

DE TOCQUEVILLE OR DISNEY? THE REHNQUIST COURT'S IDEA OF FEDERALISM

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Steven G. Calabresi succinctly identified the three elements of the Rehnquist Court's revision of constitutional federalism. The contemporary Supreme Court

is willing for the first time since 1937 to police the boundary lines of the congressionally enumerated powers over the regulation of commerce and the enforcement of the Fourteenth Amendment. . . . [T]he Court . . . erected a firm Tenth Amendment barrier to congressional efforts to commandeer state legislatures and executive entities . . . [and] expanded the doctrine of sovereign immunity so that it imposes a very high barrier to congressional efforts to expose states to private lawsuits either in federal or in state court.¹

While there is consensus on what the Rehnquist Court has done, there are many ideas on the reasons behind this renewed attention to federalism. Professor John O. McGinnis sees the Rehnquist Court's jurisprudence as a comprehensive and coherent effort to "invigorate[] decentralization and the private ordering of social norms that Alexis de Tocqueville celebrated in *Democracy in America* as being the essence of the social order generated by our original Constitution."² While the old Warren Court's mission was

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¹ Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 25 (2001). Calabresi notes *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), as examples for limitations of the power of Congress under the Commerce Clause; *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), for Tenth Amendment protection of the autonomy of state legislatures and executives; and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *Alden v. Maine*, 527 U.S. 706 (1999), for the expanded doctrine of sovereign immunity.

² John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 487 (2002) (emphasis omitted). McGinnis identifies three key features of the Rehnquist Court's jurisprudence, of which the revitalization of federalism is but one. The others are: "protecting and facilitating rights of civil and religious association"—through its decisions on freedom of association and the religion clauses—"and empowering juries at the expense of judges." *Id.* at 490. This article will focus exclusively on

“empowering and perfecting democracy, particularly at the national level,”³ the Rehnquist Court is endeavoring to empower states and local governments to foster citizen engagement in politics and to curtail the deleterious influence of special interests.⁴

McGinnis and the Rehnquist Court see the Framers’ federalism as a way of reinforcing social norms that arise from civil society by limiting the actions of the national government. For McGinnis, such an effort currently is required due to the extent to which special interests have come to dominate national domestic politics because a distracted public has become content to entertain itself with television and accept symbolic gestures from politicians as a substitute for public policy.⁵ This sorry state of affairs is a product of over-centralized “mass democracy.”⁶ McGinnis musters evidence from “[m]odern political science” that seems to demonstrate that “mass national democracy often produces legislation that neither reflects majority will nor is efficient, since special interests dominate legislators while most citizens are rationally ignorant of the salient political issues.”⁷ The damage done to the polity by over-centralization can be partially undone by empowering private civic organizations and state and local government. According to de Tocqueville, McGinnis and the Rehnquist Court, civic organizations are an antidote to the mischief of faction. According to this formula, “civil associations organize to meet the common goals of their members,” unlike political factions, which “try to use government coercion for their own ends.”⁸ “These civil associations have influence at the local level, making local government more responsive and contributory to a more public-spirited citizenry.”⁹ Moreover, the American federal system creates a marketplace in which local governments and state governments exist in competition with each other, which should drive them to deliver their public goods in the most efficient way. In this “laboratory of democracy,” the “successful experiments of yesterday become the effective public policy of tomorrow.”¹⁰

federalism.

³ *Id.* at 489.

⁴ *See id.* at 490.

⁵ *See id.* at 503–04.

⁶ *Id.* at 498.

⁷ *Id.* at 490.

⁸ *Id.* at 491.

⁹ *Id.*

¹⁰ *Id.* at 510.

HOW GOLDEN IS THE PAST?

If McGinnis is correct in his assessment of the Rehnquist Court's objectives, then the Court's solution to the twin problems of a disengaged citizenry and an unresponsive, faction-dominated government is a return to early eighteenth century America as chronicled by Alexis de Tocqueville. De Tocqueville noted that a centralized state "may contain subjects, [but] it has no citizens" because "the source of public virtue is dried up."¹¹ In the United States of the 1830s, however, "the interests of the country are everywhere kept in view," and each citizen "boasts of its success, to which he conceives to have contributed; and he rejoices in the general prosperity by which he profits."¹² If only civil associations and the state and local governments could be liberated from the controlling strings of Congress, then the nation might return to the values of an idyllic past and experience a republican revival.

