

## NOTES

### *Introduction*

1. Washington, DC: Cato Institute (1993).

### *Chapter 1*

1. James McGregor Burns, J. W. Peltason, Thomas E. Cronin, and David B. Magleby, *State and Local Politics: Government by the People* (10th ed.) (Upper Saddle River, NJ: Prentice-Hall, 2001), p. 39.
2. *Ibid.*, p. 151.
3. *Ibid.*, p. 6.
4. Michael J. Ross, *State and Local Politics and Policy: Change and Reform* (Englewood Cliffs, NJ: Prentice-Hall, 1987), p. 191.
5. H. V. Savitch and John Clayton Thomas, eds., *Big City Politics in Transition* (Newbury Park, CA: Sage, 1991), pp. 160–61.

6. Burns et al., *State and Local Politics*, p. 6.
7. Virginia Marion Perrenod, *Special Districts, Special Purposes: Fringe Governments and Urban Problems in the Houston Area* (College Station, TX: Texas A&M University Press, 1984), p. 3.
8. David R. Berman, *State and Local Politics* (7th ed.) (Madison, WI: Brown and Benchmark, 1993), p. 216.
9. U.S. Census Bureau, *Statistical Abstract of the United States* (2000), p. 299.
10. *Ibid.*, p. 304.
11. John Maggs, “Sorry States,” *National Journal* (Aug. 9, 2003), p. 2537.
12. *Statistical Abstract* (2000), p. 304.
13. U.S. Census Bureau, *State and Local Government Finances by Level of Government and by State* (1999–2000).
14. *Statistical Abstract* (2000), p. 318.
15. *Ibid.*, p. 326.
16. *Ibid.*, p. 301.
17. Louis Uchitelle, “Red Ink in States Beginning to Hurt Economic Recovery,” *New York Times* (July 28, 2003), pp. A1 and A10.
18. Gregg Easterbrook, “States’ Rites,” *New Republic* (Aug. 11, 2003), p. 15.
19. John Maggs, “From Tax Cuts to Tax Hikes,” *National Journal* (Aug. 9, 2003), p. 2550.
20. Dennis Cauchon, “Bad Moves, Not Economy, Behind Busted State Budgets,” *USA Today* (June 23, 2003), pp. 1A–2A.
21. Easterbrook, “States’ Rites,” p. 15.
22. *Ibid.*
23. *Ibid.*, p. 17.
24. Dennis Cauchon, “GOP Outspends Democrats in States,” *USA Today* (May 19, 2003), p. 1A.
25. Burns et al., *State and Local Politics*, p. 209.
26. *Statistical Abstract* (2000), p. 445.
27. David Seifman, “Gold Fringe: Benefits Surge Shocks Apple,” *New York Post* (May 20, 2003).
28. See Ross, *Politics and Policy*, p. 108.
29. Robert A. Caro, *The Power Broker: Robert Moses and the Fall of New York* (New York: Alfred A. Knopf, 1974), pp. 6–8 and 20.
30. *Ibid.*, pp. 623–24.

31. Ibid., p. 616.
32. Ibid., p. 624.
33. Ibid., pp. 14–15.
34. Ibid., p. 18.
35. Ibid., p. 19.
36. Ibid., p. 632.
37. Ibid., p. 17.
38. Ibid., p. 632.
39. Clay Risen, “Memories of Overdevelopment,” *New Republic* (Feb. 23, 2004), p. 26.
40. Ibid.
41. Ibid., pp. 27–28.
42. Paul J. Andrisani, Simon Hakim, and Eva Leeds, eds., *Making Government Work: Lessons from America’s Governors and Mayors* (Lanham, MD: Rowman and Littlefield, 2000), p. 14.
43. John C. Bollens, *Special District Governments in the United States* (Westport, CT: Greenwood Press, 1957), p. 1.
44. Nancy Burns, *The Formation of American Local Governments* (New York: Oxford University Press, 1994), p. 12.
45. Ibid., p. 12.
46. Ibid., p. 53.
47. As other types of special districts have grown, the number of school districts has shrunk dramatically – from 108,579 in 1942 to only 13,726 in 1997. See U.S. Census Bureau, *Statistical Abstract of the United States* (2000), p. 299. Ordinarily, a diminution in the number of governments might constitute a favorable development; but here the overwhelming trend is toward consolidation into large school districts that are more responsive to special interest pressures than to the wishes of parents and the needs of children. See John H. Chubb and Terry M. Moe, *Politics, Markets & America’s Schools* (Washington, DC: Brookings Institution, 1990).
48. *Statistical Abstract* (2000), p. 299.
49. Bollens, *Special District Governments*, p. 69.
50. Bernard H. Ross, Myron A. Levine, and Murray S. Stedman, *Urban Politics: Power in Metropolitan America* (4th ed.) (Ithaca, NY: F. E. Peacock, 1991), p. 298.
51. Burns, *American Local Governments*, p. 12.
52. Ibid., p. 27.

