Introduction

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What has long been true has now become obtrusively apparent: There exists a fundamental contradiction between America's most basic ordinance, its constitutional law, and the values by which Americans have lived and wish to continue to live. That disjunction promises to become even more acute as the United States, along with Europe, moves toward the internationalization of law. Several things are to be observed about these developments. First, much constitutional law bears little or no relation to the Constitution. Second, the Supreme Court's departures from the Constitution are driven by "elites" against the express wishes of a majority of the public. The tendency of elite domination, moreover, is to press America ever more steadily toward the cultural left. Finally, though this book concentrates on the role of judges, who constitute the most powerful single force in producing these effects, politicians and bureaucrats bear a share of the responsibility.

Though there have been instances of judicial perversity throughout our history, nothing prepared us for the sustained radicalism of the Warren Court, its wholesale subordination of law to

an egalitarian politics that, by deforming both the Constitution and statutes, reordered our politics and our society. Some of these changes were both constitutionally legitimate and beneficial;[1] most were not. Today's Court, though generally more honest in interpreting statutes, is, if anything, even bolder in rewriting the Constitution to serve a cultural agenda never even remotely contemplated by the founders. This Court strikes at the basic institutions that have undergirded the moral life of American society for almost four hundred years and of the West for millennia. As John Derbyshire put it, "We Americans are heading into a 'crisis of foundations' of our own right now. Our judicial elites, with politicians and pundits close behind, are already at work deconstructing our most fundamental institutions—marriage, the family, religion, equality under the law."[2]

Courts, even with the assistance of politicians and bureaucrats, have not, of course, accomplished this deconstruction entirely on their own. They both reflect and advance a broader cultural movement that has been growing and maturing among elites, including most members of the Supreme Court, for several decades and that erupted and became full-blown in the late 1960s and early 1970s, a period commonly called the Sixties decade. What was at first a counterculture gained traction and further radicalized attitudes among elites. The Court, now downplaying the question of economic equality in favor of "lifestyle" issues, came to embrace and then to celebrate group identity and radical personal autonomy in moral matters. The Court majority, to put the matter plainly, has been overtaken by political correctness. Traditional values are being jettisoned and self-government steadily whittled away. The American people have no vote on these transformations; efforts by

1. *Brown v. Board of Education*, 347 U.S. 483 (1954), ending governmental racial discrimination, is the premier example.

2. Derbyshire, "Our Crisis of Foundations," *National Review* (December 13, 2004): 37, 39.

legislatures to set limits to cultural change and to control its direction are routinely, and almost casually, thwarted.

The complaint here is not that old virtues are eroding and new values rising. Morality inevitably evolves. A society that knew only change would exist in a state of constant frenzy and would soon cease to be a society; a society whose values never altered would resemble a mausoleum. But the merits of specific changes, how far and how rapidly they should proceed, and whether any particular aspect of morality should form the basis of law, are questions of prime importance to the way we live. And these questions, according to the postulates of the American republic, are matters to be resolved primarily within families, schools, churches, and similar institutions, and only occasionally by public debate, elections, and laws that embody, however imperfectly and temporarily, the current moral consensus. What is objectionable is that, in too many instances, a natural evolution of the moral balance is blocked and a minority morality forced upon us by judicial decrees.

This judicial gnosticism was described by Justice Antonin Scalia in a dissent: "What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have regarded as constitutional for 200 years, is in fact unconstitutional? . . . Day by day, case by case, [the Supreme Court] is busy designing a Constitution for a country I do not recognize."[3]

Less far advanced, but no less objectionable, is the ongoing internationalization of law, including even the internationalization of American constitutional law. It may seem bizarre that the Constitution of the United States, written and ratified over two hundred years ago, should be interpreted with the guidance of today's for-

3. *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668, 688–689 (1996).

eign court decisions and even the nonbinding resolutions of international organizations, but that does not seem at all preposterous to some of our Supreme Court justices nor to the elites to which the justices respond. The Supreme Court reporter for the *New York Times* remarked, approvingly, that "it is not surprising that the justices have begun to see themselves as participants in a worldwide constitutional conversation."[4] She might more accurately have said "a worldwide constitutional convention."

Most of us understand law to mean rules laid down by a legislature, court, or regulatory agency, acting within its delegated authority. When the lawgiver acts without legitimate authority, its "law" is to that degree bogus, but if its order cannot be effectively resisted, it is, nonetheless, for all practical purposes, law—power without legitimacy. It is a bedrock assumption of American republicanism that authority is only legitimate when its ultimate source is either the American citizenry (acting through elected and accountable representatives) or when it follows from acceptable limitations on majority rule (federal and state constitutions enforced by judges). These are contending principles and neither should encroach systematically on the other. Judges who regularly defeat democratic outcomes without any warrant in the Constitution are justified by neither principle; they have simply enlisted on the side of the intelligentsia against the general public in our culture war.