There are at least two problems with setting the "Way Back" machine for the early nineteenth century such that we can learn important lessons from the past. As astute an observer as he was, de Tocqueville was not, and could not have been, a dispassionate chronicler of American life. The man was a French aristocrat of the nineteenth century and he viewed the United States from that perspective. Rogers Smith sees de Tocqueville's story of America as "deceptive" because it is centered on the experiences of "white men, largely of northern European ancestry . . . analyzed via reference to categories derived from the hierarchy of political and economic statuses men have held in Europe."¹³ Then, too, there is the question of whether de Tocqueville's observations are accurate and his conclusions correct. What follows is a single example of how de Tocqueville could have been wrong in some respects.

PARTICIPATORY DEMOCRACY

Antebellum America is seen by many as the golden age of participatory democracy. Grassroots democracy was everywhere in evidence. Depending on the time of year, a visitor to any American city or town could see party caucuses, nominating conventions, the

¹¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, VOL. 1 97 (1945) (Phillips Bradley ed., 1945).

¹² *Id.* at 98.

¹³ Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549, 549 (1993).

active offices of the partisan press, and spectacles, such as torch light parades, in favor of one candidate or another. Such observations would have created the impression that almost every adult white male was actively and deeply engaged in politics. Was this phenomenon a result of the decentralized democracy reported by de Tocqueville? Perhaps not. Recent scholarship by historians has challenged this impression by examining evidence of the variety and extent of politic participation.¹⁴ Turnout at local caucuses and nominating conventions was poor. Editors of the partisan newspapers publicly and frequently took their loyalists to task for their lack of commitment to the party's cause. When political activity did appear, it did not bubble up from below—rather, it was engineered from above by party operatives. Campaign events were sometimes indeed “energetic spectacle[s]” but most predominately in presidential election years.¹⁵ Such spectacles were choreographed for maximum visual effect and entertainment value. It is not surprising that people turned out in droves to see a hot-air balloon ascension followed by a torchlight parade of men in fancy uniforms, marching to the tunes of a brass band.¹⁶ Voter turnout was high, but there is a serious question of whether the turnout was a function of an individual's innate sense of civic duty, or, facilitation by party vigilance committees who lured voters to the polls with “treat[s].”¹⁷

If these historians paint an accurate picture, then the average voter of de Tocqueville's past shares much with the average voter of today. The key difference is the state of the political parties. The parties today are weak and do not induce strong feelings of support from their nominal members. Candidates for public office nominate themselves and run campaigns with their own themes and strategies. The political parties exist in what political scientists call a service role for the candidates. The parties of the nineteenth century were vigorous organizations that recruited candidates, ran campaigns, and marshaled voter turnout. The political party, an

¹⁴ See Glenn C. Altschuler & Stuart M. Blumin, *Limits of Political Engagement in Antebellum America: A New Look at the Golden Age of Participatory Democracy*, 84 J. AM. HIST. 855 (1997).

¹⁵ *Id.* at 868–69.

¹⁶ The simple fact that people showed up at such political events does not mean that they were engaged in politics, just as with today, one cannot say that television viewers of *The West Wing* of the National Broadcasting Company are engaged in politics.

¹⁷ The usual “treat[s]” were food and, more importantly, drink. According to the 1859 election issue of the *Marion Republican*, “[w]hiskey was as free as water” for illegal Irish voters. *Id.* at 877.

example of the dreaded faction, was primarily responsible for what appeared to be the spontaneous political engagement observed by some historians.

LABORATORIES OF DEMOCRACY AND EFFICIENCY

In de Tocqueville's day, state and local governments were free to experiment with policy as laboratories of democracies because the United States had yet to become an over-centralized mass democracy. Ideally, as the results of the experiments became known, good policies would be adopted, and bad ones would be discarded. The competition among the states would then result in economically efficient policies.

There is evidence, however, that when state and local governments competed with each other, the results were far from beneficial and efficient. In 1837, the United States entered into a severe economic depression that lasted until at least 1843. The chief cause of this calamity was the accumulation of massive public and private debt. One engine of debt generation was a "mania" for state-sponsored internal improvements.¹⁸ The "orgy of canal and railroad building and of bank organization" was spurred by New York's success with the Erie Canal in 1817.¹⁹ States sought to replicate the New York success story and borrowed money to fund these internal improvements. Just as the federal government was extinguishing its debt, the states were piling up a debt on the order of \$200 million.²⁰ The investments in canals, railroads, and banks much more often than not lost money, despite the promises of extravagant returns.²¹ By the 1840s, some states defaulted on interest payments and one state, Michigan, defaulted on the principal.²² The experience in the states was so negative that numerous prohibitions and constitutional restrictions on internal improvements were instituted beginning in the 1850s.²³

¹⁸ Reginald C. McGrane, *Some Aspects of American State Debts in the Forties*, 38 AM. HIST. REV. 673, 673 (1933).

¹⁹ *Id.*

²⁰ See Guy S. Callender, *The Early Transportation and Banking Enterprises of the States in Relation to the Growth of Corporations*, 17 Q. J. ECON. 111, 114 (1902).

