

ARTICLES

Dismantling the Modern State? The Changing Structural Foundations of Federalism

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I. Introduction

For most of the twentieth century, the United States has moved toward increasing centralization of political power in the national government. Since the onset of the Great Depression, that centralization has been relatively rapid. By the mid-1930s, the Supreme Court had swept aside the remaining legal obstacles to centralization, thereby formalizing a basic reconceptualization of federalism under the Constitution that had been progressing for several years in a variety of arenas. Many postwar scholars, after observing the changes wrought by the trend toward centralization, began to argue for the replacement of the “constitutional” concept of “dual federalism”¹ with a “pragmatic” (functional) concept of intergovernmental relations that would better cohere with twentieth century centralization. Thus, federalism, as a constitutional concept, was largely abandoned, and centralization was no longer regarded as requiring a legally based constitutional explanation.

However, the economic, social, political, and ideological changes of the late twentieth century suggest that the idea of federalism must be revitalized. It is no longer clear whether the American political system is committed to centralization. In fact, states increasingly play an active and independent role in American government, and relative decentralization is discussed as a realistic possibility. Such shifting trends in federalism, between centralization and decentralization, sug-

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1. The idea that the state and the federal governments operate in distinctly separate spheres.

gest that the Constitution is best understood as a dynamic political instrument. Thus, predominate conceptions about the "constitutional" structure of federalism need to be separated from the legal doctrines of the nineteenth century and integrated into a political dynamic. Scholars recently have emphasized the concept of a "political constitution"² that supplements the analytically dominant legal constitution, arguing that "the Constitution is best understood as a text-based institutional practice,"³ and as a consequence, "constitutionalism should be appreciated as a dynamic political and historical process rather than as a static body of thought laid down in the eighteenth century."⁴ Notwithstanding such suggestions, the idea of a fixed text still hovers over constitutional discourse. As a result, it is assumed that one cannot abandon the notion of "dual federalism" without abandoning the constitutional significance of federalism entirely.⁵

The operation of the "political constitution," which structures how political authority is distributed and exercised, is illustrated by

2. See generally BRUCE ACKERMAN, *WE THE PEOPLE* (1991); STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM* (1996); WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION* (1993); WAYNE D. MOORE, *CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE* (1996); WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (1908); Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 7 (1934).

3. GRIFFIN, *supra* note 2, at 56.

4. *Id.* at 5.

5. Recognition of a "political constitution" reduces the Court's role in developing constitutional meaning. Hence, if the constitutional framework develops initially through the political process, rather than through litigation, constitutional meaning looks less dichotomous and judges appear more typically as "followers, not leaders, of constitutional change." MOORE, *supra* note 2, at 12; see also *id.* at 3. In the case of federalism, the courts have operated on the margins, often accommodating the dominant political tendencies in federalism. Though the courts have sometimes formalized federal relations, they have neither caused centralization nor established the political plausibility of decentralization. GRIFFIN, *supra* note 2, at 68-87. As a result, judicial opinions may not be the best source for studying the dynamics of American constitutional development, especially in relation to structural features such as federalism.

Similarly, recent judicial interventions into federal relations have posed particular problems for the "legal constitution" model, as scholars struggle to understand judicial opinions that do not seem to articulate clear boundaries of permissible governmental action or initiate sustained judicial enforcement of such boundaries. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE* 190-95 (1982); ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES* 60-83 (1989); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS*, 171-259 (1980). See generally Sanford Lakoff, *Between Either/Or and More-or-Less—Sovereignty Versus Autonomy Under Federalism*, 24 PUBLIUS 63 (1994). A more direct examination of the operation of the "political constitution" may provide a better understanding of constitutional development in this area, even if it does not provide recommendations for judicial action. Our goal is not to identify new constitutional "amendments," but to understand the process and nature of constitutional transformations. Cf. ACKERMAN, *supra* note 2, at 266-94.

the transformations of the early and late twentieth century.⁶ In the standard historical narrative, the federal system in the nineteenth century “relied on a constitutional approach” embodied in the “set standards” of “dual federalism.”⁷ Through most of the nineteenth century, the states were the primary governing units in the United States. The judiciary was occasionally called upon to prevent state encroachment on the federal sphere, but political actors of all stripes understood the basic constraints of the federal system, and there was little political pressure to test those limits.⁸ During the New Deal, those constitutional standards were subsequently “shredded,” and the “traditional constitutional era” was abandoned.⁹ The newly preferred analytical approach of “intergovernmental relations” stripped federalism of its formal and normative implications in order to focus on pragmatic administrative adjustments within a single complex political system. This conceptual transition abandoned the core contribution of dual federalism: the idea that the state and national governments occupied “separate spheres” and performed distinct governmental functions.¹⁰ This new model emphasized cooperation between the national and state governments in providing an undifferentiated set of common governmental services. Additionally, the transition rejected any serious legal restraints on the activities of the national government based on centralization concerns. The federal government no longer stood for limited and delegated powers. Instead, it represented plenary powers constrained only by specified individual rights. Finally, the administrative minutiae of intergovernmental relations occurred against a backdrop of centralization. The passing of dual

6. Such transformations were not unexpected by the founders. As David Epstein summarized Alexander Hamilton:

Thus the relative spheres of the central and state governments will depend on the relative attachment of the people, which may be expected to change in the future [T]he partition between state and nation will not be as much a legal issue as a political one Parchment can neither limit the nation's powers, nor assure them against encroachment. Two governments competing for the people's support form a structure more useful than fixed rules.

DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 53 (1984).

7. John Shannon & James Edwin Kee, *The Rise of Competitive Federalism*, 9 PUB. BUDGETING & FIN. 5, 5 (1989).

8. See EDWARD S. CORWIN, *CONSTITUTIONAL REVOLUTION*, LTD. 96-111 (1941); ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 119-26 (1994); CARL B. SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 965-68, 1018-19 (1943).

9. Shannon & Kee, *supra* note 7, at 6.

10. See Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 1-2, 22-23 (1950).

federalism led to an actual practice of centralization and not just a mere loosening of potential restraints upon the federal government.¹¹

Modern analysis tends to obscure the contingent events necessary to centralization and suggests a natural irreversible evolution.¹² If the simple narrative, that a long period of constitutional federalism was followed by a sharp break and the collapse of federalism, is rejected, then distinct historical eras become evident, with their own organizational imperatives and patterns of political authority. We do not live in a post-constitutional world; we simply live in a world that is differently constituted. The question, then, is what motivates political actors to organize American government into these relatively stable patterns?

The founders "intended structure to protect and implement certain substantive outcomes."¹³ Notably, constitutional structures helped to protect established systems of property. It is not insignificant that dual federalism gave way at the same time that lawyers and politicians lost faith in the sanctity of the old property regime.¹⁴ But when federalism is seen as evolving in response to changing substantive commitments, rather than simply collapsing when the old commitments were abandoned, the concept of constitutionalism once again remains relevant in the context of federalism. Political actors struggle to interpret and define the significance of social and economic

11. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 537-47 (1985), the Court embraced the view that abandonment of dual federalism drains the constitutional significance from federal-state relations. Justice Blackmun, by noting that a clear division between state and federal functions is elusive, suggested that the state and federal governments engage in a constantly changing and overlapping set of functions. See *id.* at 548. Therefore, he doubted "that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty." *Id.* Blackmun's doubt came in part because of the elusiveness of objective criteria for "fundamental" elements of state sovereignty. See *id.*; see also Richard P. Nathan, *Federalism - The Great "Composition,"* in *THE NEW AMERICAN POLITICAL SYSTEM*, 231, 245-50 (Anthony King ed., 1990); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 346-59. See generally Edward L. Rubin & Malcom Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994). Although the Court in *Garcia* recognized that states have "interests," it did not recognize that those interests occupy any special constitutional status. See *Garcia*, 469 U.S. at 552. The two governments no longer occupied distinct and separate spheres; they simply conformed to the shifting demands of national public opinion.

12. See, e.g., ROBERT HIGGS, *CRISIS AND LEVIATHAN* 57-74 (1987); Samuel H. Beer, *The Modernization of American Federalism*, 3 PUBLIUS 49, 50 (1973).

13. LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF* 178 (1996).

14. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 47-195 (1993); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* 101-93 (1998).

changes that ultimately redistribute authority and material resources. Ideology and culture are as important as objective conditions to the eventual reconstitution of the political world brought about by social and economic change.¹⁵ However, explaining constitutional changes in American federalism in terms of political responses to changing values requires identifying shifts in the underlying political structures that are responsible for movements such as centralization.

Centralization was not merely fostered by the nationalization of the economy in the late nineteenth century. Instead, it arose from the particular form of that nationalization and the political responses to it. Thus, the key to centralization lies not in economic modernization and nationalization per se, but in the philosophy behind the governmental activism that accompanied it. Centralization was not predetermined by structural economic changes, but arose from the sociopolitical understanding of those changes. Constitutional structures are not simply functionalist; the linkages between economic and political arrangements are not so predetermined. Rather, the public understanding and reaction to economic change is a key site of political struggle. Constitutional meaning and structure is ultimately responsive to enduring shifts in political values and the socioeconomic environment. Changes in federalism depend not on the recovery of previously lost constitutional meanings, but on a reconfiguration of the substantive foundations upon which constitutional structures depend. A complete explanation for shifts in federalism must integrate the mechanisms by which economic, cultural, and ideological forces are translated into political action.¹⁶ Nonetheless, an important first step is to recognize the relationship between social foundations and constitutional structures.

Centralization arose through a desire to control the economic and ideological transformations of the early twentieth century, necessitating a new emphasis on regulatory, redistributive, and national security functions that the state governments could no longer adequately fulfill.¹⁷ But as those governmental functions begin to recede in impor-

15. See, e.g., GERALD BERK, *ALTERNATIVE TRACKS* 1-21 (1994); JAMES LIVINGSTON, *ORIGINS OF THE FEDERAL RESERVE SYSTEM* 33-67 (1986); MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916*, at 1-85, 431-32 (1988).

16. See Larry Kramer, *Understanding Federalism*, 47 *VAND. L. REV.* 1485, 1520-59 (1994).

17. Thus, we need to examine how markets and market ideology help preserve federalism, as well as how federal structures help preserve markets. Cf. Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 *J.L. ECON. & ORG.* 1 (1995).

tance, at least as vehicles of economic control, the value and reality of centralization is likewise reduced. States and localities become more important in the American system of government because of their ability to respond to the primary political concerns of the period, rather than because of a forced devolution of functions.

Although the states have always retained their formal independence from the central government, their ability to influence political issues and their capacity to take independent action have varied over time. The relative centralization of federalism moves along such observable lines. This paper examines the structural foundations of this movement toward centralization that has defined twentieth century American federalism.¹⁸ This paper also considers some of the modern countertrends to that movement which have fostered a move toward decentralization. Considering the interaction between several long-term political variables over the course of the twentieth century sheds light on how particular political actions can build up an interlocking architecture for political life, facilitating and constraining individual political decisions. Long-term transformations in the objective conditions of the economy, the social and political understanding of those conditions, and dominant political ideologies have significant implications for the trajectory of federalism.

Section two examines the basic precedents and transitions in function and attitude that pushed the political system toward greater centralization. Specifically, it examines the relationships among Progressivism's administrative ethic, the rise of the positive state, and shifts in public morality in order to explain the centralization of the federal structure. Section three suggests how those foundations of the modern state have changed and examines the trajectory of decentralization that is being set by the decline of liberalism, the rise of the entrepreneurial state, and shifts in the public morality. Section four highlights some countertrends to decentralization and draws out some implications of this analysis for understanding the future direction of federalism and the nature of constitutional change.