The first three chapters of this book deal with constitutional law. Lino A. Graglia provides an overview: "Rightly revered as the guarantor of our rights, the Constitution has been made, instead, the means of depriving us of our most essential right, the right of self-government. . . . The central fact as to contemporary constitutional law . . . is that it has very little to do with the Constitution." The Court has become the "ultimate law-giver on most of the basic issues of domestic social policy," and these are the "issues that determine the basic values, nature, and quality of a society." Racial

4. Linda Greenhouse, *New York Times*, July 6, 2003, Sec. 4.

and gender equality are denied by decisions favoring affirmative action and group identity while an egregiously broad scope for personal autonomy undercuts legitimate community desires for a degree of order and morality. The undercutting takes several forms: the creation of unjustified restraints on the criminal justice system that make policing, prosecution, and punishment difficult, often inordinately delayed, and sometimes impossible; disapproval of laws reinforcing morality, particularly in sexual matters, to the detriment of marriage, families, and the traditional moral order; virulent antagonism to public displays of religion; and, in a stunning inversion of the First Amendment's guarantee of freedom of speech, protection of the worst forms of pornography and vulgarity but approval of even prior restraints on political speech, historically the heart of the Amendment. Graglia's comprehensive indictment is entirely justified. The contest is one between democracy and oligarchy, and for half a century the oligarchs have been winning.

Gary L. McDowell brings into focus a major doctrine of relatively recent invention—the right of privacy—that has been used by the Court to constitutionalize the sexual revolution. Originally, as McDowell shows, the right of privacy was suggested in an article co-authored by Louis Brandeis as a tort doctrine to protect people from an intrusive press. On the Court, Brandeis tried to elevate privacy to constitutional status in a dissent extolling "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." That was surely merely empty rhetoric, for, as McDowell notes, the right is "utterly at odds with the very possibility of constitutional self-government."

The Court, in a 1965 opinion by Justice William O. Douglas, concocted a constitutional right to "privacy" in order to strike down a Connecticut law prohibiting the use of contraceptives[5]—a law that, for obvious reasons, was applied rarely and then only against birth control clinics that advertised contraceptives. The word "pri-

5. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

vacy" has such favorable connotations, however, that it has proved impossible to confine it or to convince Americans that the doctrine had little to do with privacy and everything to do with freeing judges to do whatever they want. The question, Privacy to do what?, has little resonance. It was not long before the Court began to answer that question. More laws regulating sexual morality were invalidated, and the trend reached a crescendo with the 1973 invention by the Court of a right to abortion. So solicitous has the Court been in advancing abortion rights that it has even struck down laws requiring that parents be given notice when a minor child seeks an abortion, and it has refused to allow states to ban even partial-birth abortions, which are the moral equivalent of infanticide.

One might suppose that any number of Court decisions, particularly the right to abortion invented in *Roe v. Wade*,[6] would qualify as the high-water mark of judicial arrogance, but McDowell awards that distinction to the separate concurrence of Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1993),[7] upholding a somewhat modified abortion right. "What was most shocking" about that opinion, McDowell writes, "was the utter disdain it reflected for the idea of popular government." The concurrence said the Court has the authority to "speak before all others for [the people's] constitutional ideals," and, moreover, the people's willingness to accept what the Court tells them are their ideals is what gives "legitimacy to the people as 'a nation dedicated to the rule of law.'" Why, one might ask, must the citizens of a free republic accept what the Court tells them are their own ideals? And why is it the legitimacy of the people that is in question rather than the legitimacy of the Court? It reminds one of Bertolt Brecht's jest: the people have lost the confidence of the government and a new

6. 410 U.S. 113 (1973).
7. 505 U.S. 833 (1993).

people must be formed. McDowell, like Graglia, is not optimistic about the future: "as history shows, there is no reason to think that the expansion of . . . judicially created right[s] has reached its limits."

Terry Eastland provides a comprehensive survey of the Supreme Court's religion decisions under the First Amendment. Whereas much of modern constitutional jurisprudence, as Graglia and McDowell demonstrate, consists of rights conjured up out of thin air, Eastland shows that the Court has so deformed a real constitutional provision that it bears little discernible relation to anything the framers and ratifiers understood themselves to be saying.

Of the two religion clauses—the one forbidding an establishment of religion and the other guaranteeing its free exercise—it is the establishment clause that has suffered the most abuse. Both the text and the history of its adoption show conclusively that what was to be placed beyond Congress's power was the establishment of churches on the then-familiar European model. The anti-establishment clause manifested no hostility to organized religion as such nor any intention to forbid Congress from aiding religion generally. No amount of historical demonstration of what was intended[8] has been capable, however, of deflecting a majority of the justices from antagonism to religion. Striking down a Pennsylvania law requiring that the school day begin with a reading from the Bible and with student recitation of the Lord's Prayer, though a student could be excused on the written request of a parent, the Court said that this "breach of [constitutional] neutrality that is today a trickling stream may all too soon become a raging torrent."[9] Have the justices no knowledge of history? For a century and a half the Republic staggered along without the Court's protection

8. Philip Hamburger, *Separation of Church and State* (Cambridge, Mass.: Harvard University Press, 2002).

9. *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963).

from the perils of religion, and the trickling stream never achieved even the status of a sluggish creek. Vibrant religion there was, but no hint of theocracy or religious war. Now, under the tutelage of the Court and the American Civil Liberties Union, religious symbols and speech must everywhere be suppressed.