²¹ See Carter Goodrich, *The Revulsion Against Internal Improvements*, 10 J. ECON. HIST. 145, 153 (1950). Goodrich provides excellent examples of these unsound investments. The Illinois-funded railroad collapsed after less than thirty miles of track were laid, and even New York lost large sums when it attempted to create feeder canals to the Erie Canal. See *id.*

²² See *id.* at 154 (stating that Pennsylvania, Maryland, Indiana, Illinois, and Michigan defaulted on their interest).

²³ See *id.* at 152. The loss of money was not the only reason for the state restrictions.

The internal improvements debacle can be seen as an example of interstate competition that was not beneficial or efficient. Another view of this situation would see internal improvements as a failed experiment and the resulting constitutional restrictions as evidence of states learning from their failure. This view fits with the “laboratories” metaphor in which states are seen as scientists—sometimes succeeding, sometimes failing, but always advancing.²⁴ This metaphor, however, is not sound. States did not learn from their mistakes. State aid for internal improvements persisted into the late nineteenth century, despite state constitutional restrictions and the negative experience with earlier investments. In 1860, for example, state assemblymen in New York discovered that while the state constitution prohibited loans to railroads, it did not prohibit gifts.²⁵ The net result was a donation of more than one million dollars to the railroads.²⁶ More important was the role of local governments, whose “exuberant local optimism” led to investments in railroads or canals despite the fact the local governments lacked the engineering or economic skills necessary to make a sound appraisal of an undertaking.²⁷ “Smooth-tongued promoters” of special interests preyed on gullible small communities by making appeals to patriotism, or state or local pride.²⁸ Far from being efficient laboratories of democracy, states—unfettered by the national government—were manipulated by special interests, made mistakes, and failed to learn from them.

THE STATES TODAY

In the end, de Tocqueville had reservations about the desirability and durability of a federal system.²⁹ One reason for withholding his

Citizens were alarmed by the extent to which state development money caused private interests to seek public patronage. *See id.* at 155. As one delegate to the New York Constitutional Convention of 1846 put it, the state assembly was “thronged with cormorants, asking the legislature to give them leave to thrust their hands up to the elbows into the public treasury.” *Id.*

²⁴ *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (asserting that “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”).

²⁵ *See* Goodrich, *supra* note 21, at 150.

²⁶ *See id.*

²⁷ *See id.* at 165.

²⁸ *See id.* at 165–66; *see also* Carter Goodrich, *Local Government Planning of Internal Improvements*, 66 POL. SCI. Q. 411, 437–39 (1951).

²⁹ *See* John Kincaid, *Federal Democracy and Liberty*, 32 P.S.: POL. SCI. & POL. 211, 211 (1999) (noting that de Tocqueville believed that decentralization was more advantageous than

categorical endorsement of federalism was the complexity of the system, which can lead to public confusion over accountability for decisions and a myriad of different rules, regulations and standards.³⁰ If American federalism was complicated in the 1830s, then it is even more so now with fifty states and some 86,000 local governments.³¹

Additionally, there is the question of whether state and local governments as they exist today are wells of public-spiritedness and republican virtue, needing only freedom from Washington to pour forth efficient policies for the good of the common wealth. Modern social science provides ample evidence that states and state governments are beset with problems. This article will look briefly at two of these issues: political participation and the role of special interests in state politics.

POLITICAL PARTICIPATION

It is common knowledge that many American citizens do not regularly exercise their right to vote. We applaud ourselves when voter turnout rises above fifty percent in a presidential election year. The highest turnout rates recorded for presidential elections occurred during the last quarter of the nineteenth century, when the average participation rate was seventy-two percent.³² If turnout in the most salient of elections is bad, turnout in various state and local elections is abysmal.

Average voter turnout in state gubernatorial primaries outside the South between 1946 and 1976 ranged from a low of 16.9% in New Jersey to a spectacular 46.7% in West Virginia.³³ The picture is worse for municipal elections. Between 1956 and 1979, voter turnout in national elections averaged 59.1%, while turnout for municipal elections was just 31%.³⁴ Many states still use some form of election to select the members of the judiciary. Voter turnout

federalism).

³⁰ See *id.* at 213.

³¹ See *id.*

³² Peter F. Nardulli et. al., *Voter Turnout in U.S. Presidential Elections: An Historical View and Some Speculation*, 29 P.S.: POL. SCI. & POL. 480, 480 (1996). It should be noted that this was the era of strong urban political machines. See *id.* at 483.

³³ Malcolm E. Jewell, *Voter Turnout in State Gubernatorial Primaries*, 30 W. POL. Q. 236, 242 (1977).