18. See generally Beer, *supra* note 12; John E. Chubb, *Federalism and the Bias of Centralization*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 273 (John E. Chubb & Paul E. Peterson eds., 1985); Daniel J. Elazar, *Opening the Third Century of American Federalism: Issues and Prospects*, 509 *ANNALS AM. ACAD. POL. & SOC. SCI.* 11, 13 (1990); John Kincaid, *From Cooperative to Coercive Federalism*, 509 *ANNALS AM. ACAD. POL. & SOC. SCI.* 139 (1990).

II. The Logic of the Modern State

The "modern state," as it exists within the United States, is not a natural entity or a separate and inert superstructure detached from society or politics. Instead, it results from a particular interaction of political movements and events. It is more than an arena within which politics take place; politics constitute the modern state. The state expresses itself through and by the repetitive activity of political life.¹⁹ As a result, the conglomeration of ideals, interests, and institutions that form the modern state have a distinct fundamental logic that can be analyzed and understood. For example, the specific logic of the modern state in early twentieth century America favored centralization of political authority and influence. Thus, the logic of the modern state reshaped the existing meaning of federalism within broad constitutional confines, creating a political system not inherent in the constitutional design but tolerated by it.²⁰ An analysis of early twentieth century centralization serves a dual purpose: first, it illustrates how basic elements of the Constitution are reconceptualized in a political context; and second, it provides a historical perspective on more recent political tendencies.

Centralization was marked by the judiciary's retreat from the enforcement of dual federalism in the face of the cataclysms of the Great Depression and World War II.²¹ This legal accommodation alone, however, does not explain the underlying political constitution of the postwar era. Why was centralization not just an intermittent feature of American politics after the judicial deregulation of federalism, but instead an overwhelming tendency of the new political system? The structural foundations for centralization had roots in both the early decades of the twentieth century and the postwar years. Much of the actual growth of the central government, vis-à-vis the states, occurred through the "low politics" of mid-century governmental activism, but the normal politics of centralization depended on a prior reconstitution of political understandings that established the precedents, resources, and legitimacy for such later activity.²² Although it is

19. See generally ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY* 1-40 (1984).

20. I set aside for present purposes an examination of just how well post-New Deal developments could be "tolerated" by the Founders' Constitution. Even if the old constitutional system was broken, and not just bent, in the twentieth century, it does not follow that a new constitutional system did not take its place.

21. See CUSHMAN, *supra* note 14, at 141-225. See generally Corwin, *supra* note 10.

22. John E. Chubb, *The Constitution, Institutionalization, and the Evolution of Federalism*, in *THE CONSTITUTION AND AMERICAN POLITICAL DEVELOPMENT* 262, 264-67 (Peter F. Nardulli ed., 1992).

impossible to know how American federalism would have developed in the absence of the crises of the 1930s and 1940s, many of the seeds for those developments had been planted even earlier. This section is concerned with identifying those enduring forces—the administrative ethic, the positive state, and shifts in public morality—that pushed the political system toward centralization through most of the twentieth century.

A. The Administrative Ethic

The administrative ethic, absorbed by the Progressive movement, became a crucial element in the construction of the modern state.²³ It provided the framework for the development of the new state apparatus and legitimated a vision of the new governing order. It also helped define what government should do and how it should accomplish its goals. In the process, the administrative ethic created a powerful centralizing bias.

A primary component of the administrative ethic was the expertise model.²⁴ Changing social and economic conditions of the late nineteenth and early twentieth centuries provided an opportunity for the conceptualization of expertise, recognized and exploited by a professional elite through their own organization and mobilization.²⁵ Moreover, this new class of professionals was particularly open to centralization.

Increasingly, improvements in transportation and communications technology linked remote outposts to the nation's center, thereby bringing previously isolated "island communities" into a national market.²⁶ This interdependence also brought complexity, undermined traditional and observable relationships, and replaced them with an apparently loose web of interdependent connections. The complexity of society was mirrored in the business sphere and magnified by rapid advances in the natural sciences.²⁷ Experts were re-

23. See SAMUEL P. HAYES, *CONSERVATION AND THE GOSPEL OF EFFICIENCY* 261-76 (1969); GEORGE E. MOWRY, *THE ERA OF THEODORE ROOSEVELT AND THE BIRTH OF MODERN AMERICA* 20-104 (1958); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920*, at 164-95 (1967).

24. See WIEBE, *supra* note 23, at 111-32. See generally Magali Sarfatti Larson, *The Production of Expertise and the Constitution of Expert Power*, in *THE AUTHORITY OF EXPERTS* 28 (Thomas L. Haskell ed., 1984).

25. See THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE* 24-47 (1977). See generally Larson, *supra* note 24.

26. WIEBE, *supra* note 23, at 11-75.

27. See generally ALFRED D. CHANDLER, JR., *THE VISIBLE HAND* (1977); DAVID F. NOBLE, *AMERICA BY DESIGN* (1977); Louis Galambos, *The American Economy and the*

quired both to operate the new corporations and to address their various external effects. The local elite of generalists gave way to a new cadre of formally educated specialists. These professionals understood society and the economy less by their local effects than by their central logic.²⁸ Professional standards, promulgated by new national organizations, served to separate the "true" experts from "amateurs" and generalists.²⁹ Equally important, professionalization oriented knowledgeable experts toward their own national community. Their authority and interests were not tied to local employers or neighbors, but to an association of similarly situated experts. If knowledge itself was fragmented through specialization, experts were merely dispersed.³⁰

Expertise was put into practice through scientific management, which required the centralized direction and planning of production, corporations, and ultimately society. Knowledge and decisions were transferred from the masses to a limited number of specialists. Taylorite control over the bodily movements and psychology of workers was supplemented by the rationalization of the manufacturing process.³¹ As engineers expanded their attention from natural to human resources, so economists and social scientists sought to rationalize social relations more broadly. The proliferation of professional associations in the late nineteenth century was driven by reformers who hoped to provide "intelligent leadership and social order."³² The expansion and refinement of knowledge gradually allowed replacement of the "invisible hand" with the visible. Both the process and substance of expertise underlay the administrative ethic, and as the body

Reorganization of the Sources of Knowledge, in *THE ORGANIZATION OF KNOWLEDGE IN MODERN AMERICA, 1860-1920*, at 269 (Alexandra Oleson & John Voss eds., 1979).

28. See WIEBE, *supra* note 23, at 111-63. See generally HASKELL, *supra* note 25; Larson, *supra* note 24; John Higham, *The Matrix of Specialization*, in *THE ORGANIZATION OF KNOWLEDGE IN AMERICA, 1860-1920*, at 3 (Alexandra Oleson & John Voss eds., 1979).

29. HASKELL, *supra* note 25, at 63-89. See generally Larson, *supra* note 24.

30. See generally HASKELL, *supra* note 25; Beer, *supra* note 12, at 74-87; Louis Galambos, *Technology, Political Economy, and Professionalization: Central Themes of the Organizational Synthesis*, 57 *BUS. HIST. REV.* 471 (1979); Dorothy Ross, *The Development of the Social Sciences*, in *THE ORGANIZATION OF KNOWLEDGE IN MODERN AMERICA, 1860-1920*, at 107 (Alexandra Oleson & John Voss eds., 1979).

31. See generally HARRY BRAVERMAN, *LABOR AND MONOPOLY CAPITAL* 45-249 (1974); SAMUEL HABER, *EFFICIENCY AND UPLIFT* (1964); NOBLE, *supra* note 27; ROBERT B. REICH, *THE NEXT AMERICAN FRONTIER* 47-114 (1983); CHARLES F. SABEL, *WORK AND POLITICS* (1982); ALAN TRACHTENBERG, *THE INCORPORATION OF AMERICA* 38-100 (1982).

32. Ross, *supra* note 30, at 112.

of knowledge was centralized and codified, a greater understanding of society allowed a greater control over it.

A related element of the administrative ethic was the elevation of the ideal of "neutrality." Neutrality left no place for partisan interests in the administration of government, and that commitment inevitably encroached on policy-making. Where party government called for the democratic administration of government in the interest of the electoral victors, the administrative ethic insisted on impartial rule by experts in accord with objective principles of social order. This shift in governmental ethos led to the replacement of locally rooted party regulars with nationally oriented experts, rooting out decentralizing ties and commitments as well as inefficiency and corruption.³³ Administration was to be separated from politics, and policy-making was to be reconfigured in accord with the new professional standards. Thus, the government was entrusted to serve the "public good," not the interests of political victors.

The bureaucracy became the institutional embodiment of the administrative ethic. It emerged initially in private corporations in their attempt to deal with their unprecedented scope and depth of operations. Reformist professionals refined this model in order to establish this bureaucratic form within government.³⁴ Bureaucracy promised to rationalize governmental operations by replacing the ad hoc decision-making of generalist politicians and political appointees with coherent administration in accord with pre-established rules and objective scientific findings.³⁵ A unified, hierarchical, and efficient bureaucratic structure would replace the overlapping and ineffective political structure.

Compared to developments in other countries, the actual achievement of American reformers was relatively modest. The existing constitutional structure fractured and limited reform efforts.³⁶ Nevertheless, the transformation was substantial. American policy-

33. See STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE* 47-84, 177-211, 248-84 (1982); Brian Balogh, *Reorganizing the Organizational Synthesis: Federal-Professional Relations in Modern America*, 5 *STUDIES IN AMERICAN POLITICAL DEVELOPMENT* 119 (1991); Beer *supra* note 12, at 74-80. See generally ROSS, *supra* note 30.

34. See MARTIN SHEFTER, *POLITICAL PARTIES AND THE STATE* 61-97 (1994).

35. This vision applied at the constitutional level as well, where inter-branch conflict was now the aberration to be replaced with presidentially led administration. See JOHN A. ROHR, *TO RUN A CONSTITUTION* 59-75 (1986); JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 117-32 (1987).

36. See generally Theda Skocpol, *The Origins of Social Policy in the United States: A Polity-Centered Analysis*, in *THE DYNAMICS OF AMERICAN POLITICS* 182 (Lawrence C. Dodd & Calvin Jillson eds., 1994).

making was often more centralized than formal administration, with Congress actively intervening in "local" policies from social welfare to education. Local administration, moreover, was often greatly influenced by ties to the national bureaucracy, which shaped everything from policy priorities to work habits.³⁷

The creation of a governmental bureaucracy also served the new functions of twentieth century government. The nineteenth century government readily featured Congress when the primary political decisions were either allocative, such as tariffs or internal improvements, or structural, such as the establishment of a national bankruptcy law or the definition of monetary units. Yet, once the federal government became more involved in regulating a complex economy, reflecting the centralizing tendencies outlined below, the government needed mechanisms for monitoring economic activity and intervening at will. Theodore Roosevelt was emblematic in his assessment of legislative government, lamenting that "all modern legislative bodies tend to show their incapacity to meet the new and complex needs of the time."³⁸ Railroad economists, for example, were active in shaping the political decision to regulate railroad rates—which, in turn, required the establishment of the Interstate Commerce Commission (ICC), staffed with economists—rather than to prohibit identified practices or to break up some companies legislatively.³⁹ Decisions previously made within the railroads' own centralized corporate bureaucracies were now, through federal regulation, being further centralized and made within the national government's ICC.

The significance of the administrative ethic was not merely in advancing the self-interest of a rising professional class but, more importantly, in shaping the dominant conception of what was in the public interest and how to accomplish it. Bureaucracy and centralization became the appropriate responses to socioeconomic complaints. The cultural and intellectual dominance of the administrative ethic prefigured the political response to later crises and social problems.