If any other kind of symbolism or speech, say, advocacy of Maoism, were expunged by government as thoroughly as are manifestations of religion, cries of censorship would resound throughout the land, and the Supreme Court would without doubt find the ban unconstitutional. The effect of the Court's consistent denigration of religion in the name of the Constitution must be to so marginalize religion in our public life as to weaken the influence of religion throughout the society. As Eastland remarks, "Legal scholars agree that [the Court's religion jurisprudence] is an intellectual mess. Unfortunately, that is not the worst that can be said about it. The truth is that the Court's religion decisions have done serious damage to the country." Perhaps the Court's majority is so antagonistic to religion because religion, at least its orthodox varieties, stands in the way of the moral relativism to which the Court seems dedicated.

At the outset, I made the claim that today's Court manifests one of the less attractive hangovers from the Sixties, that it is, in fact, enacting, in the name of the Constitution, the modern liberal agenda of political correctness. That, I believe, is indisputable, shown not only by the decisions of the Court discussed in the chapters by Graglia, McDowell, and Eastland but by a comparison of the rhetoric of the Court majority and that of the founding document of the Sixties New Left, the 1962 *Port Huron Statement*, a document that became the most widely circulated manifesto of the New Left.[10] The *Statement* asserted that "The goal of man and

10. The full document is reprinted in James Miller, *"Democracy Is in the Streets": From Port Huron to the Siege of Chicago* (Cambridge, Mass: Harvard University Press, 1994), 305, and is discussed in Robert H. Bork, *Slouching Towards Gomorrah:*

society should be . . . finding a meaning in life that is personally authentic," and this was to be accomplished through a (largely undefined) "politics of meaning."

Perhaps the first explicit statement of this attitude came in Justice Harry A. Blackmun's dissent, joined by three other justices, in *Bowers v. Hardwick*, arguing that there is a constitutional right to engage in homosexual sodomy. Rejecting the view that prior cases involving the right to privacy had confined that right to the protection of the family, Blackmun wrote:

> We protect those rights [associated with the family] not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "The concept of privacy embodies the moral fact that a person belongs to himself and not to others nor to society as a whole."[11]

Moral facts there may be, but that assuredly is not one of them. Blackmun was saying that the family has no value except as it contributes to the individual's gratification. Presumably, when there is a gratification deficit, individuals are morally free to shed themselves of spouse, children, and parents. On this reasoning, no-fault divorce should be a constitutional right. The second sentence sweeps even more broadly. There would seem to be no moral obligation to obey any inconvenient law and, moreover, no duty owed to colleagues, neighbors, nation, society, or anyone or anything outside one's own skin. The ultimate in psychopathology is urged on us as a constitutional right. The four-member minority did not, of course, seriously mean anything so incomprehensible, but it speaks volumes about their mood that they could utter such a sentiment, as well as about the frivolity with which they justified their

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Modern Liberalism and American Decline (New York: Regan Books/HarperCollins, 1996), 25–31.

11. 478 U.S. 186, 204 (1986).

position to the nation. What they did mean was that the justices would choose which obligations a person must honor and that among the least of these are laws reinforcing morality.

Blackmun's position became constitutional law when *Bowers* was overruled in *Lawrence v. Texas*.[12] In creating a right to homosexual sodomy, Justice Kennedy's opinion for a six-member majority, repeating language from a special concurrence earlier,[13] stated:

> These matters, involving the most intimate and personal choices a person may make in a lifetime [abortion, etc.], choices central to *personal dignity and autonomy*, are central to the liberty protected by the Fourteenth Amendment. *At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.* [emphasis added]

That is not an argument but a Sixties oration. It has no discernible intellectual content; it does not even tell us why the right to define one's own concept of "meaning" includes a right to abortion or homosexual sodomy but not a right to incest, prostitution, embezzlement, or anything else a person might regard as central to his dignity and autonomy. Nor are we informed of how we are to know what other rights will one day emerge from some person's concept of the universe.

The chaotic mood of *Lawrence* seems equivalent to that which animated the student radicals who composed the *Port Huron Statement.* A transcendental politics, whether that dreamed at Port Huron or at the Supreme Court, cannot be satisfied by the messiness and compromises of democratic politics; nor can it be satisfied by the list of particular freedoms embodied in the Bill of Rights and the Fourteenth Amendment. Transcendence requires an over-

12. 156 L. Ed. 2d 508 (2003).

13. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992). The concurrence was given as an unusual joint opinion by Justices O'Connor, Kennedy, and Souter.

arching principle, which is what the "mystery passage" tried, unsuccessfully, to articulate.

That failure was inevitable. As Lord Patrick Devlin concluded, "it is not possible to set theoretical limits to the power of the State to legislate against immorality. It is not possible to settle in advance exceptions to the general rule or to define inflexibly areas of morality into which the law is in no circumstances to be allowed to enter."[14] The Court, too, finds it impossible to articulate a theoretical limit to what other branches of government may do in curbing immorality. In attempting to establish a general, comprehensive statement of limits, the "mystery passage," like Blackmun's *Bowers* dissent, necessarily goes well beyond the particularized limits on governmental power set out in the actual Constitution. That is also why the Court becomes increasingly authoritarian. Citizens and their elected representatives, displaying good sense, do not want an overarching theory of freedom and its limits and know no better than the judicial *philosophes* how to construct one. Faced with such recalcitrance, the Court resorts to insistence that the legitimacy of the people depends upon their acceptance of the Court's ukases. In the absence of a real theory, political correctness will have to do. The Court, like the New Left, may practice a politics of expression and self-absorption, but that does not mean the politics is innocuous. To the contrary, it does serious, lasting, and perhaps permanent damage to valuable institutions, socially stabilizing attitudes, and essential standards.

