supra* note 75.

78. See Wilfred M. McClay, *The Soul of Man Under Federalism*, FIRST THINGS 12 (June/July 1996).

system—that they not dismiss this idea merely because it is in some sense “radical,” that they not muster their formidable rhetorical forces to shut down thought, that they not once again roll out consolidationist doctrine to mark the limit of permissible discussion. While it may well be too much to hope that the political culture as a whole possess the intellectualism demanded by a federal system, it ought not to be too much to ask it of the constitutional law establishment. Then again, perhaps it is the other way around.