B. The Positive State

The decades following the turn of the century witnessed the rise of new social pressures and a new public philosophy of activist liber-

37. See Chubb, *supra* note 18, at 294; Martha Derthick, *American Federalism: Madison's Middle Ground in the 1980s*, 47 *PUB. ADMIN. REV.* 66, 67-70 (1987).

38. SAMUEL P. HAYS, *THE RESPONSE TO INDUSTRIALISM, 1885-1914*, at 115 (2d ed. 1995).

39. See BERK, *supra* note 15, at 75-115, 153-70; SKOWRONEK, *supra* note 33, at 121-62, 248-84.

alism that required expanding the scope of governmental functions. The new modern state emphasized a commitment to regulatory and redistributive functions. Moreover, as the example of the ICC illustrates, the administrative ethic, with its focus on technocratic expertise, easily fits within the regulatory and redistributive model.⁴⁰ The rise of the federal regulatory scheme established the essential centralizing logic of the modern, positive state at the turn of the century, but an increasing commitment to the political redistribution of wealth supplemented and intensified those centralizing pressures.⁴¹ Ultimately, the goals of the positive state were inconsistent with the constraints of decentralized federalism. The shift in emphasis among governmental functions allowed national growth at the expense of the states.

The rise of modern federal regulation was a political response to fundamental social and economic changes in the late nineteenth and early twentieth centuries, especially developments in the corporate form. Early corporations were either used to serve as public utilities or kept small in order to be regulated by normal market forces. By the late nineteenth century, the status of corporations had dramatically changed. With the special privilege of legislative charter routinized and delegated, corporations rapidly proliferated and the effective abandonment of restrictions on corporate purposes began.⁴² Most corporations engaged in for-profit manufacturing or commerce, rather than providing public goods. Judicial rulings construed corporations as unitary entities and their charters as private property, integrating those enterprises into the general society and economy and distancing them from both government and creditors. Corporations swiftly became the dominant independent and private organizational form.⁴³

As the legal status of corporations changed, so did their economic status. Corporations did not merely replace previous business organizational forms; rather, they transformed the nature of the market within which businesses operated. Although corporations had several advantages over alternative forms of business organization, they were especially favored for their ability to replace market forces with ad-

40. See generally Theodore J. Lowi, *American Business, Public Policy, Case Studies, and Political Theory*, 16 *WORLD POL.* 677 (1964).

41. See *infra* notes 60-69 and accompanying text.

42. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 107-39 (1977); JAMES WILLIARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970*, at 13-57 (1970).

43. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 65-108 (1992); HURST, *supra* note 42, at 13-57; SKLAR, *supra* note 15, at 43-175. See generally TONY ALLAN FREYER, *FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY*, Vol. 1 (Glen Porter ed., 1979).

ministrative control mechanisms for coordinating economic activity.⁴⁴ Moreover, new multistate corporations advanced the nationalization of business in America. The multistate operations of private corporations weakened the capacity of individual states to control their internal economies. Driven in part by contingent political and economic decisions, the nationalization of businesses furthered the consolidation of the economy and society as a whole.⁴⁵ Local economies were subsumed in the periphery of a national economy, with only a handful of urban centers remaining. The decentralization of both market processes and geography was replaced with relatively hierarchical corporate management.

The growth of corporations contributed to a deepening fear that the market process itself, as traditionally understood, was no longer sustainable in the face of chronic overproduction.⁴⁶ For many corporate managers, the model of market competition that had acted in classical terms as an invisible hand to produce economic equilibrium was now imposing wild uncertainty on producers and creating a secular trend toward economic ruin. Modern productive capacity appeared to overwhelm the market mechanisms to allocate resources.⁴⁷ If the short-term problem was an excess of competition, the long-term solution was the end of competition. Eventually production could be controlled and prices stabilized only by consolidating the market in the hands of a few national corporations.⁴⁸

The alternative was to replace the free market system with internal corporate management, or at least managed competition.⁴⁹ The inevitability of this transformation was culturally and intellectually pervasive through much of the twentieth century.⁵⁰ The crucial task was to determine when free market regulation would have to be re-

44. See EDWARD CHASE KIRKLAND, *DREAM AND THOUGHT IN THE BUSINESS COMMUNITY, 1860-1900*, at 9-27 (1964); SKLAR, *supra* note 15, at 1-30; TRACHTENBERG, *supra* note 31, at 70-100.

45. See BERK, *supra* note 15, at 47-72; TRACHTENBERG, *supra* note 31, at 57-60, 84-86, 111-30; WIEBE, *supra* note 23, at 17-27; HAYS, *supra* note 38, at 4-17.

46. See SKLAR, *supra* note 15, at 43-175.

47. See *id.* at 53-68.

48. See *id.* at 72-92, 154-77.

49. See *id.* at 154-73; see also MARTIN J. SKLAR, *THE UNITED STATES AS A DEVELOPING COUNTRY* 71-77 (1992); LIVINGSTON, *supra* note 15, at 49-67.

50. See generally EDWARD BELLAMY, *LOOKING BACKWARD 2000-1887* (1917); ADOLPH A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1934); JAMES BURNHAM, *THE MANAGERIAL REVOLUTION* (1960); JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967); JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (1950); THORSTEIN VEBLEN, *THE THEORY OF BUSINESS ENTERPRISE* (1932).

placed with political control and when free market controls merely needed to be supplemented by political mechanisms. In either case, however, the corporations seemed to pose the risk that they could step out of the fetters of the market entirely given the assumptions that they could control production, set prices, and eliminate competition. Order had to be reimposed by political means.

The regulatory logic of the corporate era used positive governmental action to fill the gaps of apparent market failure. The developing regulatory logic entailed centralizing in two respects. First, it substituted the centralized administration of political controls for the decentralized coordination of market mechanisms.⁵¹ That process was already well underway in the economic realm itself, as corporations absorbed market mechanisms and put internal management in their place. Governmental regulation of corporate practices ranging from the prices of products to the working conditions of labor would merely cap these developments and insure public, rather than private, control over economic administration. Second, the regulatory logic pushed forward the nationalization of governmental control over the economy.⁵² Of course, the process was never intended to be and never was complete; but the regulatory logic established the underlying trajectory of federalism, pushing it toward greater centralization of authority in the national government. The point is not that the states were inactive, or that state governments were rarely the first targets of early reformers, but that the activism of modern liberalism created political incentives to centralize—first gradually and then rapidly during the crisis of the Great Depression.

Several factors built nationalization into the modern state's dynamic. One factor was the need to end competition among states. Political competition among states, like market competition, was increasingly seen as dysfunctional. Such competition among the states undermined reformers' efforts to develop the positive state. Certain governmental activities were too difficult to establish and maintain if state governments were in competition. For example, individual states found it difficult to impose costly regulations on mobile businesses, such as minimum wages, higher taxes, and prohibitions on child labor. Hence, in *Hammer v. Dagenhart*,⁵³ the Supreme Court recognized the force of this argument, even as it struck down direct federal prohibi-

51. See CUSHMAN, *supra* note 14, at 45-105; LIVINGSTON, *supra* note 15, at 129-212; SKLAR, *supra* note 15, at 179-430.

52. See *infra* notes 53-70 and accompanying text.

53. 247 U.S. 251 (1918).

tions on the interstate shipments of goods manufactured using child labor.⁵⁴ Those states that tolerated child labor gained “an economic advantage over others,” and such “unfair competition” made uniform laws desirable.⁵⁵ By characterizing such state competition in labor policies as intrinsically “unfair,” however, the Court accepted the logic of the reformist position. States similarly were hesitant to pursue expansive redistributive policies given the mobility of residents. Fear of becoming “welfare magnets” stifled reform efforts from the turn of the century. Although many such reforms were nonetheless locally adopted, the logic of the positive state ran against the continued state competition occasioned by decentralized federalism.⁵⁶ For the advocates of an activist liberal state, regulatory and redistributive policies needed to be nationalized in order to be politically and substantively effective.⁵⁷ Once such reforms were accepted as not only legitimate but also economically “required,” there would be little support for maintaining decentralized federalism.

Reforms also encouraged centralization because of their need for greater state capacity, especially the enhanced fiscal and administrative resources needed to effectuate such interventionist policies.⁵⁸ The size and scope of modern corporations and the redistributive goals of reformers taxed traditional state capacities. Despite some local Progressive successes, throughout much of the twentieth century, state governments were widely regarded as incompetent, with limited administrative expertise and few fiscal resources to accomplish reform.⁵⁹ The potential but largely untapped power of the federal government offered an alternative to state inaction. The national fiscal state

54. *See id.* at 273, 275.

55. *Id.*

56. The reasons for the success of particular reforms were varied, ranging from public pressure that overcame business concerns to the desire of politically powerful business interests to impose costs on rivals. Nonetheless, the states were “laboratories of democracy” precisely in the sense that they were the sites for small-scale experiments for reforms that could be nationalized if deemed successful.

57. *See* PAUL E. PETERSON, *CITY LIMITS* 3-92 (1981); JAMES WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE, 1900-1918*, at 30-32 (1968); William Graebner, *Federalism in the Progressive Era: A Structural Interpretation of Reform*, 64 *J. AM. HIST.* 331, 352-53 (1977). *See generally* PAUL E. PETERSON & MARK C. ROM, *WELFARE MAGNETS* (1990); David Brian Robertson, *The Bias of American Federalism: The Limits of Welfare-State Development in the Progressive Era*, 1 *J. OF POL’Y. HIST.* 261 (1989).

58. *See Beer, supra* note 12, at 74-87; *see also* ALICE M. RIVLIN, *REVIVING THE AMERICAN DREAM* 87-91 (1992).

59. *See* JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 474-506 (1995); HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* 317-28 (1965); Samuel P. Hays, *Political Parties and the Community-Society Continuum*, in *THE AMERICAN PARTY SYSTEMS* 152, 152-81 (Chambers & Burnham eds., 1967). *See generally* WEINSTEIN, *supra* note 57.

opened possibilities for income redistribution and governmental projects beyond the reach of a more decentralized governmental system.⁶⁰ From 1930 to 1960, total governmental revenues remained flat, but federal revenues quadrupled as a percent of the Gross Domestic Product (GDP), and federal spending rose from a quarter of all governmental spending to nearly two-thirds.⁶¹ Moreover, the federal government had administrative resources that were not readily available to the states. The federal administrative state, although uncoordinated and slow in its development, mustered expertise and institutional resources that exceeded those of the states and the largest corporations.⁶² Federal civilian employment increased six-fold between 1881 and 1930, and quadrupled again by 1960.⁶³ As American government increasingly engaged in new kinds of activities, the central government provided a relative advantage as opposed to individual states.⁶⁴

New corporate managers had their own reasons to support centralization during this period. For corporations and supporters of the new nationalized economy, federal action was a source of uniformity in economic regulation when state efforts to provide uniformity proved ineffective.⁶⁵ Interjurisdictional differences, no longer viewed as nurturing local industry, seemed to be a hindrance to the efficiency of national industry.⁶⁶ Additionally, the political autonomy of the states threatened the reformist accommodation to the new corporate order. Nationalizing fundamental decisions about how to structure

60. See Elliot W. Brownlee, *Tax Regimes, National Crisis, and State-Building in America*, in *FUNDING THE MODERN AMERICAN STATE 1941-1995*, at 37, 69-97 (W. Elliot Brownlee ed., 1996).

61. See OFFICE OF MANAGEMENT AND BUDGET [OMB], *HIST. TABLES, BUDGET OF THE U.S. GOV'T, FISCAL YEAR 1998*, at 16, 21 (1997); see also THOMAS R. DYE, *AMERICAN FEDERALISM* 36-38 (1990).