Perhaps a better understanding of what is taking place may be gained by combining the insights of Max Weber and Kenneth Minogue. Weber wrote:

> The intellectual seeks in various ways . . . to endow his life with a pervasive meaning, and thus to find unity with himself, with

14. Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1987), 12–13.

> his fellow men, and with the cosmos. . . . As a consequence, there is a growing demand that the world and the total pattern of life be subject to an order that is significant and meaningful.[15]

Minogue lists three variants in the intellectuals' quest for meaning. (These developed after religion ceased to provide meaning for the intelligentsia.) The first is the idea of progress, which eventually spawned a Marxist version, and then, when communism's promises proved disastrous, was incorporated into an alternative endeavor that abandoned the "quick fix of revolution" for a more gradual course of instructing the public in proper opinions. "We may call it Olympianism," he writes,

> because it is the project of an intellectual elite that believes that it enjoys superior enlightenment and that its business is to spread this benefit to those living on the lower slopes of human achievement. And just as Communism had been a political project passing itself off as the ultimate in scientific understanding, so Olympianism burrowed like a parasite into the most powerful institution of the emerging knowledge economy—the universities.[16]

Minogue does not discuss the role of courts, but his analysis fits well with what we observe of the behavior of the Supreme Court and its intellectual-class allies. They display a "formal adherence to democracy as a rejection of all forms of traditional authority, but with no commitment to taking any serious notice of what the people actually think. Olympians instruct mortals, they do not obey them."[17]

Olympians are highly suspicious of the people: "democracy is the only tolerable mode of social coordination, but until the majority of people have become enlightened, it must be constrained

15. Weber, *The Sociology of Religion* (Boston: Beacon Press, 1963), 124–125.

16. Minogue, "'Christophobia' and the West," *The New Criterion* 21 (June 2003): 4, 9.

17. Ibid., 10.

within a framework of rights, to which Olympian legislation is constantly adding. Without these constraints, progress would be in danger from reactionary populism appealing to prejudice."[18] As predicted, the Supreme Court, which is the Olympians' favorite legislature, is constantly inventing new rights to constrain an unenlightened majority. It is amazing to the modern lawyer that in Joseph Story's *Commentaries on the Constitution of the United States*,[19] written in 1833, the discussion of the first ten amendments, the Bill of Rights, occupies about one-fiftieth of the text. In today's casebooks, rights decisions, with the Fourteenth Amendment added, take up two-thirds to four-fifths of the pages. These provisions were not extensively litigated until well into the twentieth century. It is hardly coincidental that the explosive proliferation of rights paralleled the rise of Olympianism.

Sometimes, as in *Romer v. Evans*,[20] the Court majority is quite explicit about its distrust of the American people. The citizens of Colorado adopted an amendment to their constitution by statewide referendum providing that any law making illegal even private discrimination against homosexuals must be enacted at the state and not at municipal levels. Striking down the state amendment, the Supreme Court gave as a reason that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," and that the amendment was adopted only out of a "desire to harm a politically unpopular group." The argument in *Romer* was illogical. All state and federal statutes and constitutions require groups that feel themselves adversely affected to seek relief at the state or federal level, but the Court will not, on that account, destroy all government above the local level. Given its belief in the American peo-

18. Ibid.

19. Story, *Commentaries on the Constitution of the United States* (Durham, N.C.: Carolina Academic Press, 1987).

20. 517 U.S. 620 (1996).

ple's atavistic primitivism, it is hardly surprising that the Court majority, regarding itself as free from the strictures of the Constitution, has begun a campaign to normalize homosexuality. The attribution of malice as the reason for the amendment, however, was wholly gratuitous. As Scalia remarked in dissent, "The Court has mistaken a Kulturkampf for a fit of spite." Instead, the amendment was a "modest attempt to preserve traditional sexual mores." That, apparently, was just what the majority found wrong with the law.

The Court's religion decisions rest upon the same foundation, fear of reactionary populism that will convert a trickle into a torrent. But there is something more: Olympianism, as Minogue notes, though fiercely secular, has the characteristics of a religion. That is why it is unflaggingly hostile to Christianity. "Real religions . . . don't much like each other; they are, after all, competitors. Olympianism, however, is in the interesting position of being a kind of religion which does not recognize itself as such, and indeed claims a cognitive superiority to religion in general."[21] It is impossible, I think, to read Eastland's chapter without recognizing the truth of that insight. It is probably also the case that a Court devoted to radical autonomy for individuals is hostile to religion because religion, like morals legislation, attempts to set limits to acceptable behavior. Religion and law are not merely parallel in this endeavor. Such laws (regulating abortion and prohibiting homosexual sodomy, for example) often enough flow directly from religious belief. Whether or not individual members of the Court are themselves religious, they are swayed by a false history and by the moral atmosphere of the intellectual class.

Political correctness is not confined, of course, to moral relativism. The "pc" impulse also frequently requires the submergence of individuals into groups, usually groups viewed as victimized.