53. Ross et al., *Urban Politics*, pp. 298–99.
54. Perrenod, *Special Districts*, pp. 41 and 117.
55. Diana B. Henriques, *The Machinery of Greed: Public Authority Abuse and What to Do About It* (Lexington, MA: Lexington Books, 1986). Apart from Caro's biography of Robert Moses, Henriques's book is the finest critique of special authorities I have encountered.
56. *Ibid.*, p. 15.
57. Michael S. Gruen, "Government by Subterfuge," *City Journal* (Winter 1995), reprinted at [http://www.city-journal.org/html/5\\_1\\_govt\\_by.html](http://www.city-journal.org/html/5_1_govt_by.html).
58. *Ibid.*
59. See generally Andrisani et al.
60. Haya El Nasser, "Some Big Places Find Paradise in *Not* Being Real Cities," *USA Today* (June 25, 2003), p. 1A.
61. See [www.nlc.org](http://www.nlc.org).
62. See <http://www.afscme.org/private/index.html>.

## Chapter 2

1. It is a topic that I treat in greater detail in Clint Bolick, *Grassroots Tyranny: The Limits of Federalism* (Washington, DC: Cato Institute, 1993), pp.13–92.
2. Felix Morley, *Freedom and Federalism* (Indianapolis: Liberty Press ed., 1981), p. xxiv.
3. See Timothy Conlan, *New Federalism* (Washington: Brookings Institution, 1988), p. 3.
4. Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987), p. 91. Elazar explores in depth the origins and history of federalism. See pp. 115–52.
5. Robert H. Bork, *Federalism and Federal Regulation: The Case of Product Labeling* (Washington, DC: Washington Legal Foundation, 1991), p. 1.
6. A good essay on the tasks confronting the framers and the structural methods they devised to achieve them is Akhil Reed Amar, "Of Sovereignty and Federalism," 96 *Yale Law Journal* 1425, 1439–51 (1987).
7. Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," in Randy E. Barnett, ed., *The Rights*

*Retained by the People* (Fairfax, VA: George Mason University Press, 1989), pp. 83–84.

8. James Madison, “Speech to the House Explaining His Proposed Amendment and His Notes for the Amendment Speech,” in Barnett, *The Rights Retained*, p. 61.
9. *The Federalist* No. 10 (Madison), in *The Federalist Papers* (New York: Modern Library, 1937), pp. 60–61. All subsequent *Federalist* citations pertain to this text.
10. See, e.g., David A. Logan, “Judicial Federalism in the Court of History,” 66 *Oregon Law Review* 453, 467 n. 68 (1988).
11. *The Federalist* No. 15 (Hamilton), p. 89.
12. John C. Yoo, “The Judicial Safeguards of Federalism,” 70 *Southern California Law Review* 1311, 1403 (1997).
13. Quoted in Randy E. Barnett, “James Madison’s Ninth Amendment,” in Barnett, *The Rights Retained*, p. 21.
14. Quoted in *The Great Debate: Interpreting Our Written Constitution* (Washington: Federalist Society, 1986), p. 16.
15. *The Federalist* No. 10 (Madison), p. 54.
16. *Ibid.*, p. 58.
17. *Ibid.*, pp. 57–58.
18. Morley, *Freedom and Federalism*, p. 31.
19. Amar, “Of Sovereignty and Federalism,” p. 1426.
20. Quoted in Raoul Berger, *Federalism: The Founders’ Design* (Norman, OK: University of Oklahoma Press, 1987), p. 52.
21. *The Federalist* No. 46 (Madison), p. 305.
22. *Ibid.*, pp. 304–05.
23. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); quoted in *Saenz v. Roe*, 526 U.S. 489, 504 n. 17 (1999).
24. Madison, “Speech to the House,” in Barnett, *The Rights Retained*, p. 61.
25. *Ibid.*
26. Quoted in Morley, *Freedom and Federalism*, p. 27.
27. Bork, *Federalism and Federal Regulation*, p. 4.
28. *The Federalist* No. 44 (Madison), p. 291.
29. Quoted in Berger, *Federalism*, p. 63.
30. *The Federalist* No. 51 (Hamilton or Madison), pp. 338–39.
31. *The Federalist* No. 46 (Madison), p. 306.
32. Quoted in Logan, “Judicial Federalism,” p. 467.

33. Barnett, in Barnett, *The Rights Retained*, p. 34.
34. *Ibid.*, p. 41.
35. Ronald D. Rotunda, “The New States’ Rights, the New Federalism, the New Commerce Clause, and the Proposed New Abdication,” 25 *Oklahoma City Law Review* 869, 869–70 (2000).
36. Barnett, in Barnett, *The Rights Retained*, p. 41.
37. 32 U.S. 243, 250 (1833).
38. Robert J. Harris, “States’ Rights and Vested Interests,” in Gary L. McDowell, ed., *Taking the Constitution Seriously* (Dubuque, IA: Kendall/Hunt, 1981), p. 179.
39. *Dred Scott v. Sandford*, 19 How. 399, 410 (60 U.S. 663) (1857).
40. Michael Kent Curtis, *No State Shall Abridge* (Durham, NC: Duke University Press, 1986), pp. 30–31. See also Clint Bolick, *Changing Course: Civil Rights at the Crossroads* (New Brunswick, NJ: Transaction Books, 1988), pp. 19–21.
41. Harold M. Hyman, “Federalism: Legal Fiction and Historical Artifact?” 15 *Brigham Young Law Review* 905, 919 (1987).
42. J. M. Balkin, “Federalism and the Conservative Ideology,” 19 *Urban Lawyer* 473 (1987).
43. *Ibid.*
44. Curtis, *No State Shall Abridge*, p. 41.
45. Quoted in Alfred Avins, ed., *The Reconstruction Amendments’ Debates* (Wilmington, DE: Delaware Law School, 1974), p. 136.
46. Quoted in Clint Bolick, *Unfinished Business: A Civil Rights Strategy for America’s Third Century* (San Francisco: Pacific Research Institute, 1990), p. 26.