62. See ALAN DAWLEY, *STRUGGLES FOR JUSTICE* 297-408 (1991); HIGGS, *supra* note 12, at 20-30; BARRY D. KARL, *THE UNEASY STATE* 5 (1983); Beer, *supra* note 12, at 74-86.

63. See H.R. DOC. NO. 93-78 (Part 2), at 1102-03 (1975).

64. The continual military activities of War World II and the Cold War gave further impetus to these centralized state-building activities. War is a premier activity of the central government and justifies a larger claim on social resources on its part. Moreover, militarism has tended to expand central governmental activity into traditionally local areas, from industrial production, to road construction, to education. See JOHN D. DONAHUE, *DISUNITED STATES* 26-27 (1997); GRIFFIN, *supra* note 2, at 81-86; ALFRED M. KELLY, ET AL., *THE AMERICAN CONSTITUTION* 572-601, 663-81 (1983); Balogh, *supra* note 33, at 154-66. A continuing preoccupation with national security heightened the relative importance of the central government.

65. See Graebner, *supra* note 57, at 347-55.

66. See HURST, *supra* note 42, at 69-74, 146-51; Harry N. Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 L. & Soc. REV. 57, 118, 97-99, 113-16 (1975).

and regulate the economy avoided and disempowered populist strongholds and socialist threats in state legislatures.⁶⁷ The range of acceptable political options could be effectively narrowed by centralizing the decision-making forum to one where those who agreed on basic premises were dominant.⁶⁸

The economic and political situation of the late nineteenth and early twentieth centuries paralleled the logic of activist liberalism, or at least seemed to make it possible. This period was marked by an expanding and deepening industrialization. Unlike state boundaries, national boundaries were not readily permeable to corporate flight and worker migration. Technical and administrative limitations, as well as heavy prior investments, kept firms within the United States. Centralization of governmental regulation in the national government was sufficient to contain the heavy industry of the early twentieth century.⁶⁹ The structure of those industries and evolving political and social arrangements also fostered the development of a theory of "counterbalancing power," or "interest group pluralism."⁷⁰ The modern state, dedicated to the regulation of large corporations and the redistribution of national income, could readily identify and mobilize the relevant social groups that were needed to support governmental policy. Although diverging in many particulars, the leadership of such groups shared a basic agreement about the desired future of the American economy and society that emphasized social stability and a corporate economy. As a result, negotiations among those leaders, facilitated by governmental officials, could lead to viable compromises on policy. The stability of centralized social structures facilitated centralized policy-making by a national elite.⁷¹

Thus, centralization naturally coincided with the rise of the positive state. It was consistent with the dominant theories explaining the

67. See GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM* 5-6, 159-64, 279-80 (1963).

68. See E.E. SCHATTSCHNEIDER, *THE SEMI-SOVEREIGN PEOPLE* 78-96 (1960).

69. This economic situation is historically specific, not universal. Prior to the late nineteenth century, firms were largely local and could be contained by sub-national governments exercising regulatory and redistributive powers. Even in the early twentieth century, the effect was not uniform. See STEPHEN P. ERIE, *RAINBOW'S END* 254-58 (1988); PAUL KANTOR, *THE DEPENDENT CITY REVISITED* 17-112 (1995).

70. JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM* 108-53 (1956); THEODORE J. LOWI, *THE END OF LIBERALISM* 55-99 (1979).

71. See GALBRAITH, *supra* note 70, at 108-53; LOWI, *supra* note 70, at 55-123; SKLAR, *supra* note 15, at 179-332; WEINSTEIN, *supra* note 57, at 3-39. Such efforts at policy-making were not always successful—the relevant players could be fragmented. When agreement at this level broke down, policy-making itself was brought to a halt. See ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* 6-7 (1966); KENNETH FINEGOLD & THEDA SKOCPOL, *STATE AND PARTY IN AMERICA'S NEW DEAL* 90-113, 161-65 (1995).

workings of the modern corporate economy. Centralization also provided the best model for accomplishing newly important governmental functions and underscored the dominant ideology of modern liberalism. Given an expanding political commitment to controlling social forces, the national government presented the best vehicle for successfully exercising such control.

C. The Public Morality

Centralization was bolstered not only by shifting economic commitments and their ideological foundations, but also by a shifting public morality. As a result of public debate over appropriate ideals, the modification and mobilization of cultural norms, and the development of a new understanding of public administration, reformers fashioned a new public philosophy that required rethinking the way government operates and the nature of its responsibilities.⁷² States lost much of their moral authority as representatives of the people, and popular allegiance shifted to the national government.⁷³ The states also lost public confidence in their ability to function as independent polities within a federal system. In the context of the judicial deregulation of federal boundaries, the public's lack of faith in state governments had significant ramifications for their political influence.

The first wave of moral reconsideration of federalism can be designated as Progressive-era morality. Ironically, the significance of this movement rested on the very dominance of the states as governing institutions in the nineteenth century. The states, the political units most responsible for public well-being, suffered the consequences of public disillusionment with the existing governing structure. Muck-raking journalism called attention to state policy failures, corruption and the unpleasantness of early industrialism, subnational politics, and local political machines.⁷⁴ Although the federal government suffered its own scandals, the states and localities bore the brunt of the new journalistic and reformist attention.⁷⁵

The exposure of government and business practices focused not only on corruption and bad faith, but also on the limitations of inher-

72. See *infra* notes 74-79 and accompanying text.

73. See *infra* notes 80-84 and accompanying text.

74. See HAYS, *supra* note 38, at 92-94; RICHARD HOFSTADTER, *THE AGE OF REFORM 185-212* (1955); TRACHTENBERG, *supra* note 31, at 161-62.

75. For example, public exposés of federal corruption were a basic part of the campaign for civil service reform. See SKOWRONEK, *supra* note 33, at 47-83, 177-210.

ited political forms.⁷⁶ Economic and social modernization was outstripping the capacity of states to respond adequately to new corresponding social needs. Such concerns led to numerous reforms in state and local governments, such as the building-up of administrative capacity, the establishment of the civil service, and the adoption of secret ballots.⁷⁷ Nonetheless, these reforms were often piecemeal and rarely had the full effect that was originally expected of them. Replacing party machines with expert administrators did not have a clearly democratizing effect on urban politics; further, cities and states still suffered from limited fiscal resources and a tenuous hold on the national economy. Even with reforms, states were still conceived of as backwards, dominated by parochial concerns, and incapable of addressing the larger problems of the national economy.⁷⁸

The apparent failure of the states was particularly significant given the expanded role of government advocated by modern liberal reformers. While earlier observers were willing to tolerate political failures as inevitable or unimportant, modern reformers found state disabilities to be a major obstacle to achieving their substantive goals.⁷⁹ State and local governments hardly ceased to be important in practical terms, but future initiatives devolved increasingly to the national government. Social progress was to be achieved by circumventing states, not by working with them. This gradual frustration with state parochialism, though already firmly established, was greatly accelerated by the crisis of the Great Depression.

The second wave of moral reconsideration of the states' role in a federal system came with the civil rights movement of the 1950s and 1960s. During this period, federalism was increasingly associated with the inadequacy of the state governments and the moral bankruptcy of the states.⁸⁰ The focus of the civil rights movement on *de jure* segregation highlighted the racial policies of the South as a particular regional problem. State governments were integral to Southern racism, which made racism a political problem requiring political reform, rather than a social problem requiring moral suasion and civic education.

76. See HAYS, *supra* note 38, at 89-93; HOFSTADTER, *supra* note 74, at 186-219; SKOWRONEK, *supra* note 33, at 177-210.

77. See MORTON KELLER, *AFFAIRS OF STATE* 317-42 (1977).

78. See TERRY SANFORD, *STORM OVER THE STATES* 17-38 (1967).

79. See CROLY, *supra* note 59, at 317-56.

80. See MORTON GRODZINS, *THE AMERICAN SYSTEM* 290-306 (1966); SANFORD, *supra* note 78, at 1-8. See generally BURKE MARHALL, *FEDERALISM AND CIVIL RIGHTS* (1964); WILLIAM H. RIKER, *FEDERALISM* (1964).

Furthermore, the defense of Jim Crow laws relied on the exploitation of the federal structure. State representatives in the U.S. Senate and state governmental institutions were mobilized to resist national efforts to vindicate civil rights. Opponents of civil rights reforms explicitly defended their position with states' rights arguments. Images of Southern governors barring blacks from access to schools and Southern police beating black protesters changed the social perception, understanding, and value of federalism. As a result, civil rights were effectively equated with centralization, such that political scientist William Riker could conclude: "if in the United States, one disapproves of racism, one should disapprove of federalism."⁸¹ Only the centralization of political power in the national government was perceived as an appropriate response for resolving racial antagonisms and overcoming local opposition to reform. The civil rights crisis of the 1950s and 1960s was understood as the consequence of a failure to centralize power in the 1870s.⁸²

Race-related civil rights were only the most dramatic instance of the postwar expansion of notions of individual rights, and the states found themselves on the losing side of that historic transition. The Warren Court's judicial activism came into its own with the application of new individual rights doctrines against the states in areas such as race relations, religious establishment, police conduct, and sexual behavior.⁸³ The states and decentralized federalism were represented as at best impotent and at worse malevolent. From the earliest opinion polls of the late 1930s to those of the late 1960s, public attitudes showed strong support for giving more power to the federal government and showed relatively greater trust in federal government than in the state or local governments.⁸⁴ The identification of federalism with civil rights abuses created a strong presumption against decentralization.

Such shifts in public attitudes, in conjunction with the rise of the administrative ethic and the positive state, undermined the position of the states vis-à-vis the national government and biased political devel-

81. RIKER, *supra* note 80, at 155.

82. See C. VANN WOODWARD, REUNION AND REACTION xi-xii (1966); cf. Richard Young & Jerome Burstein, *Federalism and the Demise of Prescriptive Racism in the United States*, 9 STUD. AM. POL. DEV. 1 (1995) (explaining that the civil rights movement was made possible by fragmented political structure).

83. See KARL, *supra* note 62, at 5; RIVLIN, *supra* note 58, at 91-109. See generally David Fellman, *The Nationalization of American Civil Liberties*, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 49 (M. Judd Harmon ed., 1978).

84. See Roper Center for Public Opinion Research, *Assessing Government*, 4 THE PUB. PERSP. 87 (1993).

opment toward greater centralization. Political interests and ideals were reshaped by socioeconomic events and political movements that favored centralization. Restructuring federalism per se was rarely the specific goal of these various efforts, but it was often a necessary means and an accepted byproduct. The logic of the modern state was one of centralization, and federalism was increasingly understood in nationalizing terms. The most important policies were to be developed at the national level, and governmental resources shifted upward. National policy-making dominated American politics, even when it did not directly supplant local policies. Centralization of power in the federal government became the guiding presumption, both descriptively and prescriptively.

III. The Changing Foundations of the Modern State

The developing logic that biased the federal system toward centralization reached its zenith in the 1960s. More recent political developments, however, have altered the foundations upon which the growth of the modern state depended. Those basic forces that encouraged centralization through most of the twentieth century have exhausted themselves, and the centralizing bias that was present earlier this century has correspondingly weakened. Moreover, an examination of emerging political currents suggests that the forces of change may instead favor decentralization. Specifically, socioeconomic and ideological change has eroded support for the governmental functions and ideologies that fostered centralization, while states have strengthened their own institutional and political position through electoral and fiscal reforms. An opening for a return to decentralization has appeared as the result of further economic changes and reevaluations, the collapse of faith in progressive governmental activism, and a revitalization of the moral and institutional capacity of state governments vis-à-vis the national government. Thus, conditions for decentralization are fairly well established, and important and striking examples of the movement toward actual decentralization are evident in recent politics.