21. Minogue, "'Christophobia' and the West," 10.

The results are constitutionally indefensible. Contrast, for example, *Grutter v. Bollinger*[22] with *United States v. Virginia*.[23] In *Grutter*, the Court approved racial preferences in admissions by the law school of the University of Michigan, despite the Court's own rule that such discrimination is subject to strict scrutiny to ensure that the discrimination is required by a "compelling interest." Justice O'Connor's opinion for the Court easily found such an interest: racial diversity. "The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." But not an iota of deference was accorded in *Virginia* to the Virginia Military Institute's educational judgment that an all-male student body was essential to its "adversative" method of education. Yet sex discrimination is required to meet a much lower standard of justification ("intermediate scrutiny") than racial discrimination. It is difficult not to conclude that the disparate results were based on current elite moods that favor preferences for racial minorities and women but abhor preferences for white males. The latter are incompatible with "diversity" and feminism.

Grutter contained one other strand that is worth remark: the politics of group identity. Among the evils of Communism and Nazism was the attempt to reduce the individual to his group, in the first case to his class status, in the second to his racial group. Though it has taken a far milder form, something of the sort is happening in the United States with the importation into public policy in general and into constitutional law in particular of the concepts of multiculturalism and diversity. Individuals are to a degree reduced to their race, ethnic group, or sex. It is assumed, or sometimes insisted, that individuals think and behave as their group is supposed to do. Stereotyping, once considered wrong, has become a politically correct virtue. Thus the Court embraced that

22. 539 U.S. 305 (2003).
23. 518 U.S. 515 (1996).

notion in *Grutter* even while denying that stereotyping was involved. The majority disavowed any belief that an individual's thinking could be expected to reflect his membership in a racial group: "The Law School does not premise its need for critical mass [of each minority] on 'any belief that minority students always (or even consistently) express some characteristically minority viewpoint on any issue.'" The opinion immediately went on, however, to adopt something almost indistinguishable from what was denied: "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Grutter* thus not only mocks the equal protection clause of the Fourteenth Amendment and the explicit command of the 1964 Civil Rights Act but contains more than a whiff of the notion that blacks and American Indians (the favored groups) bring diversity to the classroom because their "unique experience" leads them to think as blacks and Indians.

The tendency of that notion, of course, is to inform those minorities that they are expected to display certain attitudes. Members of preferred groups are thus given rights on the premise, and the implied promise, that they will display the correct attitudes. That reinforces the stereotypes the law school claims to want to diminish. So strong has this thinking become in the elite world that blacks and women who arrive at conclusions unacceptable to the elites are often said not to be real blacks or women. Clarence Thomas and Jeane Kirkpatrick come to mind. Elite support for the position the law school and the Court took was demonstrated by the blizzard of briefs filed by universities, bar associations, major corporations, and other institutions that either believe in the politics of group identity or have been intimidated by it.

There are additional costs inflicted on the society by the Court's

systematic departures from the actual Constitution. Among them are anti-intellectualism, selective nihilism, a loss of the sense of the sacred, and the destruction of taboos.

The cases discussed in this book demonstrate that a majority of the Court is willing to make decisions for which it can offer no intelligible argument. There is, therefore, a sharp decline in intellectual honesty and integrity in the law. Perhaps worse, generations of law students are taught by their professors and by the casebooks they study that constitutional law is not an intellectual discipline but a series of political impulses. What counts is who wins and who loses, which political and cultural causes prevail and which are relegated to the dustbin. It is particularly unfortunate, therefore, that most law schools require the basic constitutional law course in the first year, which inevitably colors the outlook of students throughout their legal education. The constitutional law casebooks have become for that reason corrupting influences.

In the hands of the Court, radical individualism in moral matters amounts (almost) to nihilism. If each individual defines meaning for himself, that can only mean that there is no allowable community judgment about moral truth. That conclusion is qualified by the simultaneous insistence that there are some moral truths the Court, but not an atavistic citizenry, has access to. Some academics, surveying the wreckage made of constitutional law, approvingly call it postmodern jurisprudence. Postmodernism has been defined as an uneasy alliance between nihilism and left-wing politics. The latter component is why the nihilism is selective: those who deny moral truth frequently simultaneously take uncompromising positions on their own versions of such truth, and those positions are invariably to the left of the American center.

The sense of the sacred, moreover, is reduced to a mocked and withered virtue. It is worth recalling what John Stuart Mill wrote

when not in his ultralibertarian mode. Gertrude Himmelfarb calls our attention to this passage from Mill:[24]

> In all political societies which have had a durable existence, there has been some fixed point; something which men agreed in holding sacred; which it might or might not be lawful to contest in theory, but which no one could either fear or hope to see shaken in practice. . . . But when the questioning of these fundamental principles is (not an occasional disease but) the habitual condition of the body politic; . . . the state is virtually in a position of civil war; and can never long remain free from it in act or fact.

That might have been written about the culture war in America and, indeed, in the West generally, a culture war in which the judiciary is deeply involved and for which it must accept a large degree of the responsibility. Almost every value, every virtue, every symbol, and every institution that was once taken as sacred, not to be overthrown in practice, has now been overthrown or is in question. Among these are the Constitution itself (which has become a launching pad for a politically correct agenda), marriage and the family, religion, and the flag. Marriage and the family are mocked by the string of decisions protecting the vilest pornography as free speech guaranteed by the First Amendment and by the judicial drive to normalize homosexuality. Religion is denigrated and marginalized by the deformation of the establishment clause of that same amendment. Desecration of the American flag is now protected speech.[25] Some commentators dismiss the flag-burning decisions with the observation that there have since been few or no instances of desecration. The reason is probably that it is hardly worth bothering to desecrate a flag that has been reduced to a piece of cloth like any other, all by the empty rationalism of the Court.