### Chapter 3

1. For an account of the intended scope of the privileges or immunities clause and its subsequent evisceration, see Bolick, *Unfinished Business*, pp. 47–91.
2. *Slaughter-House Cases*, 83 U.S. 36, 96 (1873) (Field, J., dissenting).
3. *Ibid.* at 110 (Field, J., dissenting).
4. 163 U.S. 537 (1896).
5. For a superb account of that case and its origins in the jurisprudence of *Slaughter-House*, see Charles A. Lofgren, *The Plessy Case* (New York: Oxford University Press, 1987).
6. 347 U.S. 483 (1954).

7. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).
8. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Unlike other substantive due process cases from that period, the *Pierce* line of cases remains good law today.
9. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). This phenomenon is recounted in Steven M. Simpson, “Judicial Abdication and the Rise of Special Interests,” 6 *Chapman Law Review* 173, 177 (2003).
10. See Curtis, *No State Shall Abridge*, p. 203 (see ch. 2, n. 40). For a discussion of the origins of the dichotomy between fundamental and nonfundamental rights, see Simpson, “Judicial Abdication,” p. 184.
11. See, e.g., *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). For a masterful treatment of how the takings clause should be used to constrain government power, see Richard A. Epstein, *Takings* (Cambridge, MA: Harvard University Press, 1985).
12. I always get nervous any time an adjective is used before the term “justice.” Regardless of the adjective employed, it typically tends to serve as a nullification or distortion of ordinary concepts of justice.
13. That is not to say that the Warren Court was entirely misguided. Its deployment of the equal protection clause to strike down segregated education; its recognition of a general right to privacy, however awkwardly conceived; and its strong protections of freedom of speech all helped to vindicate the framers’ intent of a judicial bulwark against governmental tyranny.
14. *United States v. Darby*, 312 U.S. 100, 124 (1940).
15. Robert H. Freilich, “A Proposed Congressional ‘Statute of Federalism,’” 19 *Urban Lawyer* 539, 541–42 (1987).
16. 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
17. *Ibid.*, p. 280 (majority).
18. William J. Brennan, Jr., “Some Aspects of Federalism,” 39 *New York University Law Review* 945, 959 (1964).
19. For an insightful examination of Brennan’s shifting views, see Earl M. Maltz, “False Prophet—Justice Brennan and the Theory of State Constitutional Law,” 15 *Hastings Constitutional Law Quarterly* 429, 430 (1988).
20. William J. Brennan, Jr., “State Constitutions and the Protection of Individual Rights,” 90 *Harvard Law Review* 489, 502 (1977).

See also Jon O. Newman, “The ‘Old Federalism’: Protection of Individual Rights by State Constitutions in an Era of Federal Passivity,” 15 *Connecticut Law Review* 21 (1982–83).

21. Brennan, “State Constitutions,” p. 491.
22. Quoted in William Bennett Turner and Beth S. Brinkman, “The Constitution of First Resort,” *California Lawyer* (June 1989), p. 52.
23. Brennan, speech delivered at Georgetown University (1985), in *The Great Debate: Interpreting Our Written Constitution* (Washington, DC: Federalist Society, 1986), p. 16.
24. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).
25. See, e.g., *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973).
26. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).
27. Brennan, “State Constitutions,” p. 496.
28. *Robins v. PruneYard Shopping Center*, 23 C.3d 899 (1979).
29. *PruneYard Shopping Center v. Robins*, 447 U.S. 79, 81–83 (1980).
30. *Ibid.* at 91 (Marshall, J., concurring).
31. Raoul Berger, *Federalism: The Founders’ Design* (Norman, OK: University of Oklahoma Press, 1987), p. 52.
32. Stephen Macedo, *The New Right v. the Constitution* (Washington, DC: Cato Institute, 1987), p. 25.
33. Robert H. Bork, *The Tempting of America* (New York: Free Press, 1990), pp. 184–85.
34. Quoted in Randy E. Barnett, ed., *The Rights Retained by the People* (Fairfax, VA: George Mason University Press, 1989), p. 1.
35. Calvin R. Massey, “Federalism and Fundamental Rights: The Ninth Amendment,” 38 *Hastings Law Journal* 305, 316–17 (1987).
36. See, e.g., Berger, *Federalism*, p. 26. Here, Berger explicitly rejects the statement made by Justice Joseph Story that the union “was emphatically the act of the whole people of the united colonies.”
37. Bork, *The Tempting of America*, pp. 52–53.
38. Raoul Berger, “The Ninth Amendment,” in Barnett, *The Rights Retained*, p. 218.
39. Robert H. Bork, *Tradition and Morality in Constitutional Law* (Washington, DC: American Enterprise Institute, 1984), pp. 8–9.