³⁴ Robert L. Morlan, *Municipal vs. National Election Voter Turnout: Europe and the United States*, 99 POL. SCI. Q. 457, 462 (1984). The United States ranked dead last when its turnout rates were compared against Denmark, Finland, Ireland, the Netherlands, Norway, Sweden, Switzerland, and West Germany. See *id.*

varies considerably in state judicial races, depending on the nature of the election (i.e., partisan, non-partisan or retention) and the timing of the election (i.e., whether the judicial contests are coincidental with regular November elections or held at another time).³⁵ The figures here are not comforting. For example, between the years of 1948 and 1974, turnout in Indiana, which has a judicial merit retention election that is held in conjunction with a presidential election, averaged 27.7%, while the spring judicial elections in Michigan hovered at a pitiful 18.2% average.³⁶

CURING THE MISCHIEF OF FACTION: DIRECT DEMOCRACY

The initiative and referendum—both are products of the Progressive Era—are state experiments in direct democracy. The reason for the introduction of direct democracy was the perception that state legislatures had become “places for registering decisions outside the legislative hall: sometimes in committee rooms, very often in the Speaker’s chamber, too frequently in the office of a political boss, and sometimes in the sanctum of a corporation.”³⁷ Theoretically, direct democracy would wrest government from the hands of special interests and corrupt politicians, and return control to the people themselves.

Theory is one thing; practice is another. Over fifty years ago, political scientists began to recognize that direct democracy in the states might lead to “[g]overnment by [s]pecial [i]nterests.”³⁸ Organized interests would have little difficulty meeting the signature requirements to put pet projects on the ballot. Corporations, labor unions, churches and other groups with shared special interests were using their administrative capacity to circulate petitions and collect signatures.³⁹ Moreover, a fledgling initiative industry was already in place—“petition hawkers’ would guarantee enough signatures for any proposal at a specified price per signature.”⁴⁰

Today, the Ballot Initiative Strategy Center Foundation

³⁵ See Philip L. DuBois, *Voter Turnout in State Judicial Elections: An Analysis of the Tail on the Electoral Kite*, 41 J. POL. 865, 870–71 (1979).

³⁶ *Id.*

³⁷ Albert Bushnell Hart, *Growth in American Theories of Popular Government*, 1 AM. POL. SCI. REV. 531, 555 (1907).

³⁸ Joseph G. Lapalombara & Charles B. Hagan, *Direct Legislation: An Appraisal and a Suggestion*, 45 AM. POL. SCI. REV. 400, 414 (1951).

³⁹ *See id.*

⁴⁰ *Id.* at 415.

anticipates that the initiative will become an even more important political battleground in the future.⁴¹ Campaign finance reform has begun to limit hard and soft money contributions, but contributions to ballot proposal campaigns remain unregulated.⁴² While the Progressives who endorsed the initiative process saw it as a means to “circumvent entrenched legislatures” and minimize the impact of corporations and wealthy individuals on public policy, the initiative today has become a tool of only the “most well organized and well-heeled special interests.”⁴³ The amount of money spent on initiative campaigns has grown to almost obscene levels. For example, spending on a 1984 Missouri proposal on nuclear power plants was greater than that year’s spending on the governor’s, lieutenant governor’s, secretary of state’s, and all state house and senate races *combined*.⁴⁴ A 1978 California initiative on “Clean Indoor Air” produced seven million dollars in advertising—most of it from the tobacco companies.⁴⁵ A 1986 California measure on public employee compensation generated eight million dollars in spending.⁴⁶ The initiative industry now provides a number of services to its well-heeled clients, including direct mail fund raising, campaign management, legal services, and media consulting. As of the mid-1980s, it was estimated that it costs between \$1.25 to \$5.00 *per signature* if a group wishes to avail itself of professional services for an initiative campaign.⁴⁷

The “tax revolt” that placed limitations on state revenue raising could not have been possible without the initiative.⁴⁸ The tax revolt that began in California in 1978 was seen by some as the “most important political-economic event of the 1970s.”⁴⁹ Contemporary observers saw the phenomenon as a “genuine and effective revolt against spiraling taxes and profligate government spending, the

⁴¹ See Ballot Initiative Strategy Foundation, *The Campaign Finance Reform Blind Spot: Ballot Measure Disclosure*, at http://www.ballot.org/blindspot/Ballot_Disclosure_Report.pdf (last visited Feb. 10, 2003).

⁴² *See id.*

⁴³ *Id.*

⁴⁴ David B. Magleby, *Taking the Initiative: Direct Legislation and Direct Democracy in the 1980s*, 21 PS: POL. SCI. & POL. 600, 605 (1988).