24. Himmelfarb, *On Liberty and Liberalism: The Case of John Stuart Mill* (New York: Alfred A. Knopf, 1974), 46–47.

25. *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990).

Only one institution is still regarded as sacred, and that, ironically, is the Supreme Court.

Our culture's abandonment of a sense of the sacred, an abandonment greatly facilitated by the Supreme Court, is a heavy loss. "Culture when it loses its sacred sense loses all sense," Leszek Kolakowski argues.

> With the disappearance of the sacred, which imposed limits to the perfection that could be attained by the profane, arises one of the most dangerous illusions of our civilization—the illusion that there are no limits to the changes that human life can undergo, that society is "in principle" an endlessly flexible thing, and that to deny this flexibility and perfectability [*sic*] is to deny man's total autonomy and thus to deny man himself. . . . Thus the bottom line, as it were, of the ideal of total liberation is the sanctioning of force and violence and thereby, finally, of despotism and the destruction of culture.[26]

Mill and Kolakowski make much the same point. Mill's argument is that the decline of the sense of the sacred inevitably loosens societal bonds such as family, patriotism, and the like, while the resultant rise in individualism leads to conflict, disorder, and, ultimately, to the dissolution of society itself. Kolakowski contends that this extreme individualism, this total liberation, made possible by the abandonment of the idea of the sacred, creates the need for coercion to replace the institutions that had held society together and thus leads to tyranny. The twentieth century saw attempts to achieve the perfectibility of man which, because that required the destruction of institutions once held sacred, led to the vilest despotisms inaugurated and maintained by violence.

The sense that there are sacred subjects in a culture is, of course, protected by taboos, and Kolakowski argues that "the most dangerous characteristic of modernity" is "the disappearance of

26. Kolakowski, "The Revenge of the Sacred in Secular Culture," in *Modernity on Endless Trial* (Chicago: University of Chicago Press, 1990), 63, 72.

taboos." "Various traditional human bonds which make communal life possible, and without which our existence would be regulated only by greed and fear, are not likely to survive without a taboo system, and it is perhaps better to believe in the validity of even apparently silly taboos than to let them all vanish."[27] He notes that most sexual taboos have been abandoned and that the remaining few, like hostility to incest and pedophilia, are under attack. An empty rationality plays the same role in shrinking taboos that it does in displacing the sense of the sacred. This is especially obvious in the Supreme Court's destruction of taboos about vile language. In *Cohen v. California*,[28] the Court, in an opinion by Justice John Marshall Harlan, overturned the conviction of a man for disorderly conduct because he refused to remove his jacket, worn in a courthouse, that featured the words "F. . . the Draft" (without the ellipsis). Harlan wrote that it was impossible to distinguish this from any other offensive word and, furthermore, that one man's vulgarity is another's lyric. The year after *Cohen* the Court overturned the convictions of persons for shouting "motherf. . .ing" repeatedly at a school board meeting, at police, and at a meeting in a university chapel. In short, a hitherto taboo word, even when flaunted in public, is just another word just as the American flag has been reduced to just another piece of cloth.

In a sense, all taboos are irrational just as is regarding some things as sacred. If we experience the profane often enough, it will cease to be profane; we will become accustomed to the F-word and similar words and actions—displaying pictures of the Virgin Mary festooned with dung, for example—that we now (decreasingly) regard as off-limits. Our motion pictures, television shows, popular music, and art museums have already gone far toward

27. Kolakowski, "Introduction: Modernity on Endless Trial," in *Modernity on Endless Trial*, 13.

28. 403 U.S. 15 (1971).

accomplishing that. Well, what is wrong with that outcome? A lot is wrong: the brutalization of the culture, for one thing. The words and images reduce everything to the same level; no longer will there be hierarchies of taste, intellect, and discrimination. We will all exist in the monoculture of a barracks. Ideas will be reduced to grunts of approval or disapproval. Beauty will lose its ability to stir us. Authority will be dissipated so that our culture will fly apart or gradually disintegrate.

The judiciary, having drained authority from other public and private institutions, will prove unable alone to sustain a common culture. The multiplication of rights and group privileges fragments rather than unifies a culture. Since an anarchistic society would be intolerable, the remedy is likely to be comprehensive and detailed coercion by legislatures and bureaucracies, subject to judicial approval, which will be forthcoming. The result may be what Tocqueville foresaw: a society whose surface is covered "with a network of small, complicated, painstaking, uniform rules" that "does not break wills, but it softens them, bends them, and directs them" and "finally reduces each nation to being nothing more than a herd of timid and industrious animals of which the government is the shepherd." Liberationist philosophy will have produced its opposite.

There are certainly other major centrifugal forces in American society (massive immigration and multiculturalism, for instance) and many other forces attacking the sense that anything other than individual gratification is sacred or that many taboos remain in force (popular entertainment), but the judiciary plays a prominent role in attacking our foundations. It is not difficult to see—it is almost impossible not to see—in the Supreme Court's anticonstitutional rulings an attempt to remake society and thus to remake man himself. By denigrating the sacred, by abolishing taboos, by announcing the principle of man's radical autonomy, the Court has embarked on a reconfiguration of our society, on what the Court

seems to imagine as a perfectibility project. There is, and will be, reason to regret it.