A. The End of Liberalism

Activist liberalism underwrote the accession of the modern state and the expansion of the national government through a succession of political movements beginning at the turn of the century. Recent decades have witnessed the collapse of liberalism as the dominant political ideology, undermining the legitimating public philosophy behind

centralization and the substantive governmental commitments that required centralization.⁸⁵ The old liberal consensus has been fragmented, without a replacement, by a newly dominant set of substantive commitments.⁸⁶ The collapse of liberalism and the concomitant push toward decentralization is marked by three primary developments: increasing distrust of government, fiscal constraint, and the rise of "special interest" politics.

Perhaps the defining feature of modern liberalism was the abandonment of the historical liberal fear of governmental power and the adoption of the Progressive faith that government was a force for social good, which allowed for expansion of governmental functions.⁸⁷ Nonetheless, tensions remained within liberalism's embrace of governmental activism, which eventually fragmented the support for liberalism itself.⁸⁸ The "vital center" of modern liberalism gave way under attack from both the left and the right. The New Left posed a radical challenge to liberalism's ambivalent embrace of the positive state.⁸⁹ Much of the social democracy embraced by the New Left required small communities to engage in participatory politics instead of relying on a strong national government to challenge corporations. The radical goals of the New Left did not match the conservative or reformist goals of established liberalism. Similarly, as the national government became the central feature of the modern state, libertarian challenges increasingly focused on abuse of national powers, dramatized by the Vietnam War and Watergate. Modern American liberalism had never come to terms with the state power that was necessary to achieving its goals, and thus was not well positioned to address state power when its darker side became obvious in the 1960s and 1970s.⁹⁰

The vital center was also fragmented by attacks from the New Right.⁹¹ The New Right was not without its statist elements, espe-

85. See *infra* notes 87-127 and accompanying text.

86. See THEODORE J. LOWI, *THE END OF THE REPUBLICAN ERA* 33-108 (1996); E. J. DIONNE, JR., *WHY AMERICANS HATE POLITICS* 31-143 (1992).

87. See SIDNEY FINE, *Laissez Faire and the General-Welfare State* 12-25 (1966); DAWLEY, *supra* note 62, at 211-14.

88. See generally ALLEN J. MATUSOW, *THE UNRAVELING OF AMERICA* (1984); LOWI, *supra* note 70, at 3-100.

89. See generally JOHN PATRICK DIGGINS, *THE RISE AND FALL OF THE AMERICAN LEFT* 218-306 (1992); MATUSOW, *supra* note 88, at 275-394; JAMES MILLER, "DEMOCRACY IS IN THE STREETS" 65-155 (1987).

90. See LOWI, *supra* note 70, at 41-54.

91. See JOHN EHRLMAN, *THE RISE OF NEOCONSERVATISM* 1-62 (1995).

cially in regards to national security.⁹² Nonetheless, the New Right inherited and revitalized the Old Right's critique of the modern state's economic regulation, while explicitly defending a more decentralized version of federalism.⁹³ The regulatory and redistributionist logic at the center of the modern national state was directly challenged by the Right as economically harmful and morally questionable.⁹⁴ President Reagan memorialized the new public philosophy of the Right when he insisted that "government is not the solution to our problem; government is the problem."⁹⁵ Reformist faith in the progressive capacity of the national government to solve social and economic ills was deeply attenuated in favor of a renewed belief in the benevolence of the invisible hand.

Although President Reagan's immediate achievements in paring back the federal government were less revolutionary than his rhetoric, he did capture a changing public mood. Today, distrust of the government is as high as trust of the government was during the height of liberalism; moreover, such distrust has been the dominant public attitude since the Watergate era.⁹⁶ Though not all governmental functions are equally disfavored, many of the centralized functions pursued by the modern state, such as income redistribution and economic regulation, are particularly disfavored.⁹⁷ In addition to the Right's general attack on the positive state, Reagan specifically linked centralization to the problems of "Big Government." Although Reagan's commitment to decentralization was in tension with other elements of the Right's agenda, his election and legacy are widely seen by scholars of federalism as an important blow to centralized liberalism.⁹⁸ Centralization has become a specific target for the public's increasing skepticism about government. The federal government is now the least trusted level of government. As a result, increasing plu-

92. See GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA* 1-35, 94-130 (1979). See generally MICHAEL W. MILES, *THE ODYSSEY OF THE AMERICAN RIGHT* (1980).

93. See MILES, *supra* note 92, at 241-344; NASH, *supra* note 92, at 186-219.

94. See NASH, *supra* note 92, at 271-89.

95. RONALD REAGAN, *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES* 1 (1982).

96. See Carl Everett Ladd, *The 1994 Congressional Elections: The Postindustrial Realignment Continues*, 110 *POL. SCI. Q.* 1, 8-14 (1995).

97. The public makes exceptions for such specific issues as social security and environmentalism. See PAUL E. PETERSON, *THE PRICE OF FEDERALISM* 44 (1995). See generally Roper Center for Public Opinion Research, *How Much Government—Devolution*, 6 *PUB. PERSP.* 26 (1995) (hereinafter Roper Center).

98. See Richard L. Cole, et al., *Reversing Directions: A Ranking and Comparison of Key U.S. Intergovernmental Events, 1960-1980 and 1980-1995*, 26 *PUBLIUS* 25, 27 (1996).

ralities favor decentralizing governmental power.⁹⁹ President Clinton has declared that he also embraces the end of "Big Government," a testament to the current distrust of government, and he, too, has embraced decentralizing initiatives such as welfare reform.¹⁰⁰ Because liberalism has been fractured to the point that it can no longer sustain centralization, and even if no alternative ideology has yet gained dominance, the ascendant political questions and assumptions at the end of the twentieth century are radically different from those at the beginning, with substantial implications for the decentralization of federalism.

Liberalism has also declined as a result of "deficit politics."¹⁰¹ Federal budgeting has undergone a basic reconceptualization, from a postwar expectation of incremental revenue growth to a recognition beginning in the late 1960s of fundamental fiscal constraints.¹⁰² The fiscal politics of the 1980s and 1990s is only an amplified version of this basic acceptance of budgeting as requiring tradeoffs among favored programs, a generalization of the "guns versus butter" concerns of the Johnson administration.¹⁰³ Moreover, retrenchment in the domestic budget was an explicit part of the Reaganite conservative message, linking the ideal of fiscal constraints to an ideological vision and a policy program.¹⁰⁴ The availability of funds for new social programs could no longer be assumed. The apparent continued expansion of the federal fiscal capacity that had fueled the twentieth century centralization had reached its limits.

New fiscal limits are partly the function of a restructured economy and partly a function of new political sensibilities. The wave of "tax revolts" that began in the states and spread to the national government in the late 1970s have imposed sharp constraints on the ability of the federal government to reclaim the fiscal advantage of earlier

99. See Timothy J. Conlan, *Federal, State, or Local? Trends in the Public's Judgment*, 4 PUB. PERSP. 3 (1993); Roper Center, *supra* note 97.

100. See DONAHUE, *supra* note 64, at 32-37; STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE 409-46 (1993); Robert Kuttner, *Reaganism, Liberalism, and the Democrats*, in THE REAGAN LEGACY 99, 108-16 (Sidney Blumenthal & Thomas Byrne Edsall eds., 1988).

101. See generally DONALD F. KETTL, DEFICIT POLITICS (1992); Paul E. Peterson, *The New Politics of Deficits*, in THE NEW DIRECTION IN AMERICAN POLITICS 365 (John E. Chubb & Paul E. Peterson eds., 1985).

102. See ALLEN SCHICK, CONGRESS AND MONEY 19-32 (1980).

103. See ALLEN SCHICK, THE CAPACITY TO BUDGET 1-83 (1990); KETTL, *supra* note 101, at 38-67. In that context, the current prospect of a balanced budget is a temporary phenomenon that will soon be dwarfed by federal entitlement commitments.

104. See JAMES D. SAVAGE, BALANCED BUDGETS AND AMERICAN POLITICS 198-236 (1988).

decades.¹⁰⁵ In particular, the indexation of tax rates has placed real limits on the ability of the federal government to expand its revenue base without an explicit, and politically risky, vote for tax hikes.¹⁰⁶ One consequence has been that declining military spending has reduced the perceived importance of the national government without producing the expected "peace dividend" that could be readily shifted to other federal activities.¹⁰⁷ Political stalemate reinforced the ideal of fiscal restraint. The handful of programs that were allowed to grow, primarily defense and entitlements, only added to the fiscal pressures and political tensions faced by most social programs. After accounting for what became known as "non-discretionary" spending, there were few federal funds remaining to address new liberal concerns or to sustain the old.¹⁰⁸ Deficits did not lead to the type of spending cuts advocated by conservatives, but they did have real effects in undermining the political base of modern liberalism.

Deficit politics is relevant to the decline of centralization because it both weakens liberalism and undermines "fiscal federalism." The political response to the deficit has placed severe limits on the national government's ability to take positive action. Conservative claims of governmental ineffectiveness in addressing social ills became a self-fulfilling prophecy as relative fiscal austerity was demanded in response to large federal deficits. In addition, the limitations imposed on spending made fiscal policy resemble a zero-sum game. Consequently, all the political players became increasingly distrustful of one another, and recipients of the governmental largesse have been increasingly the object of taxpayer scorn.¹⁰⁹ Welfare recipients, for example, have been viewed as parasites of public largesse, especially when fiscal politics revolves around scarcity.¹¹⁰ The federal government is now viewed as providing the least amount of services per taxpayer dollar, while state governments have increasingly been lauded

105. See THOMAS BYRNE EDSALL & MARY D. EDSALL, *CHAIN REACTION* 116-36 (1991).

106. See R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 193-97 (1990); KETTL, *supra* note 101, at 119-20.

107. See DONAHUE, *supra* note 64, at 9-11, 34-37.

108. See KETTL, *supra* note 101, at 129-42. See generally PETERSON, *supra* note 101.

109. See CLAUS OFFE, *CONTRADICTIONS OF THE WELFARE STATE* 147-60, 193-202 (John Keane, ed., 1984); LESTER C. THUROW, *THE ZERO-SUM SOCIETY* 155-90 (1980).

110. See generally Roper Center for Public Opinion Research, *Welfare: American Dilemma*, 6 *PUB. PERSP.* 39 (1995) (hereinafter Roper Center).

for their fiscal efficacy.¹¹¹ Thus, as distrust of national fiscal policy has increased, a corresponding decline in the liberal foundation for centralized federalism becomes ever more evident.

More directly, deficit politics has weakened support for intergovernmental transfers, a key component of postwar centralization. Aid to states has proven politically vulnerable relative to such priorities as military and entitlement spending. Since the mid-1970s, real growth in federal grants to states and localities has slowed considerably and declined as a percentage of the federal budget.¹¹² Meanwhile, state governments have revitalized their own fundraising capacity. Excluding trust fund accounts, state and local governments now claim nearly as large a share of GNP as does the federal government for the first time since the New Deal.¹¹³ Consequently, federal grants have also fallen as a percentage of state and local expenditures from mid-1970s peaks. States and localities, rather than dependents, are now competitors with the federal government for revenue.¹¹⁴ The national government is losing a key tool for influencing state behavior, leaving states to respond to their own political dynamics rather than those of the national government.¹¹⁵

A final element contributing to the end of liberalism is the ideological transformation of pluralistic interest group politics into corrupt special interest politics. The primary change occurred in dominant normative judgments rather than political behavior, and deficit politics helped to redefine the political perception of interest group politics.¹¹⁶ Pluralism becomes more difficult to maintain in periods of scarcity than in periods of abundance. Theodore Lowi recognized that interest group liberalism developed in part to obscure the coercive exercise of state authority. In the context of postwar abundance, interest group competition created a veneer of voluntarism and concealed the need to legitimize public authority.¹¹⁷ In the context of

111. See ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS [ACIR], CHANGING PUBLIC ATTITUDES ON GOVERNMENTS AND TAXES 7 (1990); Roper Center, *supra* note 97, at 87-90.