⁴⁵ *See id.* (noting that this exceeded the amount spent on the gubernatorial campaign).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See David Lowery and Lee Sigelman, *Understanding the Tax Revolt: Eight Explanations*, 75 AM. POL. SCI. REV., 963, 963 (1981).

⁴⁹ *Id.* For a more thorough examination of the tax revolt, see Susan P. Fino, *Tax Limitation in the Michigan Constitution: The Headlee Amendment*, in MICHIGAN AT THE MILLENNIUM: A BENCHMARK OF ITS FISCAL AND ECONOMIC STRUCTURE (C. Ballarç et. al. eds., forthcoming 2003).

renunciation of big-government politicians, a reaffirmation of free-enterprise priorities,” and the return of government control to the people.⁵⁰ The exact reasons why the tax revolt occurred has been a source of much reflection and debate. Everett Carll Ladd, Jr., noted that Americans have long had qualms about the taxes that they pay.⁵¹ He found survey data from 1947 that showed that, even then, about two-thirds of Americans thought that their federal income taxes were too high.⁵² By 1978, Ladd found that only twenty percent of respondents in one poll thought that their taxes were “reasonable,” while in another poll over two-thirds thought that the amount of taxes that they paid had “reached the breaking point.”⁵³ Something else was happening to the perceptions of taxpayers in the late 1970s—most taxpayers came to believe that the nation’s tax system was simply not fair. Over half the respondents to an April 1978 New York Times poll labeled the distribution of taxes as “unfair,” and a whopping eighty-nine percent of respondents to a 1977 Harris poll thought that “the ‘big tax burden falls on the little man in this country.’”⁵⁴ One thing is certain—the revolt would not have started without the efforts of individual policy entrepreneurs and political leaders.⁵⁵ Charismatic leaders behaved and spoke as if there had been a sudden and marked increase in the public’s resentment of taxes that required immediate redress.⁵⁶ The public statements of policy entrepreneurs capitalized on the public’s latent resentment of taxes, and political leaders began to pander to the public.

The tax revolt of California soon spread to other states. The initiative was the major weapon of the anti-tax faction. The Cato Institute reported that between 1978 and 1980, forty-three states approved new restrictions on local property taxes or new property tax relief plans.⁵⁷ That same report indicates that “emboldened . . .

⁵⁰ Richard Boeth et. al., *The Big Tax Revolt*, NEWSWEEK, June 19, 1978, at 20.

⁵¹ See Everett Carll Ladd, Jr. et. al., *The Polls: Taxing and Spending*, 43 PUB. OPINION Q. 126, 128 (1979).

⁵² See *id.*

⁵³ *Id.* at 126–27.

⁵⁴ *Id.* at 127.

⁵⁵ See Boeth, *supra* note 38, at 27. Howard Jarvis, instigator and author of California’s Proposition 13, described his role in this initiative process: “I’m the political strategist, the media man and the janitor, I’m the whole goddam show.” *Id.* Jarvis, however, did hire a public relations firm, which used direct mail to raise \$1.2 million for the initiative campaign. *Id.*

⁵⁶ See Ladd, *supra* note 51, at 128.

⁵⁷ Dean Stansel, *Taming Leviathan: Are Tax and Spending Limits the Answer?*, CATO POLICY ANALYSIS NO. 213 (July 25, 1994), available at <http://www.cato.org/pubs/pas/pa->

tax revolters” subsequently took on other forms of state taxes.⁵⁸ Between 1978 and 1982, fifteen states reduced general income tax rates, ten states indexed personal income tax systems, seven states eliminated gift taxes, and six repealed inheritance taxes.⁵⁹

Citizens of the states may hate taxes, but they love to spend when it comes to all manner of public programs—schools, police, parks, libraries, and the like. Again, the major weapon of interests from both ends of the political spectrum is initiative. Some think that Americans are naïve and foolish enough to believe there is such as thing as a free lunch. Other social scientists have found explanations that are more charitable. Everett Carll Ladd, Jr., argued that the paradox is explained by public perceptions of government inefficiency and waste.⁶⁰ In 1978, Ladd found results from two different polls that showed that an enormous percentage of respondents—from eighty-eight percent to ninety-six percent—believed that the government used tax dollars wastefully or inefficiently.⁶¹ These voters probably suspected that they could secure the same level of services for less money if government was run more efficiently.

What is the result of initiating laws that cut taxes and increase spending? It creates nothing short of a fiscal crisis in the states. The National Association of State Budget Officers estimated the cumulative budget shortfall of the states as of January 25, 2002 at a whopping forty billion dollars.⁶² The *New York Times* reported one state legislator’s perspective on the problem: “Democrats used the initiative process for new spending programs on education, health care and the environment, and Republicans used it to cut taxes or limit states’ ability to raise taxes. Many voters punched yes for both sides.”⁶³

Special interests have come to dominate the initiative process. The mischief of faction is evident. Even state judiciaries are not immune to the increased attention of interest groups.⁶⁴ This

213.html (last visited Mar. 21, 2003).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Ladd, *supra* note 51, at 133–34.