40. Bork, *The Tempting of America*, p. 119.
41. Amar, “Of Sovereignty and Federalism,” p. 1520 (see ch. 2, n. 6).
42. Michael S. Greve, “Federalism’s Frontier,” 7 *Texas Review of Law & Politics* 93, 126 (2002).
43. 426 U.S. 833 (1976).
44. 469 U.S. 528 (1985).
45. *National League of Cities*, 426 U.S. at 845.
46. *Ibid.* at 858 (Brennan, J., dissenting).
47. *Ibid.* at 859 (Brennan, J., dissenting).
48. *Garcia*, 469 U.S. at 556.
49. *Ibid.* at 560 (Powell, J., dissenting).
50. *Ibid.* at 570 (Powell, J., dissenting).
51. *Ibid.* at 571 (Powell, J., dissenting).
52. *Ibid.* at 572 (Powell, J., dissenting) (emphasis added).
53. *Ibid.* at 567 (Powell, J., dissenting).
54. *Ibid.* at 580 (Rehnquist, J., dissenting).
55. See generally Yoo, “The Judicial Safeguards of Federalism” (see ch. 2, n. 12).
56. See Rotunda, “The New States’ Rights,” pp. 911–24 (see ch. 2, n. 35). For differing perspectives on the impact of those cases, see Calvin R. Massey, “The Tao of Federalism,” 20 *Harvard Journal of Law & Public Policy* 887, 899–903 (1997); and Vicki C. Jackson, “Narratives of Federalism: Of Continuities and Comparative Constitutional Experience,” 51 *Duke Law Journal* 223 (2001).
57. 514 U.S. 549 (1995).
58. 529 U.S. 598 (2000).
59. *Lopez*, 514 U.S. at 552.
60. *Lopez*, 514 U.S. at 559; *Morrison*, 529 U.S. at 609–11.
61. In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Court retreated from its previous free exercise of jurisprudence by upholding a law that denied Native Americans the right to use peyote during religious ceremonies.
62. 521 U.S. 507 (1997).
63. *City of Boerne*, 521 U.S. 519–29.
64. 505 U.S. 144 (1992).
65. *New York*, 505 U.S. at 177.

66. *New York*, 505 U.S. at 161.
67. *Printz v. United States*, 521 U.S. 898 (1997).
68. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 439 (1978); *Community Communications Co. v. City of Boulder*, 435 U.S. 40 (1982).
69. *City of Lafayette*, 435 U.S. at 439 (1978) (Stewart, J., dissenting).
70. *Ibid.* at 408 (majority).
71. For a depiction of the internal battle within the Reagan administration, see Bolick, *Grassroots Tyranny*, pp. 87–88 (see ch. 2, n. 1).
72. Justice Kennedy was joined by Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer.
73. *Romer v. Evans*, 517 U.S. 620, 627 (1996).
74. *Ibid.* at 630.
75. *Ibid.* at 623.
76. *Ibid.* at 635.
77. *Ibid.* at 636 (Scalia, J., dissenting).
78. *Ibid.* at 653 (Scalia, J., dissenting).
79. *Ibid.* at 652 (Scalia, J., dissenting).
80. This constitutional prognosticator, drawing from the justices' positions in previous decisions including *Romer*, confidently predicted that not a single justice would vote to accept review in *Bush v. Gore*. The liberals would not do so because they would not want to disturb prospects for a Democratic victory, I reasoned, while conservatives would refrain from doing so due to their deeply held convictions on federalism. I was wrong.
81. *Bush v. Gore*, 531 U.S. 98, 104 (2000). A concurring opinion by Chief Justice Rehnquist joined by Justices Scalia and Thomas based the decision on stronger jurisprudential ground, specifically the constitutional role delegated in the presidential election context to state legislatures. *Ibid.* at 111 (Rehnquist, C.J., concurring).
82. *Ibid.* at 111 (Rehnquist, C.J., concurring).
83. *Ibid.* at 112 (Rehnquist, C.J., concurring).
84. *Ibid.* at 110 (majority). At least when conservatives engage in judicial activism, they hang a sign on it saying, "Good for today only": *Ibid.* ("Our consideration is limited to the present circumstances").
85. *Ibid.* at 128 (Stevens, J., dissenting).

86. *Ibid.* at 141 (Ginsburg, J., dissenting).
87. *Ibid.* at 142 (Ginsburg, J., dissenting).
88. Amar, “Of Sovereignty and Federalism,” p. 1520 (see ch. 2, n. 6).
89. Cass R. Sunstein, “Federal Appeal,” *New Republic* (Dec. 22, 2003), p. 23.