112. See OMB, *supra* note 61, at 194-95.

113. See Shannon & Kee, *supra* note 7, at 7-12.

114. See *id.*

115. See Chubb, *supra* note 18, at 277-81. In addition to protecting key constituents against the most severe effects of fiscal retrenchment, politicians have also reacted by turning to political mechanisms that do not cost the government money. It remains to be seen how extensively "unfunded mandates" will be used to maintain centralization. See Kincaid, *supra* note 18, at 148-52.

116. See ALLAN J. CIGLER & BURDETT A. LOOMIS, INTEREST GROUP POLITICS 1-28 (1995).

117. See Lowi, *supra* note 70, at 29-97.

fiscal scarcity, however, the legitimacy of other interest groups is less easily recognized when their gains come at the expense of others; "they" become "special" interests that corrupt politics rather than share in good government.

As decision-making was centralized and increasingly shifted from Congress to the executive branch, representation of political interests at the national level included leaders and agents of organized interest groups in the policy-making process.¹¹⁸ However, despite the initial expectations, interest group pluralism was never all-inclusive. Important, and occasionally politically influential, social interests were often not represented.¹¹⁹ At times, the limitation on interest inclusion constrained the government's ability to make stable and effective policy.¹²⁰ More importantly, the evident truncation of pluralist representation helped undermine its legitimacy. As old organizations fragmented, new "public" interest groups arose.¹²¹ The proliferation of new interest groups served less to revitalize the authority of the liberal state than to subvert the basis for its authority.¹²² Distinguishing between "public" and "private" interests merely called into question the legitimacy of interest group decision-making. Once interest groups appear to represent parochial concerns rather than the common good, trust in governmental decision-making that is heavily influenced by group politics is undermined. Vast majorities now believe that "government is the problem," and that it is run for the benefit of "special interests," though there remains support for some specific governmental actions.¹²³ While the bureaucratic consensus that guided the positive state may serve some interests and do some good, it appears unlikely that it can locate the genuinely public good effectively.¹²⁴

118. See CIGLER & LOOMIS, *supra* note 116, at 11-25; JAMES A. MORONE, *THE DEMOCRATIC WISH* 129-43 (1990); Lowi, *supra* note 40, at 101-24.

119. See Lowi, *supra* note 70, at 68-97; HAWLEY, *supra* note 71, at 72-146. See generally PETER BACHRACH & MORTON S. BARATZ, *POWER AND POVERTY* (1970); GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966).

120. See HAWLEY, *supra* note 71, at 19-146.

121. See Thomas L. Gais, et al., *Interest Groups, Iron Triangles and Representative Institutions in American National Government*, 14 *BRIT. J. POL. SCI.* 161, 166-77 (1984). See generally Jack L. Walker, *The Origin and Maintenance of Interest Groups*, 77 *AM. POL. SCI. REV.* 390 (1983).

122. See CIGLER & LOOMIS, *supra* note 116, at 1-28.

123. Ladd, *supra* note 96, at 13.

124. See Balogh, *supra* note 33, at 171.

Finally, interest group liberalism depended on a political consensus, even a manufactured one, in order to operate.¹²⁵ The willingness to delegate governmental policy-making to executive branch officials and an administrative elite hinged on the ability of the political elite to portray such decisions as merely technical or instrumental. Such a representation is viable only so long as there is an underlying agreement on political ends and legitimate means. Pragmatism does not replace ideology as much as it replaces ideological conflict. Policy-making could be delegated and centralized in a handful of bureaucratic venues because the crucial political decisions had already, at least implicitly, been made. However, the breakdown of the liberal consensus repoliticizes government. Power is fragmented as administrative expertise is challenged by alternative experts, exposing the political aspects of "neutral" decision-making.¹²⁶ Moreover, the repoliticization of government encourages legislative rather than executive politics. Legislative politics benefit from greater permeability to social interests, openness to public scrutiny, and participation than is characteristic of executive politics, which is crucial to rebuilding political consensus for governmental action. The proliferation of participants and points of access fragments and decentralizes decision-making.¹²⁷ Legislative politics, in the absence of consensus, also brings electoral risks to legislators, however, and congressmen may increasingly pass hard choices back to the states. In any case, the decline of liberalism as the source of public authority undercuts a key justification for political centralization.

Both the success of an ideological consensus and the substantive commitments of modern liberalism underwrote the modern state. But the current crisis for liberalism delegitimizes and fragments the state, shifting power and authority to alternative institutions, both public and private. The fragmentation of the old consensus has left a lingering distrust of centralized governmental policy-making. The contingent ideological and political underpinnings of the functional utility of centralization have been exposed. Meanwhile, the national govern-

125. See LOWI, *supra* note 70, at 30-84; MORONE, *supra* note 118, at 97-143, 253-320. See generally Balogh, *supra* note 33.

126. See ROHR, *supra* note 35, at 133-93; Balogh, *supra* note 33, at 166-72; SKOWRONEK, *supra* note 33, at 361-406.

127. See JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 440-59 (1981); Michael Mezey, *The Legislature, the Executive and Public Policy: The Futile Quest for Congressional Power*, 13 CONGRESS & PRESIDENCY 1, 12-15 (1986). Legislative politics has historically been decentralizing, within both the national government and the federal structure. There are, however, limits to that relative decentralization. See Chubb, *supra* note 18, at 275-92.

ment has lost its comparative advantage in fiscal and administrative capacity, as the states have built up their resources and the national government has limited its own. Centralization now offers fewer political advantages and carries less ideological appeal than it did through most of the twentieth century. In this context, the states are both more capable and more likely to take a leading role in policy-making.

B. The Entrepreneurial State

The modern state has been shaken not only by an ideological crisis, but also by changes in economic conditions and understandings to which the state structure was a response. The economy has not returned to its precorporate form, but rather has developed beyond the period of industrial consolidation that made administrative control seem both desirable and possible.¹²⁸ The national government held a comparative advantage relative to the states at the turn of the century in seemingly standing above the market and maintaining its ability for autonomous decision-making. That advantage has dissipated in recent years, and the national government now occupies a position that is similar to that of the states themselves.¹²⁹

A primary aspect of that change is the globalization of the American economy.¹³⁰ Just as the rise of interstate corporations transformed the logic of postbellum federalism, so the rise of transnational corporations has altered the foundations of the modern state. Most notably, the globalization of the economy has meant that there is no escaping the market. Interstate corporations and the consolidation of the domestic economy threatened to outstrip the capacity of the states or the market to control them, but also opened the possibility of an effective national response. One effect of globalization is to weaken the apparent need for a strong national state. Nineteenth-century market failures called for a national response because corporations no longer seemed disciplined by the market. Global competition has instead emphasized the vulnerability of American corporations to expanded market forces. A managed economy seems less viable, rendering moot the earlier question of whether the economy would be

128. See MARC ALLEN EISNER, *REGULATORY POLITICS IN TRANSITION* 134-208 (1993); *infra* note 146.

129. See *infra* notes 130-45, and accompanying text.

130. See ROBERT B. REICH, *THE WORK OF NATIONS* 81-168 (1991); LESTER C. THUROW, *THE FUTURE OF CAPITALISM* 115-38 (1996). See generally KENICHI OHMAE, *THE BORDERLESS WORLD* (1990); KENICHI OHMAE, *THE END OF THE NATION STATE* (1995).

under private or public control. The discipline of the global market has displaced the accepted need for governmental regulation, while highlighting the cost of such regulation to American business.¹³¹

Equally important, globalization has weakened governmental sovereignty, the perceived governmental ability to make and enforce autonomous decisions.¹³² This does not hearken the withering away of the state or the end of nationalism, but it does suggest that the national government is no longer in the commanding position that it was a century ago. The United States has itself been transformed over the past few decades from an island community into an integrated part of an international economic system. As a consequence, there is no longer the perceived state capacity to control the economy that was once available. The value of centralization was that it could overcome political and market fragmentation. To the extent that there is still support for some aspects of the positive state, the expression of governmental activism is increasingly hedged in by a recognition of the limits of governmental power. The regulatory and redistributive burdens that could be safely imposed on interstate corporations are more costly when imposed on multinationals, weakening the political will to tax corporate profits or impose new social regulations.¹³³ As a result, the national government now finds itself in a position similar to that faced by the states at the turn of the century—a market participant rather than a sovereign over the market. Thus, political centralization no longer seems to provide the benefits of economic management.

The national government has gradually been pushed from the role of social regulator to one of competitive provider of public services, a return to governmental competition that was anathema to centralized federalism.¹³⁴ The expressions of this pressure are various. As economic globalization rapidly expanded in the 1970s and 1980s, the United States was one of many nations to reform its tax system in order to reduce the costs imposed on the most fluid elements of the economy.¹³⁵ The resulting fiscal constraints limited governmental activism and eroded fiscal autonomy, one of the advantages of centrali-

131. See, e.g., Roger Lowenstein, *Trust in Markets: Antitrust Enforcers Drop the Ideology*, *Focus on Economics*, WALL ST. J., Feb. 27, 1997, at A1.

132. See RICHARD B. MCKENZIE & DWIGHT B. LEE, *QUICKSILVER CAPITAL* 84-156 (1991); SUSAN STRANGE, *THE RETREAT OF THE STATE* 44-87 (1996). See generally SASKIA SASSEN, *LOSING CONTROL?* (1996).

133. See SVEN STEINMO, *TAXATION AND DEMOCRACY* 156-92 (1993); Eisner, *supra* note 128, at 170-201.

134. See DYE, *supra* note 61, at 1-34. See also JEAN-LUC MIGUE, *FEDERALISM AND FREE TRADE* 13-40 (1993).

135. See STEINMO, *supra* note 133, at 156-92.

zation. Two governmental functions, regulation and redistribution, are particularly conducive to centralization because both impose costs that mobile economic actors seek to escape through flight. Modern liberalism called for the government to engage in both of these activities, and centralization allowed the government to impose those costs on relatively immobile, national actors in the early twentieth century. In an international economy, such policies have become more difficult to maintain. Although there remains popular pressure for certain forms of regulation, the regulatory costs borne by market participants have become an increasingly prominent part of the political calculation of policy-makers. The response has been deregulation and relative regulatory restraint.¹³⁶ Similarly, redistributive policies are seen as increasingly costly. Although intergenerational transfers remain popular, welfare policies have become relatively unpopular as the costs have been emphasized.¹³⁷ Weakening political support for redistributive policies has resulted in direct retrenchment or in a shifting of redistributive burdens to the states, which are subject to even greater competitive pressures than the national government.¹³⁸ Economic globalization reinforces ideological changes by altering the mix of policies pursued by government. The same types of policies that underwrote centralization through most of the twentieth century are those most affected by economic openness and the decline of liberalism.¹³⁹ Economic and social regulations that might be costly to business now face added hurdles, leaving them less aggressively enforced or off the legislative agenda.

The government has not sunk into inactivity. An emerging method of political competition is the search for "value added" policies, or "public investment."¹⁴⁰ The turn to public investment is a natural one, reflecting the loss of political control over economic conditions. The government justifies itself through its ability to add value to society through the services it provides, just as other economic actors do. It is precisely such developmental policies as crime control and education that have retained or garnered public support

136. See MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* 29-146 (1985); Eisner, *supra* note 128, at 170-201.

137. See PETERSON, *supra* note 97, at 44. See generally Roper Center, *supra* note 110.

138. See DONAHUE, *supra* note 64, at 120-42; PETERSON, *supra* note 97, at 16-49, 108-28.

139. Military protection remains the one public service for which national governments remain the premier provider, but the end of the Cold War has significantly reduced the importance of this national activity. See generally STRANGE, *supra* note 132.