⁶¹ *Id.* at 134.

⁶² National Association of State Budget Officers, table at: <http://www.nasbo.org/Publications/State%20Budgets%20-%20January%2025,%202002.htm> (last visited Feb. 10, 2003).

⁶³ Timothy Egan, *They Give, but They Also Take: Voters Muddle States’ Finances*, N. Y. TIMES, March 2, 2002, at A1, A12.

⁶⁴ See Lee Epstein, *Exploring the Participation of Interest Groups in State Court Litigation*,

phenomenon should not surprise anyone. There is nothing in the structure of state governments that immunizes them from the attentions of special interests. Even the Progressive experiment in direct democracy through the initiative has ultimately failed in its goal to restore power to the people. It has become another tool of organized interests.

DISNEYLAND FEDERALISM

Such idealized federalism is not de Tocqueville; it is Walt Disney. Of course, "federalism" can be defined as a "principle of political organization in which a single polity, or nation, has both a central government and separate, geographically defined governments that are subordinate to the central government in certain matters but independent of it in others."⁶⁵ Scholars have argued that nations organize themselves as federal systems as "an alternative to dissolution, civil war, or other manifestations of a basic unwillingness of the people in some geographic area to live under the central government."⁶⁶ The United States is a federal system because it *needed* to be a federal system to both become and to maintain itself as a unified nation. Without a guarantee of states' rights to protect the peculiar institution of slavery, the Southern states would not have participated in the Constitutional Convention, let alone joined the Union. At the founding of the republic, "[p]eople's loyalty to their own state was stronger than their loyalty to the nascent national regime, and thus they opted for a federal system, where the constituent states retained large areas of autonomy as a matter of right."⁶⁷

The United States now has a decentralized system rather than a true federal system.⁶⁸ Nevertheless, the Rehnquist Court and

47 POL. RES. Q. 355 (1994). Epstein looked at the participation of *amici curiae* in state court litigation. He found that participation has increased with the onset of the "new judicial federalism," *id.* at 337, but that participation is not evenly distributed. Business groups have increased their participation, and most conspicuously absent are women's and "[g]overnment" groups. *Id.* at 340, 347.

⁶⁵ Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 38 (2001).

⁶⁶ *Id.* at 40.

⁶⁷ *Id.* at 43.

⁶⁸ Rubin offers a sound definition of "decentralization" that highlights its differences between decentralization and federalism:

Decentralization, or devolution, to use the au courant term, is a decision by the central government authorizing its subordinates, whether geographically or functionally defined, to exercise authority in certain areas. It differs from federalism in that the subunits that have been authorized to act do not possess any claim of right against the central

others continue to speak the quaint language of the Framers' federalism. Despite their national unity and national identity, Professor Rubin notes that many Americans possess a certain nostalgia for old-time federalism.⁶⁹ He offers three possible explanations for this phenomenon:

The first is that the Framers are correctly perceived as having established a federalist regime . . . and we incorrectly fear that some horrible consequences will ensue if we admit that we no longer abide by their intentions. Second, the yearning of many Americans for the simplicity of the premodern era, and the more sinister yearning of some Americans for the moonlight, magnolia, and mint-julep era of the antebellum South, slides over to the federalism that prevailed at that time. Third, we dislike the centralized administrative state and see federalism as a welcome antidote to the government that we have created and that we need but do not like.⁷⁰

There are other explanations for this nostalgia. The modern and postmodern eras filled society with anxiety and created a "painful homesickness" for the other place of the past.⁷¹ "In a world of loss and unreality, nostalgia rises to importance as 'the phantasmal, parodic rehabilitation of all lost frames of reference.'"⁷² As Professor Lowenthal puts it: "Whatever the deficiencies of bygone times, they possess the supreme advantage of lacking the uncertainty of the present"⁷³

A similar phenomenon contributed to the development of Protestant fundamentalism in the latter part of the nineteenth century. Scientific theories such as "[n]on-Euclidean geometries, discoveries in electricity, the wave theory of light, [and] X-rays" challenged traditional conceptions of nature.⁷⁴ New social and psychological sciences emphasized natural processes in human

government. That government has given them their authority by some established political or legal mechanism and can take it away by the same means.

Id. at 39.

⁶⁹ *Id.* at 46.

⁷⁰ *Id.*

⁷¹ Kathleen Stewart, *Nostalgia—A Polemic*, 3 CULTURAL ANTHROPOLOGY 227, 228 (1988).