#### Chapter 4

1. *Chaddock v. Day*, 42 N.W. 977, 978 (Mich. 1889).
2. For a description of the California hair braiding controversy, see, e.g., Karen E. Klein, “What it Takes to Take On the State Regulators,” *Los Angeles Times* (Nov. 3, 1999); “Hair Raising,” *Wall Street Journal* (Sept. 1, 1999).
3. *Cornwell v. Hamilton*, 80 F.Supp.2d 1101 (S.D. Cal. 1999).
4. So far we have completed studies of barriers to entrepreneurship in Washington State, Arizona, Baltimore, Boston, Charlotte, Detroit, New York City, San Antonio, and San Diego. See <http://ij.org/publications/index.html>.
5. See S. David Young, *The Rule of Experts: Occupational Licensing in America* (Washington, DC: Cato Institute, 1987).
6. Walter Williams, *The State Against Blacks* (New York: McGraw-Hill, 1982), p. xvi.
7. For a good account of abuses of economic liberty, see Randy Fitzgerald, *Mugged by the State: Outrageous Government Assaults on Ordinary People and Their Property* (Washington, DC: Regnery Publishing, 2003), pp. 109–26. For additional examples, see Bolick, *Grassroots Tyranny*, pp. 141–52 (see ch. 2, n. 1).
8. See, e.g., *New Orleans v. Dukes*, 427 U.S. 297 (1976). For a fuller discussion of the erosion of protection for economic liberty, see Bolick, *Unfinished Business*, pp. 47–91 (see ch. 2, n. 46).
9. *Federal Communications Commission v. Beach Communications*, 508 U.S. 307 (1993).
10. Anthony Ramirez, “Judge Rejects Most of Law on Commuter Van Licenses,” *New York Times* (Mar. 24, 1999).
11. Richard N. Velotta, “Independent Limo Operators Fight Rule,” *Las Vegas Sun* (May 4, 1998).
12. “A Win for the Little Guy,” *Las Vegas Review-Journal* (May 18, 2001).

13. *Craigmiles v. Giles*, 110 F.Supp.2d 658 (E.D. Tenn. 2000); see also Ronnie Moore, “Casket Stores Win Right to Sell Without License,” *Chattanooga Free Press* (Aug. 22, 2000); “Economic Liberty Alive and Well,” *Chattanooga Free Press* (Sept. 13, 2000).
14. *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).
15. *Powers v. Harris*, 2002 U.S. Dist. LEXIS 26939 (Dec. 12, 2002).
16. Chi-Doo Li, “What Is the City Council Thinking?” *Seattle Post-Intelligencer* (Sept. 25, 2003).
17. Benjamin Minnick, “City Rule Has Haulers Talkin’ Trash,” *Seattle Daily Journal of Commerce* (May 14, 2003), p. 1.
18. William R. Mauer, “Waste Monopoly Trashes Free Market,” *Seattle Post-Intelligencer* (May 16, 2003).
19. Lisa Heyamoto, “Small Firm Sues City Over Hauling Rules,” *Seattle Times* (May 14, 2003).
20. Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003), available at <http://www.ftc.gov/os/2003/07/winereport2.pdf>.
21. Compare *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003); and *Bolick v. Roberts*, 199 F.Supp.2d 397 (E.D. Va. 2002), *vacated and remanded sub. nom. Bolick v. Danielson*, 330 F.3d 274 (4th Cir. 2003); with *Swedenburg v. Kelly*, 2004 U.S. App. LEXIS 52337 (Feb. 12, 2004); and *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000).
22. “Rats! Bureaucrats’ Bullying of an Enterprising Teenager Is Shameful,” *East Valley Tribune* (Mar. 16, 2004), p. 29. See also Cindy Hernandez, “Lessons Learned After School,” *Arizona Republic* (Apr. 7, 2004).
23. Quoted in “The Vans Roll,” *Wall Street Journal* (Aug. 13, 1997).

#### Chapter 5

1. Elisabeth Rosenthal, “Factories Wrest Land from China’s Farmers,” *New York Times* (March 23, 2003), p. A10.
2. For additional examples, see Fitzgerald, *Mugged by the State*, pp. 21–34 (see ch. 4, n. 7). Other accounts of violations of private-property rights are described in Bolick, *Grassroots Tyranny*, pp. 111–22 (see ch. 2, n. 1).
3. *Bailey v. Myers*, 76 P.3d 898 (Ariz. App. 2003).
4. Dana Berliner, *Public Power, Private Gain* (Washington, DC: Institute for Justice, 2003). The report can be found at <http://>

[www.castlecoalition.org/report/](http://www.castlecoalition.org/report/). Because the number of cases it can handle is limited, while the number of abuses is enormous, the Institute for Justice launched the Castle Coalition to provide tools to help grassroots activists combat eminent domain abuse.