The battle about the place of the Court and the proper meaning of the Constitution is but one battleground, albeit a major one, in our larger cultural conflict. It is a struggle for dominance between opposing moral visions of our future. The contending forces in constitutional law have been called originalism and evolutionism. Though the terms sound abstruse, they are actually quite simple. Originalism means that the judge should interpret the Constitution according to the principles originally understood by the men who ratified it and made it law. Those principles must, of course, be applied to unforeseen circumstances. The standard example is the Fourth Amendment's prohibition of unreasonable searches and seizures. The framers and ratifiers had in mind the intrusion of a constable into a citizen's home or office. The Supreme Court has recognized that the same principle covers the government's placement of electronic devices and requires a search warrant issued by a judge. Similarly, the First Amendment's guarantee of freedom of speech has without difficulty been interpreted to prevent interference with modes of communication unknown to the ratifiers.

The evolutionist position, held by a majority of the Supreme Court as well as by those who would achieve results no legislature will enact, is that the Constitution is a "living document" that can only be understood in the light of how the Court has interpreted it over time. Though the word "evolution" evokes a favorable response (after all, it resulted in us), that position is preposterous. "A 'living' (constantly changing) constitution is in a sense no constitution at all."[29] When faced with a new question—the right to abortion or to homosexual marriage, for example—how is the Court to interpret something that has never been interpreted before?

29. Graglia, "Interpreting the Constitution: Posner on Bork," 4th Stan. L. Rev. 1019, 1030 (1992).

An evolutionist court invents rather than evolves a new right. Only an originalist judge can be politically neutral. The judge who looks outside the historic Constitution looks inside himself and nowhere else.

When all else fails, the proponents of an evolutionist, politically liberal Court take to calling judges who would follow the original understanding "outside the mainstream." The *New York Times,* Olympianism's flagship, has called Justice Scalia just that.[30] It is the standard liberal epithet for any judge who adheres to the original understanding in applying the Constitution's principles to current controversies. What the cultural left calls the "mainstream" is a polluted current that has long since overflowed its banks and is wreaking devastation on America's moral and aesthetic landscape.

The internationalization of law displays a parallel development. There are few problems when what is involved are treaties concerning such matters as fishing rights and border adjustments in which the parties agree to settle disputes by binding arbitration or by referring them to another designated tribunal. Serious difficulties arise, however, when law attempts to deal, either by treaty or by customary international law, with subjects such as aggression, war crimes, genocide, or human rights violations.[31] Given its worldwide ambitions, inspired by a false analogy to the Nuremberg Trials, law of this sort is obviously capable of interfering with American interests and values. It is, often enough, intended to do just that. Since the culture war is transnational and Olympianism is dominant across national borders, the ideological tendencies of constitutional

30. "New Leader's Injudicious Start," *New York Times*, December 10, 2004, sec. A.

31. Fred Ikle has quite properly taken me to task for concentrating almost exclusively on problems caused by courts and skimping on the blame that should attach to "lawmakers and bureaucrats installed in Washington or Brussels. They want to lord over the *hoi polloi* in the provinces: the states of the United States, the member-states of the European Union, the nations of the world." Fred Ikle, "Bad Laws Make Bad Judges," *The National Interest*, no. 75 (Spring 2004):144, 147.

law and international law are alike. Many of those intent on altering and strengthening international law are Americans who find even U.S. courts inadequate to their ambitions. International tribunals are created or proposed, which, in the international sphere as in the domestic arena, devolve power to ambitious judges. Henry Kissinger has tried to alert us to this danger: "In less than a decade, an unprecedented concept has emerged to submit international politics to judicial procedures. It has spread with extraordinary speed and has not been subject to systematic debate because of the intimidating passion of its advocates."[32] He warns against the tyranny of judges: "the dictatorship of the virtuous has often led to inquisitions and even witch hunts." There is little doubt, in today's climate, that the primary witches to be hunted are Israel and the United States. Nor is it to be supposed that antipathy to those two nations will subside in the foreseeable future. The causes of these antipathies are too complex to be explored here, but realism suggests that the United States should be very cautious about submitting itself to forms of international governance. The last two chapters of this book address aspects of the dangers inherent in law's internationalization.

The need to resist the current passion for international law when it conflicts, as it often does, with legitimate American interests is one lesson to be learned from David Davenport's chapter on the "new diplomacy." That term refers to a process in which nongovernmental organizations (NGOs), actuated by ideology, and small- and medium-sized nations ("like-minded states") attempt to make international law that binds even nations that refuse to agree. Like much in our domestic constitutional law, internationalized law and the agendas of these new and newly assertive players are almost unknown to the American public. Davenport advises that

32. Kissinger, *Does America Need a Foreign Policy?: Toward a Diplomacy for the 21st Century* (New York: Simon & Schuster, 2001), 273.

we "watch for expansions of international law in three areas: (1) treaty-based law; (2) universal jurisdiction, as part of customary international law; and (3) international organizations and global governance."