140. REICH, *supra* note 130, at 252-61.

in the past decade.¹⁴¹ Such public investments demonstrate their success by an ability to improve the national business climate or net social well-being. As a provider of public services, however, the federal government has no natural comparative advantage over the states and in many cases may be at a disadvantage given its relative inflexibility in adjusting to highly fluid and localized conditions and desires.¹⁴² States and localities remain the primary provider of such developmental policies.¹⁴³ American federalism has resulted in a functional policy specialization by the different levels of government. As the policy mix of the political agenda changes, different levels of government take priority.¹⁴⁴ To the extent that developmental policies dominate politics, centralized federalism carries little appeal. State and local politics become more "relevant" than federal politics.¹⁴⁵

A second and related aspect of this economic transformation has been characterized as "post-industrialism."¹⁴⁶ The most relevant features of post-industrialism for present purposes are its effects on the economic environment within which the federal system operates and on the administrative ethic within the government itself. Technology and changing managerial practices have substantially altered the way corporations operate. Notably, corporate organizations are more far-flung, and decision-making is more decentralized. Technology has allowed business to globalize operations while speeding its adjustments to external and internal problems. Relative liquidity in capital formation and production allows modern firms to move more quickly to

141. See PETERSON, *supra* note 97, at 44, 65.

142. See PETER K. EISINGER, *THE RISE OF THE ENTREPRENEURIAL STATE* 64-69 (1988); DAVID OSBORNE, *LABORATORIES OF DEMOCRACY* 283-88 (1988); RIVLIN, *supra* note 58, at 116-22.

143. See generally PETERSON, *supra* note 97.

144. See FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 216-34 (1993).

145. A second response to economic globalization has been the formation of limited intergovernmental entities, especially common as part of trade pacts. Overall, however, such efforts tend to fragment political power further, siphoning power and authority away from national governments without legitimating new supranational governments. Moreover, such intergovernmental entities have more often sought to work within markets than attempt to control or supplant them in the fashion of twentieth century centralization. See STRANGE, *supra* note 132, at 161-81; cf. Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1447-71 (1994). See generally DAVID VOGEL, *TRADING UP* (1995).

146. See KANTOR, *supra* note 69, at 77-111; MCKENZIE & LEE, *supra* note 132, at 158-219; REICH, *supra* note 31, at 117-225; THUROW, *supra* note 109, at 65-87. See generally Daniel Bell, *THE COMING OF POST-INDUSTRIAL SOCIETY* (1973); PETER F. DRUCKER, *POST-CAPITALIST SOCIETY* (1993); THIERRY J. NOYELLE, *BEYOND INDUSTRIAL DUALISM* (1987); SASKIA SASSEN, *THE MOBILITY OF LABOR AND CAPITAL* (1988).

take advantage of market opportunities and to escape government-imposed costs. Such fluidity has also destabilized the operating environment of the administered corporate economy, as current capital markets allow not only corporate growth but also intermarket penetration and rapid upstarts.¹⁴⁷ The reduced geographic commitment of modern corporations minimizes the target for political control. Not only has global competition increased the economic impact of government-imposed costs on domestic firms, but post-industrialism has enhanced the ability of firms to escape those costs.¹⁴⁸

Post-industrial management has also altered the administrative ethic that helped legitimate and guide centralization. Rather than monopolizing and managing information from the top, firms require information to be acted upon by those closest to the ultimate market or production process as emphasized by such innovations as "team management" and decreased production line specialization. Organizational changes have also tried to recreate market structures within the corporate form, whether through "outsourcing" or performance-based compensation.¹⁴⁹ Like the administrative ethic, post-industrial organizational developments both structure governmental functions and are internalized in governmental operations. The "reinventing government" movement attempts to carry the reforms of private corporations into the public bureaucracy.¹⁵⁰ Central to such efforts is the decentralization of decision-making to lower levels of the bureaucracy. Not only does this fragment the national bureaucracy, but it also shifts responsibility to subnational policy-makers and administrators.¹⁵¹ The effective pursuit of governmental objectives is increasingly seen as requiring decentralization, empowering actors outside

147. See DRUCKER, *supra* note 146, at 19-110; MCKENZIE & LEE, *supra* note 132, at 35-83. See generally NOYELLE, *supra* note 146.

148. See DRUCKER, *supra* note 146, at 113-78; KANTOR, *supra* note 69, at 77-111; MCKENZIE & LEE, *supra* note 132, at 84-157; REICH *supra* note 130, at 81-153; THUROW, *supra* note 109, at 115-37, 271-78. See generally SASSEN, *supra* note 146.

149. See generally WILLIAM H. DAVIDOW & MICHAEL S. MALONE, *THE VIRTUAL CORPORATION* (1992); MICHAEL HAMMER & JAMES CHAMBY, *REENGINEERING THE CORPORATION* (1993); JOHN NAISBITT & PATRICIA ABURDENE, *RE-INVENTING THE CORPORATION* (1985); Noyelle, *supra* note 146; GIFFORD & ELIZABETH PINCHOT, *THE END OF BUREAUCRACY & THE RISE OF THE INTELLIGENT ORGANIZATION* (1994); THUROW, *supra* note 130, at 79-82.

150. See generally AL GORE NATIONAL PERFORMANCE REVIEW, *FROM RED TAPE TO RESULTS* (1993); MICHAEL BARZELAY, *BREAKING THROUGH BUREAUCRACY* (1992); David Osborne & Ted Gabler, *Reinventing Government* (1992); James P. Pinckerton, *What Comes Next* 51-128 (1995).

151. See generally David B. Walker, *The Advent of an Ambiguous Federalism and the Emergence of New Federalism III*, 56 PUB. ADMIN. REV. 271 (1996).

the national government to make crucial decisions about policy goals, design, and implementation. Such reforms also try to integrate or reproduce market processes in governmental programs, from school choice to tradable pollution emission permits.¹⁵² As with Progressive era bureaucratization, such reforms bring substantive political change in the guise of neutral technical adjustments. To the extent that policy experts and the general public absorb this postindustrial perspective, the use of centralized bureaucratic mechanisms to solve social problems will be less compelling. Just as railroad regulation emphasized the central government, airline deregulation chipped away at the significance of the national government.¹⁵³ Likewise, the decentralization of decision-making within government reduces the importance of the national government even when government is active.

Socioeconomic changes, and how we understand those changes, have reinforced many of the political ramifications from the fragmentation of support for modern liberalism. Globalization and post-industrialism have weakened the value of centralization by reducing the autonomy of the national state. The increased costs and decreased benefits of many regulatory and redistributive policies have helped to alter the mix of favored governmental functions. In this new political and economic environment, the national government occupies a less commanding position, and the state governments are likely to play a more important role providing the types of public services—from education to crime control—most in demand.

C. The New Public Morality

Just as the centralization of federal relations was advanced by the national government's seizure of the moral high ground, so the decentralization of federalism requires the moral recovery of the states. Significant decentralization is not viable if the states fail to eradicate the corruption and the incompetence of the past. The moral authority of the national government has been in relative decline since the late 1960s, while the states have gradually recovered public confidence.¹⁵⁴ The momentary shape of federalism is a function of historical forces, not the natural progression from fragmented states to an ever more centralized national system. Past shifts toward centralization are not

152. See DIONNE, *supra* note 86, at 242-99; PINCKERTON, *supra* note 150, at 255-318.

153. See DERTHICK & QUIRK, *supra* note 136, at 29-56; see also Garry Wills, *Washington Is Not Where It's At*, N.Y. TIMES MAG., Jan. 25, 1998, at 26.

154. See generally Roper Center, *supra* note 97.

irreversible.¹⁵⁵ For those who define the moral authority of federalism by the standards of desegregation efforts, the contingency of the relationship between moral authority and centralization is not obvious.¹⁵⁶ Nonetheless, more recent developments have made possible precisely that political decoupling, as the priority of national uniformity has been reduced and the competence of the state governments has increased.

Decentralization opens the possibility of diversity, as different states will adopt divergent policies and standards.¹⁵⁷ Decentralization gives play to the diverse policy preferences of the individual states, requiring a political environment that will tolerate the expression of such diversity.¹⁵⁸ But, as Ronald Dworkin has pointed out, moralism cannot abide a "checkerboard" of different political outcomes.¹⁵⁹ To the extent that the subject matter of politics is one of principle, the bias of centralization is increased as uniform outcomes are sought. A moral universalism cannot abide regarding slavery, or more recently segregation, as merely the "peculiar institution" of the South, but rather must approach it as a blight upon the nation as a whole. Local compromises are unacceptable if justice is at stake, and local traditions are expendable if universal truths can be applied in their stead. A decline in the influence of such universalistic moral movements give rise to the potential for decentralization. The presence of diversity, in and of itself, ceases to be a reason to centralize.

One avenue for shedding a commitment to uniformity is the localization of values and positive acceptance of diversity.¹⁶⁰ Although universalist theories remain influential, recent intellectual currents emphasize the plurality and historicity of moral values.¹⁶¹ Communitarian, neo-pragmatist, and post-modernist theorizing all reject universalism in favor of recognizing diverse, historically specific moral

155. See generally Keith E. Whittington, *The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change*, 26 *PUBLIUS* 1 (1996).

156. See, e.g., KENNETH S. STERN, *A FORCE UPON THE PLAIN* 219-20 (1996).

157. See generally Aaron Wildavsky, *Federalism Means Inequality: Political Geometry, Political Sociology, and Political Culture*, in *THE COSTS OF FEDERALISM* 55 (Robert T. Golembiewski & Aaron Wildavsky eds., 1984).

158. See DYE, *supra* note 61, at 41-44, 189-90.

159. See RONALD DWORKIN, *LAW'S EMPIRE* 178-84 (1986).

160. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 297-334 (1974). An additional possibility for decentralization, even in the face of universalistic commitments, is through the positive adoption of decentralization or localism as a competing value to be balanced against other moral goods. The rise of a new substantive vision of "states' rights" seems unlikely, however.

161. See SEYLA BENHABIB, *SITUATING THE SELF* 1-144 (1972).

traditions.¹⁶² Without a moral trump of universalism, diversity may not only be an acceptable outcome but may even be regarded as preferable. Although state political boundaries are unlikely to be coterminous with favored ethical "communities," such non-universalistic moral theories ultimately favor political decentralization. Moreover, the rejection of a universalist imperative has resonance beyond such esoteric theorizing.

For example, multiculturalism is a particular expression of such thinking. Its influence in raising questions about the value of integration is indicative of the weakening of earlier moral certainties that underwrote centralization.¹⁶³ Another example is the Supreme Court's weakening of a national, uniform standard of obscenity in *Miller v. California*,¹⁶⁴ which requires the evaluation of material on the basis of "community" values and is an example of the judicial acceptance of the possibility that localities will pursue different moral visions.¹⁶⁵ Similarly, the Court's partial retreat from *Roe v. Wade*'s¹⁶⁶ national standards regulating abortion in *Webster v. Reproductive Health Services*¹⁶⁷ and *Planned Parenthood of Southeast Pennsylvania v. Casey*¹⁶⁸ are consistent with the acceptance of heterogeneity on even a heavily moralized issue. In these cases, judicial "pragmatism" is as useful for decentralization as judicial conservatism.