5. *Ibid.*, p. 2.
6. *Ibid.*, pp. 144–54.
7. 467 U.S. 229 (1984).
8. Berliner, *Public Power, Private Gain*, pp. 115–16.
9. See Blaine Harden, “In Ohio, a Test for Eminent Domain,” *Washington Post* (June 22, 2003), p. A3.
10. Transcript, *60 Minutes*, CBS (Sept. 28, 2003).
11. The bible for property-rights advocates in fighting government’s power to take property is the brilliant classic by Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985).
12. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).
13. See Bolick, *Grassroots Tyranny*, pp. 113–14 (see ch. 2, n. 1); Marcia Coyle, “Property Revival,” *National Law Journal* (January 27, 1992).
14. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
15. The Court’s recent decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), holding that a lengthy development moratorium did not on its face amount to a compensable temporary taking, illustrates the conundrum that property owners face.
16. *Dolan v. City of Tigard*, 512 U.S. 374, 386–392 (1994).
17. In 2000, President Clinton signed into law a bill sponsored by Rep. Henry Hyde raising the burden of proof in federal civil-asset forfeiture proceedings and implementing other reforms. But the legislation did not alter oppressive state rules.
18. *Bennis v. Michigan*, 516 U.S. 442 (1996).
19. Jim Edwards, “Prosecutors React to Knockdown Forfeiture Spending,” *New Jersey Law Journal* (Dec. 20, 2002).
20. *State of New Jersey v. One 1990 Ford Thunderbird*, letter opinion, No. CUM-L-000720-99 N.J. Super. Ct., Dec. 11, 2002), at 8.
21. Tanya Kornelsen, “Court Axes Inspection Policy,” *Matteson/Richton Park (IL) Star* (March 8, 1998).
22. *Black v. Village of Park Forest*, 20 F.Supp.2d 1218 (N.D. Ill. 1998).
23. *U.S. v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

24. *Dolan*, 512 U.S. at 512.
25. *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993).

#### Chapter 6

1. See Susan Finch, “Couple Win One for the Books,” *New Orleans Times-Picayune* (June 18, 2003).
2. *Wezler v. City of New Orleans*, 267 F.Supp.2d 559, 568 (E.D. La. 2003).
3. Examples of the abuse of free-speech rights by state and local governments are set forth in Bolick, *Grassroots Tyranny*, pp. 123–40 (see ch. 2, n. 1).
4. See Jason Emerson, “Doughnut Shop Sues Mesa,” *East Valley Tribune* (Jan. 9, 2003); Court Rich, “Mesa Takes Strong Stand on Weak Law,” *Arizona Republic* (Jan. 11, 2003). Court Rich is ably litigating the case pro bono with the Institute for Justice Arizona Chapter.
5. See Gordy Holt, “Bagel Business Sues Redmond Over Sign Ban,” *Seattle Post-Intelligencer* (July 24, 2003); Nick Perry, “Group Bankrolls Suit on Behalf of Bagel Shop,” *The Seattle Times* (July 24, 2003); Christine Frey, “Blazing Bagels Fights Redmond’s Sign Rules,” *Seattle Post-Intelligencer* (July 27, 2003).
6. *Ballen v. City of Redmond*, slip op., No. C03-2580Z (W.D. Wash. Jan. 21, 2004) at 9.
7. “Just Sue It: Supreme Court Skips Nike, Consumer Speech Dispute,” *Palm Beach Daily Business Review* (June 27, 2003).
8. *Kasky v. Nike, Inc.*, 45 P.3d 243 (Ca. 2002).
9. *Ibid.* at 268 (Brown, J., dissenting, citing Kozinski and Banner, “Who’s Afraid of Commercial Speech?” 76 *Virginia Law Review* 627, 627 (1990)). Alex Kozinski, the co-author of the cited article, is a judge on the U.S. Court of Appeals for the Ninth Circuit and a leading critic of the commercial speech doctrine.
10. *Ibid.* at 268 (Brown, J., dissenting) (emphasis in original).
11. *Ibid.* at 280 (Brown, J., dissenting) (emphasis in original).
12. *Nike, Inc. v. Kasky*, 123 S.Ct. 2554 (2003).
13. Christopher Schurtz, “Campaign Signs Must Go,” *Las Cruces Sun-News* (Jan. 3, 2004).
14. This system accounted for State Attorney General Janet Napolitano’s narrow victory in the 2002 gubernatorial race. Ms. Napolitano’s campaign coffers were filled with public subsidies, while her opponent, former U.S. Representative Matt Salmon,

refused to accept them. See Clint Bolick, “Fundraising Arizona,” *Weekly Standard* (Dec. 2, 2002).

15. Daniel Burnette, “Lobbyist Fee Unconstitutional, Court Surcharge OK Superior Court Judge Rules on Clean Elections Act Funding,” *Arizona Capitol Times* (Dec. 31, 2002).
16. *May v. McNally*, 55 P.3d 768 (2002).

#### Chapter 7

1. Additional examples of abuses of privacy rights are depicted in Bolick, *Grassroots Tyranny*, pp. 153–62 (see ch. 2, n. 1).
2. An excellent case for protecting the right to privacy under the Ninth Amendment is made in Calvin R. Massey, “Federalism and Fundamental Rights: The Ninth Amendment,” 38 *Hastings Law Journal* 305 (1987).
3. See Clint Bolick, “Flip-Flopping on Free Association,” *Washington Post* (June 17, 2003), p. A21.
4. *Lawrence v. Texas*, 123 S.Ct. 2472, 2476–77 (2003).
5. 478 U.S. 186, 190 (1986).
6. *Lawrence*, 123 S.Ct. at 2475.
7. *Ibid.* at 2478.
8. *Ibid.* at 2480.
9. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992); quoted in *Lawrence*, 123 S.Ct. at 2484.
10. *Lawrence*, 123 S.Ct. at 2497 (Scalia, J., dissenting).
11. *Ibid.* at 2498 (Scalia, J., dissenting).
12. *Ibid.* at 2497 (Scalia, J., dissenting).
13. *Ibid.* at 2498 (Thomas, J., dissenting).
14. *Boy Scouts of America v. Dale*, 530 U.S. 640, 645 (2000) (internal quote marks omitted).
15. *Ibid.* at 646.
16. *Ibid.* at 647–48 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622–23 (1984)).
17. *Ibid.* at 661.
18. *Ibid.* at 664 (Stevens, J., dissenting).
19. *Ibid.* at 678.