Treaty-based law is not as beneficent or harmless as it may sound. The problem is not merely the heated, moralistic rhetoric that attempts to shame governments into agreeing to treaties antithetical to their interests; it is also the new style of treaties that pursues ideological ends and, increasingly, attempts to bind even nations that refuse to sign them. The most prominent current example is the Treaty of Rome that established the International Criminal Court (ICC), a court that claims jurisdiction to try and to punish American soldiers and political leaders for actions in contravention of the treaty's highly ambiguous terms, even though the United States, among other major countries, has repudiated the treaty. Yet even when it refuses to sign, for example, the Treaty of Rome or the Kyoto Accords, the United States, as Davenport points out, is affected by the diplomatic and policy environment created that sets the agenda for what the world will discuss.

Universal jurisdiction, a form of which is claimed by the ICC, is the idea that some acts are so heinous as to be the concern of all nations, and thus the perpetrators may be tried by an international tribunal or by any nation that can lay hands on them. Such jurisdiction is claimed by its advocates to be supported by customary law (the actual practice of nations). That claim is examined in detail in the final chapter of this book by Lee A. Casey and David B. Rivkin Jr. Here, it need be noted only that customary international law is a marvelously flexible and hence an inherently dangerous concept. Though it is said to rise from the actual practice of nations, often as not what is claimed to be customary is in fact contrary to what nations actually do. Thus, when the United States mined Nicaraguan harbors to aid democratic forces fighting the Sandinista dictatorship, the International Court of Justice con-

demned the action as a violation of customary law, though there was no possibility of a similar condemnation of the Soviet Union's invasion and occupation of Afghanistan, or of many other aggressions around the world.

These and other developments discussed by Davenport are steps, taken one issue at a time (e.g., the ICC, the Kyoto Accords, the treaty outlawing land mines, and the pressure to eliminate the death penalty), toward global governance. "A current emphasis on human security, rather than national security," Davenport notes, "could lead to international intervention into a host of previously domestic values," because, as he quotes Ramesh Thakur, "security policy embraces the totality of state responsibilities for the welfare of citizens from the cradle to the grave." Yet the American sovereign state is better able to protect our values than are international organizations. That, on Davenport's showing, as well as recent history, seems undeniable. International activists, however, want to control aspects of American domestic policy not only on such matters as the death penalty but on such subjects as the rights of women and children and the possession of firearms by individuals. As Davenport notes, "The basic stance of the globalists is that state sovereignty is an antiquated seventeenth-century concept that will eventually give way to the regional and international institutions that make up the growing web of global governance."

Casey and Rivkin examine the claim that customary international law already recognizes the doctrine of universal jurisdiction. They find that claim to be a myth that would be pernicious in operation. Most readers of this chapter will be surprised at how little substance there is to this widely proclaimed doctrine. There is, for example, the generally accepted notion that piracy was punished by nations exercising universal jurisdiction because no single nation had jurisdiction over crimes committed on the high seas. But Casey and Rivkin demonstrate that the body of precedent necessary to support such a claim does not exist. The doctrine was

referred to, but "[a]t most, there was a largely nineteenth-century effort, principally by Great Britain but to a lesser extent by the United States, to use universal jurisdiction as a means of justifying claims to police the high seas." And only three cases exist that did not have a link to traditional bases for jurisdiction. That hardly establishes customary law on the subject.

Similarly, the attempt to use the Nuremberg Trials as precedent for universal jurisdiction founders on the fact that the International Military Tribunal never claimed to act on principles of universal jurisdiction but relied on the rights of victors to legislate for the defeated state and on the Charter that established the tribunal. The authors state that Israel's trial and execution of Adolph Eichmann may be the only instance in which universal jurisdiction was exercised but even that was "by no means a clear case," since the Israeli court, like the tribunal at Nuremberg, held that it was bound to apply statutory authority whether or not that was consistent with international law. Casey and Rivkin examine other claimed exercises of universal jurisdiction—among them, the Pinochet case, Belgium's failed attempt to give its courts such authority, and the American Alien Tort Claims Act—and argue persuasively that none of them establish a customary law of universal jurisdiction.

Should present attempts to establish universal jurisdiction succeed, the outcome would be "international anarchy," as nations adopted their own interpretations of ambiguous rules. "In fact," the authors point out, "each and every state [would be] perfectly entitled to interpret the requirements of international law in accordance with its own values, traditions, and national interests, and then to impose that interpretation on any other through the device of a criminal prosecution." As Americans have had recent occasion to notice, values, traditions, and national interests diverge sharply even among the nations of the European Union. One can only imagine how much worse differences would be if universal jurisdiction, and hence the right to interpret international law, were

extended to the nations of Asia, Africa, and the Middle East. The International Criminal Court aspires to just such universality, which is but one example of why universal jurisdiction is a desperately bad idea and poses a genuine threat to American sovereignty, even to our right to interpret our own Constitution.

The recent tendency for courts of different nations to take guidance from each other's decisions evidences the internationalization of constitutional law. One result will be the homogenization of constitutional law. Since neither American nor foreign judges regard themselves as bound by the intentions of their constitutions' makers, this new transnational law will be judge-made common law. The culture war being common to Western nations, judges of those nations will cater to elite opinion. Political correctness will arrive as the new transnational constitutional law.

The chapters of this book reflect the truth that control of law is part of a larger struggle for power, the power to coerce individuals, groups, and nations to accept particular values. In both constitutional and international law, the power-seekers are predominantly on the left, and so far they have been largely successful. That is a fact that United States citizens, insofar as they cherish self-government and American values, should recognize as reason for profound concern.