⁷² *Id.*

⁷³ David Lowenthal, *The Timeless Past: Some Anglo-American Historical Preconceptions*, 75 J. AM. HIST. 1263, 1279 (1989).

⁷⁴ Alice B. Kehoe, *The Word of God*, in SCIENTISTS CONFRONT CREATIONISM 1, 7 (Laurie R. Godfrey ed., 1983).

behavior and development. The net result was that the old order was threatened by “anarchists and socialists and nationalists who sought to deprive clergy of secular power, by freed slaves and illiterate immigrants and suffragette women.”⁷⁵ Responses from religious leaders came in 1910, in the form of the Presbyterian General Assembly’s list of “Five Fundamentals,” which were seen as the “rock bottom of Protestant Christianity.”⁷⁶ Among these fundamentals was the tenet that each word of the Bible was the revealed word of God.⁷⁷ The scheme of Bible interpretation prescribed was “dispensationalism,” which requires “the most literal interpretations of Scripture possible.”⁷⁸

The Rehnquist Court’s return to a constitutional fundamentalism represents a similar response to the unsettling and confusing features of a postmodern world.⁷⁹ The Constitution is the revealed word of James Madison—strict adherence to its text is the only salvation from the perils of the contemporary Congress.

De Tocqueville was aware of “how limited democracy was in America . . . [b]ut . . . he still frequently wrote in unqualified terms about America’s supposedly egalitarian conditions.”⁸⁰ Black persons and Native Americans were treated as peoples apart from society.⁸¹ Women were not considered outside their traditional role in the household. But what is remembered about de Tocqueville is how he explained the equality that is part of the American creed.

The Constitution is an unknown to most Americans, and it offers a wonderful “template for remaking the past in the image of present ideals.”⁸² American politics is filled with divisive issues. There are those who see contemporary society as amoral, immoral, or corrupt beyond redemption. The idealized past can be used “as a stick with

⁷⁵ *Id.*

⁷⁶ *Id.* The five fundamentals are: “the miracles of Christ; his virgin birth; his bodily resurrection; his sacrifice upon the cross . . . ; and the Bible as the directly inspired Word of God.” *Id.*

⁷⁷ *Id.*

⁷⁸ George M. Marsden, *Understanding Fundamentalist Views of Science*, in SCIENCE AND CREATIONISM 95, 106 (Ashley Montagu ed., 1984).

⁷⁹ Michael Kammen examines this “constitutional fundamentalism” in his book: A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986).

⁸⁰ Smith, *supra* note 13, at 553.

⁸¹ De Tocqueville believed that the enslaved Black man “admires his tyrants more than he hates them, and finds his joy and his pride in the servile imitation of those who oppress him.” DE TOCQUEVILLE, *supra* note 11, at 345. The free Black man is “beset” with a “thousand new desires,” and “he has not the knowledge and energy necessary to resist them.” *Id.* “European tyranny” has rendered the Indians “more disorderly and less civilized than they were before.” *Id.* at 346.

⁸² Lowenthal, *supra* note 73, at 1265.

which to beat the present.”⁸³ The idealized past of the Framers’ federalism and de Tocqueville’s America is not a real time or place—it is a selective reconstruction that omits nasty inconveniences such as slavery. Such an act of reconstruction is akin to the aesthetic quest of Walt Disney. Disney’s animations sought to create “a kind of sentimental idealism, an attempt to present a conventionally attractive or impressive appearance as an actual or attainable reality’ . . . where dark or messy dimensions of reality had been wiped away.”⁸⁴ According to the Disney creed:

The first duty of the cartoon is not to picture or duplicate real action or things as they actually happen, but to give a caricature of life and action, to picture on the screen things that have run through the imagination of the audience, to bring to life dream fantasies and imaginative fantasies that we all have thought of during our lives.⁸⁵

There is critical consensus that Disney’s art succeeded. According to reviews from the 1930s, “Mr. Disney has . . . cast a spell over us—to such an extent that we cannot tell the real from the unreal.”⁸⁶ “[O]nce the ‘Disney universe’ established itself in ‘a reasonable way, the mind of the spectator is so enchanted that the artist can go to the wildest extremes of fantasy.”⁸⁷ Like Walt Disney, through the magic of words and citations to authority, the Rehnquist Court allows us to enter a dream world of a young republic where everything is perfect, or at least better than United States of the third millennium.

But even taken on its own terms, the Rehnquist Court’s federalism is a false and incomplete federalism. Under this federalism, state legislatures and executives receive limited protection from Congress but not from the Supreme Court. In *Michigan v. Long*, the Supreme Court changed the methodology used to determine whether a state court decision rested on adequate and independent state grounds.⁸⁸ Under the new methodology, the Supreme Court will assume jurisdiction whenever a “state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and

⁸³ *Id.* at 1277.