#### Chapter 8

1. Sue Ann Pressley, “Texas Interracial Adoption Case Reflects National Debate,” *Washington Post* (Jan. 2, 1997).

2. Steven A. Holmes, “Bitter Racial Dispute Rages Over Adoption,” *New York Times* (Apr. 13, 1995) (emphasis added).
3. *Ibid.*
4. Pressley, “Texas Interracial Adoption Case.”
5. Holmes, “Bitter Racial Dispute.”
6. *Ibid.*
7. Steven A. Holmes, “Texas Approves Couple’s Adoption of 2 Black Boys,” *New York Times* (Apr. 15, 1995).
8. The nondiscrimination provisions regarding adoption placements are now codified at 42 U.S.C. 5115a.
9. 347 U.S. 483 (1954).
10. Other examples of government-imposed racial classifications are described in Bolick, *Grassroots Tyranny*, pp. 163–74 (see ch. 2, n. 1).
11. Quoted in Gerald Sorin, *Abolitionism: A New Perspective* (New York: Praeger, 1972), p. 31 (emphasis omitted).
12. See Bolick, *Unfinished Business* (see ch. 2, n. 46).
13. *Korematsu v. United States*, 323 U.S. 214, 245–36 (1944) (Jackson, J., dissenting).
14. The history of the quest for equality under the law in America, and the many departures from that principle, are described in Clint Bolick, *The Affirmative Action Fraud: Can We Restore the American Civil Rights Vision?* (Washington, DC: Cato Institute, (1996)); and Bolick, *Changing Course* (see ch. 2, n. 40).
15. See, e.g., Maria Puente, “Asians, Whites Join Forces in School Integration Debate,” *USA Today* (Sept. 11, 1995).
16. Sam Howe Verhovek, “Americans Reject Means But Not Ends of Racial Diversity,” *New York Times* (Dec. 14, 1997), sec. 1, p. 1.
17. See Stuart Taylor Jr., “Do African-Americans Really Want Racial Preferences?” *National Journal* (Dec. 20, 2002).
18. *Dea v. Washington Suburban Sanitary Comm’n*, unpublished opinion, No. 97–1572 (4th Cir. June 15, 2001). See “Engineer Who Refused to Comply With Policy Protected under Title VII Opposition Clause,” *Daily Labor Report* (June 26, 2001).
19. See, e.g., *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).
20. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
21. Stephan Thernstrom and Abigail Thernstrom, *America in Black*



*and White: One Nation, Indivisible* (New York: Simon & Schuster, 1999), pp. 357 and 397.

22. Jay P. Greene and Greg Forster, “College Diversity: Fix the Pipeline First,” *Washington Post* (Jan. 7, 2004), p. A21.
23. See, e.g., William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (Chicago: University of Chicago Press, 1990); Bolick, *The Affirmative Action Fraud*.
24. Michael Scott Moore, “Affirmative Reaction,” *SF Weekly* (Nov. 12, 1997).
25. James Traub, “The Class of Prop. 209,” *New York Times* (May 2, 1999), sec. 6, p. 44.
26. Jim Yardley, “Desperately Seeking Diversity,” *New York Times* (Apr. 14, 2002), sec. 4A, p. 28; “Governor’s One Florida Plan Works,” *Fort Myers (FL) News-Press* (June 21, 2002), p. 8B.
27. The Court’s opinion was authored by Chief Justice William Rehnquist. Joining Rehnquist in striking down the undergraduate preferences were Justices Sandra Day O’Connor, Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Stephen Breyer. Dissenting were Justices John Paul Stevens, David Souter, and Ruth Bader Ginsburg.
28. *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003).
29. *Ibid.* at 285 (O’Connor, J., concurring).
30. *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003). Justice O’Connor authored the Court’s opinion. Joining O’Connor in the majority were Justices Stevens, Souter, Ginsburg, and Breyer.
31. *Ibid.* at 327.
32. *Ibid.* at 332.
33. *Ibid.* at 336.
34. Dissenting were Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas.
35. *Grutter*, 539 U.S. at 371 (Kennedy, J., dissenting).
36. *Ibid.*
37. *Ibid.* at 363 (Thomas, J., concurring in part and dissenting in part).
38. *Ibid.* at 360 (Thomas, J., concurring in part and dissenting in part).
39. *Ibid.* at 349 n.3 (Thomas, J., concurring in part and dissenting in part).

40. *Ibid.* at 349 (Thomas, J., concurring in part and dissenting in part).
41. *Ibid.* at 341.
42. *Ibid.* at 342.
43. *Ibid.* at 359 (Thomas, J., concurring in part and dissenting in part).
44. Dan Beyers, “Diversity’s Double Bind: Montgomery, Citing Race Policy, Won’t Let Girls Switch Schools,” *Washington Post* (Aug. 22, 1995), p. A1.
45. Dan Beyers, “Montgomery Reverses Itself, Lets Asian Girls Switch Schools,” *Washington Post* (Sept. 14, 1995), p. A1.

#### Chapter 9

1. *Herndon by Herndon v. Chapel Hill–Carrboro City Board of Education*, 89 F.3d 174 (4th Cir. 1997); *Immediato v. Rye Neck School District*, 73 F.3d 454 (2d Cir. 1996); see also Michael Winerip, “Required Volunteerism: School Programs Tested,” *New York Times* (Sept. 23, 1996), p. A16.
2. My account of the first 12 years of the battle to defend school choice programs is Clint Bolick, *Voucher Wars: Waging the Legal Battle Over School Choice* (Washington, DC: Cato Institute, 2003).
3. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).
4. Abigail Thernstrom and Stephan Thernstrom, *No Excuses: Closing the Racial Gap in Learning* (New York: Simon & Schuster, 2003).
5. Thernstrom and Thernstrom, *No Excuses*, p. 274.
6. The plight of inner-city schoolchildren, as well as policy prescriptions to redress it, are set forth in Clint Bolick, *Transformation: The Promise and Politics of Empowerment* (Oakland, CA: Institute for Contemporary Studies, 1998), pp. 34–67.
7. National Center for Education Statistics, *The Nation’s Report Card: Fourth Grade Reading 2000*, p. 33.
8. Michael Dobbs, “At Colleges, An Affirmative Reaction,” *Washington Post* (Nov. 15, 2003), p. A11.
9. Jay P. Green and Marcus A. Winters, *Public School Graduation Rates in the United States* (New York: Manhattan Institute, 2002), p. 3.
10. *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925). See also *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down law forbidding instruction in German as violating parental liberty); *Far-*

*rington v. Tokushige*, 273 U.S. 284 (1927) (invalidating pervasive regulation of Japanese schools). All three decisions remain good law today.

11. John E. Chubb and Terry M. Moe, *Politics, Markets & America's Schools* (Washington, DC: Brookings Institution, 1990).
12. *Ibid.*, p. 140.
13. *Ibid.*, pp. 215–29. See also Bolick, *Transformation*, pp. 62–67.
14. Chubb and Moe, *America's Schools*, p. 227.
15. *Ibid.*, p. 229.
16. See Bolick, *Transformation*, pp. 53–61.
17. See Bolick, *Voucher Wars*, pp. 201–02.
18. Quoted in Bolick, *Transformation*, p. 34.
19. The early struggle for the Milwaukee Parental Choice Program is eloquently chronicled in Mikel Holt, *Not Yet "Free at Last": The Unfinished Business of the Civil Rights Movement* (Oakland, CA: Institute for Contemporary Studies, 2000); and Daniel McGroarty, *Break These Chains: The Battle for School Choice* (Rocklin, CA: Prima Publishing, 1996). See also Bolick, *Voucher Wars*, pp. 15–43.
20. *Davis v. Grover*, 480 N.W.2d 460, 477 (Ceci, J., concurring).
21. See Bolick, *Voucher Wars*.
22. *Zelman*, 536 U.S. at 677 (Thomas, J., concurring).
23. *Ibid.* at 682 (Thomas, J., concurring).

#### *Chapter 10*

1. *The Federalist* No. 48 (Madison), p. 322.
2. See Steven M. Simpson, “Judicial Abdication and the Rise of Special Interests,” 6 *Chapman Law Review* 173, 183 (2003).
3. *Ibid.*, pp. 183–84.
4. *Ibid.*, p. 205.
5. IJ’s economic liberty litigation strategy was first sketched out in Bolick, *Unfinished Business*, pp. 47–91 (see ch. 2, n. 46).
6. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (striking down a zoning law that forbade a home for the mentally retarded). A more recent example is *Romer v. Evans*, 517 U.S. 620 (1996) (striking down Colorado’s prohibition against local laws forbidding discrimination against homosexuals).

7. *Brown v. Barry*, 710 F. Supp. 352, 355–56 (D.D.C. 1989) (emphasis deleted).
8. *Santos v. City of Houston*, 852 F. Supp. 601, 608 (S.D. Tex. 1994).
9. *Cornwell v. Hamilton*, 80 F.Supp.2d 1101 (S.D. Cal. 1999).
10. *Craigmiles v. Giles*, 110 F.Supp.2d 658 (E.D. Tenn. 2000).
11. See, e.g., *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).
12. David M. Herszenhorn, “Widowed Homeowner Foils Trump Bid in Atlantic City,” *New York Times* (July 21, 1998).
13. See Bolick, *Grassroots Tyranny*, pp. 141–44 (see ch. 2, n. 1).
14. See Bolick, *Transformation*, pp. 76–80 (see ch. 9, n. 6).
15. Thomas Paine, *The Crisis* (Dec. 23, 1776).