⁸⁴ Steven Watts, *Walt Disney: Art and Politics in the American Century*, 82 J. AM. HIST. 84, 90–91 (1995).

⁸⁵ *Id.* at 93–94 (quoting memorandum from Walt Disney, to Don Graham (Dec. 23, 1935)).

⁸⁶ *Id.* at 95.

⁸⁷ *Id.*

⁸⁸ 463 U.S. 1032, 1040–41 (1983).

independence of any possible state law ground is not clear from the face of the opinion.”⁸⁹ While claiming that the decision in *Long* respects the integrity of state courts, the majority nevertheless departs from the older approaches, such as that of *Herb v. Pitcairn*, in which the Supreme Court asked the state court to clarify or amend the grounds for its decision.⁹⁰ According to Justice Jackson, the *Herb* approach “seems consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended.”⁹¹

The *Long* majority claimed that the new methodology would “obviate[] in most instances the need to examine state law,”⁹² yet three pages later, the majority proceeded to delve into the question of the circumstances under which the Michigan Constitution’s protections are more generous than the Fourth Amendment and whether the definition of “narcotic” is dependent on state statutes.⁹³ For some, *Long* represents an expansion of federal judicial power to review any state court decision not in conformity with federal doctrine⁹⁴ and the potential for erosion of state constitution-based civil rights and liberties.

Chief Justice Rehnquist’s concurring opinion in *Bush v. Gore* demonstrates his incomplete federalism.⁹⁵ The Chief Justice makes the usual disclaimer: “[c]omity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns.”⁹⁶ He acknowledged that sections of the Florida elections code were interpreted differently by the Florida Supreme Court.⁹⁷ Because the election of the President is a federal issue, however, the Chief Justice believes that the Supreme Court must “undertake an independent, if still deferential” examination of state law.⁹⁸ There appears to be little deference in the Chief Justice’s

⁸⁹ *Id.*

⁹⁰ 324 U.S. 117, 128 (1945).

⁹¹ *Id.*

⁹² *Long*, 463 U.S. at 1041.

⁹³ *See id.* at 1044 n.10.

⁹⁴ *See* Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 992–93 (1985).

⁹⁵ 531 U.S. 98, 111 (2000) (Rehnquist, C.J., concurring). Justices Scalia and Thomas joined in the concurrence.

⁹⁶ *Id.* at 112 (Rehnquist, C.J., concurring).

⁹⁷ *See id.* at 115 (Rehnquist, C.J., concurring).

⁹⁸ *Id.* at 114 (Rehnquist, C.J., concurring).

conclusion that “the Florida Supreme Court’s interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required.”⁹⁹ Justice Stevens highlighted the Chief Justice’s attitude when he concluded that the petitioners’ view stemmed from an “unstated lack of confidence in the impartiality and capacity of the state judges.”¹⁰⁰

The Rehnquist Court’s readjustment of federalism is in its infancy, and even its supporters acknowledge that it is not likely that the Court can or will effect a complete reworking of the federal system. Professor McGinnis concedes that civil associations may be divisive or local governments corrupt,¹⁰¹ so that devolution of power to the states does not offer a panacea to all the ills of American politics and society. Nevertheless, both McGinnis and the Rehnquist Court seem to believe that there is something important, if not magical, in the Framers’ federalism. The problem is that the Framers’ federalism and the republic of de Tocqueville cannot be retrieved; it can only be reconstructed. Any such reconstruction, however, is not authentic. The reconstruction of the republic is much like Walt Disney’s reconstruction of his hometown of Marceline, Missouri. “Main Street,” which is at the heart of Disneyland, is manufactured to welcome the visitor to Walt’s hometown.¹⁰² From Main Street, the visitor “could choose to enter a number of themed lands, each of which was based on a world that was near and dear to Walt’s heart and populated with the characters he loved.”¹⁰³ The Midwestern town of Main Street is “better than the real thing”¹⁰⁴—just as Rehnquist Court federalism is “better” than the real thing.

⁹⁹ *Id.* at 115 (Rehnquist, C.J., concurring).

¹⁰⁰ *Id.* at 128 (Stevens, J., dissenting).

¹⁰¹ See McGinnis, *supra* note 2, at 507.

¹⁰² The Walt Disney Family Museum, *Walt’s Story, Episode 13*, at <http://disney.go.com/disneyatoz/waltdisney/maincollection/waltsstoryepisode13.html> (last visited Feb. 10, 2003).

¹⁰³ *Id.*

¹⁰⁴ *Id.*