Acceptance of diversity also arises through the strategic weakness of competing political factions.¹⁶⁹ The fragmentation of support for earlier moral commitments has prevented the national imposition of universalistic moral positions. Moralists have been forced to defend strategic local strongholds rather than pursue an offensive national struggle.¹⁷⁰ Morally infused political struggles over such issues as gay rights, abortion, and affirmative action have raged at the local level, even as reformers have been unable to advance their agenda at the

162. See generally ALASDAIR MACINTYRE, *AFTER VIRTUE* (1981); RICHARD RORTY, *OBJECTIVITY, RELATIVISM, AND TRUTH* (1991); MICHAEL S. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1987).

163. See DANIEL FARBER & SUZANNA SHERRY, *BEYOND ALL REASON* 15-33 (1997) (providing a critical overview).

164. 413 U.S. 15 (1979).

165. See *id.* at 24; Derthick, *supra* note 37, at 70-72.

166. 410 U.S. 113 (1973).

167. 492 U.S. 490 (1989).

168. 505 U.S. 833 (1992).

169. See HARVEY C. MANSFIELD, JR., *AMERICA'S CONSTITUTIONAL SOUL* 84-97, 101-35 (1991).

170. See, e.g., Edward G. Carmines & Geoffrey C. Layman, *Issue Evolution in Postwar American Politics: Old Certainties and Fresh Tensions*, in *PRESENT DISCONTENTS* 89 (Byron E. Shafer ed., 1997).

national level. The Court displayed a lingering nationalism in *Romer v. Evans*,¹⁷¹ when it struck down Colorado's Amendment Two. However, issues ranging from school curriculum, to environmentalism, to affirmative action, to capital punishment are diversely resolved at the state and local levels.¹⁷² More generally, *Romer* appears to be a fairly isolated effort on the part of a Court that has been generally unwilling to inject itself strongly into local moral disputes. Efforts to inoculate individual states and the national government against the effects of Hawaii's expected legalization of homosexual marriages are indicative of such political stalemates. Both sides have been able to use state governments to advance their agenda but have been unable to nationalize their preferred outcome.¹⁷³ Diversity becomes an acceptable second-best solution when political fragmentation prevents success at the national level. Although such strategic diversity is potentially unstable and does not reflect a direct valorization of decentralized federalism, it is nonetheless consistent with the historic foundations of federalism and tends to weaken the foundations of centralization.

Finally, the commitment to uniformity may give way if dominant political issues are seen as primarily pragmatic, rather than moral, in nature. Such pragmatism may arise from a change in the political agenda or from the exhaustion of a previously ascendant moral vision. Although the overall tendency of the current political climate is difficult to gauge, several recent events illustrate the decentralizing thrust of pragmatic politics and the minimization of its moral dimension. Perhaps the most dramatic recent example is the reconstitution of some federal welfare programs as block grants to the states rather than as entitlements to individuals.¹⁷⁴ The conflict over entitlements clearly reflects partisan calculations of constituency interests and differing judgments on policy effectiveness, but it also reflects a reconceptualization of the nature of welfare spending. Although never fully national or uniform, welfare spending had briefly enjoyed moral significance as an individual entitlement on social resources.¹⁷⁵ The current welfare debate reflects a fundamental rethinking of social welfare

171. 517 U.S. 620 (1996).

172. See DYE, *supra* note 61, at 41-44.

173. See Rhys H. Williams, *Is America in a Culture War? Yes-No-Sort Of*, CHRISTIAN CENTURY, Nov. 12, 1997, at 1038; Christopher Caldwell, *The Southern Captivity of the GOP*, ATLANTIC MONTHLY, June 1998, at 55.

174. See Robert Pear, *House Democrats Assail Welfare Plan Backed by Governors*, N.Y. TIMES, Feb. 21, 1996, at A16.

175. See, e.g., Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964). See generally Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731 (1997).

programs, including the influence of Charles Murray's work challenging the morality of welfare at the individual level and emphasizing an aggregate, utilitarian analysis of social spending.¹⁷⁶ By contrast, Catholic Charities, for example, criticized the reforms in the language of individual rights and moral social responsibilities.¹⁷⁷ Liberal activists, on the other hand, have sought to emphasize the wide range of likely state welfare payments as evidence of state irresponsibility and a national moral crisis, achieving success only in such cases as intergenerational transfers where the "moral" argument is still ascendant.¹⁷⁸ This debate, which emphasizes "flaws in the welfare system," reflects an increased focus on pragmatic policy "success" rather than the moral character of individual claims on social resources.¹⁷⁹ But a more pragmatic welfare debate can tolerate subnational diversity and experimentation, at the expense of individual claimants to supplemental income. If there is no longer an agreed upon answer as to how social goals are to be achieved or even as to what those goals are, then the political argument for imposing one national outcome and displacing multiple, locally chosen outcomes becomes less compelling. As the moral certainties of earlier debates on issues ranging from race to consumer safety give way to moral confusion or pragmatism,¹⁸⁰ then the costs of diversity become more acceptable and the political support for centralization becomes more tenuous.

A second element in the altered dynamic of public morality is the recovery by the states of much of their legitimacy as independent polities. The foundation for such a recovery was laid with the state governments' own internal reforms.¹⁸¹ Through accident, external prodding, and internal agitation, the state governments have largely managed to shed their image as venal backwaters.¹⁸² Since the early

176. See generally CHARLES A. MURRAY, *LOSING GROUND* (1984).

177. See Pear, *supra* note 174.

178. See Tom Teepen, *Welfare "Reform" an Insult to the Poor*, ATLANTA CONST., July 30, 1996, at A7.

179. See generally Roper Center, *supra* note 110.

180. See David A. Hollinger, *Group Preferences, Cultural Diversity and Social Democracy: Notes Toward a Theory of Affirmative Action*, 55 REPRESENTATIONS 31 (1996); Don Phillips, *Federal Speed Limit, Set in 1974, Repealed*, WASH. POST, Nov. 29, 1995, at A16; Barbara Vobejda & Judith Havemann, *In Welfare Decisions, One Size No Longer Fits All*, WASH. POST, June 30, 1997, at A1.

181. See ANN BOWMAN & RICHARD C. KEARNEY, *THE RESURGENCE OF THE STATES* 1-104, 187-256 (1986); DAVID B. WALKER, *THE REBIRTH OF FEDERALISM* 249-83 (1995). See generally Mavis Mann Reeves, *The States as Polities: Reformed, Reinvigorated, Resourceful*, 509 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 83 (1990).

182. See generally Reeves, *supra* note 181; WALKER, *supra* note 181; BOWMAN & KEARNEY, *supra* note 181.

1960s, state and local employment has grown at ten times the rate of federal civilian employment, as the states have professionalized and taken on new responsibilities.¹⁸³ The decline of political machines, the reapportionment of state legislatures, and the expanded capacity and expertise of state governing bodies, among other reforms, have all improved the real and perceived quality of state government. As a consequence, states have been able to demonstrate an ability to govern in a responsible manner, helping to overcome the lingering animus of state failures to address the economic and social problems of industrialization and racism. In an era of federal deficits, the states have generally been constitutionally obliged to balance their budgets. Education, tax, and welfare reform movements originated in the states. State and local governments have been active in restructuring their own operations to provide services more efficiently, and the states have been highly responsive to changing policy preferences ranging from assisted suicide, to term limits, to bilingual education. State governments increasingly seem to be the dynamic and effective level of government.¹⁸⁴ Such decentralization and "state empowerment" are only viable for state and federal officeholders if state governments are regarded as trustworthy political agents in their own right. In fact, even as distrust of the federal government has risen, state and local governments have gained the trust of distinct majorities of the general public.¹⁸⁵

New state activism is important not only for enhancing the image and legitimacy of the states, but also for expanding the relative importance of the states. Despite the ambivalence of many local reformers, state activism had distinctly centralizing implications through much of the twentieth century, as liberal regulatory and redistributive policies required national intervention to be effective.¹⁸⁶ More recent state activism, by contrast, has shown state officials to be responsive to constituent concerns while engaging in the types of developmental and allocative activities that state governments can perform effectively.¹⁸⁷ State efforts ranging from tax reform, to welfare reform, to educational reform show the states to be dynamic polities that are more likely to portray national policy as a hindrance than as an aid.

183. See DONAHUE, *supra* note 64, at 10-11.

184. See Robert Pear, *Governors Group Finds Agreement on Medicaid Plan*, N.Y. TIMES, Nov. 6, 1995, at A1; Don Phillips, *Safety Groups Aghast at Prospect of No National Speed Limit*, WASH. POST, Nov. 25, 1995, at C1.

185. See generally Conlan, *supra* note 99; Roper Center, *supra* note 97.

186. See KARL, *supra* note 62, at 25.

187. See generally OSBORNE, *supra* note 142.

Although state policy successes may be replicated in other governments,¹⁸⁸ current state policy is less likely to require nationalization in order to be effective than was the case with the Progressive reforms of the earlier part of the century. In the past two decades, state and local governments have actively formed and implemented their own policies, while increasingly relying on their own fiscal and administrative resources.¹⁸⁹ States are acting more as the independent decision-makers expected in federalism than as the functional administrators envisioned by intergovernmental relations.¹⁹⁰

Ironically, the cause of centralized federalism has also been weakened by its very success. Notably, the constitutional reordering of the early twentieth century has established a new legal baseline, most relevantly in the area of civil rights. The federal judiciary has essentially legalized the general postwar consensus that expanded the range of protected individual rights and sharply curtailed many traditionally accepted state practices. The worst governmental abuses in a myriad of areas have been largely outlawed through statute, regulation, and judicial pronouncement. The winning of such libertarian victories involved embarrassment and defeat on the part of the states, but the current status of such legal protections now empowers the states toward renewed importance. The states have regained trust, in part because the federal judiciary provides an apparent guarantee that they will not descend into actions now regarded as universally reprehensible. Meanwhile, the states can pursue more diverse "experimentation" in areas of less national agreement.

IV. Countervailing Tendencies

There are a number of countervailing tendencies in current politics, however, that could support further centralization on different grounds. For example, the twentieth century has also seen the gradual nationalization of the media and social interests, often in response to the increased activity of the national government itself.¹⁹¹ One result of this nationalization of interests is a decreased tolerance for local diversity. Just as television was instrumental in mobilizing national opposition to Southern segregationists, so national interest groups

188. See Virginia Gray, *Competition, Emulation, and Policy Innovation*, in NEW PERSP. ON AM. POL. 230, 237-38 (Lawrence C. Dodd & Calvin Jillson eds., 1994).

189. See generally Shannon & Kee, *supra* note 7; Conlan, *supra* note 99.

190. See Martin Diamond, *The Ends of Federalism*, in THE FEDERAL POLITY 129, 130-42 (Daniel J. Elazar ed., 1974); see also Garry Wills, *The War Between the States. . .and Washington*, N.Y. TIMES MAG., July, 5, 1998, at 26.

191. See MANSFIELD, *supra* note 169, at 170-72.

currently mobilize to attack such localized policies as Colorado's Amendment Two or California's heightened environmental measures. Similarly, increased demographic mobility not only tends to homogenize national populations and minimize local differences, but also to reduce the individual citizen's attachment to subnational governments, which the Founders regarded as a crucial bulwark of state authority.¹⁹² Such cultural and political homogenization should not be overstated, however. Local, state, and regional populations remain distinct in their policy preferences and political identities.¹⁹³ Political parties have also been weakened and nationalized, such that federal officials are less responsive to the concern of local officials and more directly concerned with constituent demands. As a consequence, the institutional and ideological barrier to federal intervention in "local issues" has been reduced.¹⁹⁴ Although globalization has been politically accepted to this point, the United States could experience a populist rejection of current economic changes or a reconsideration of how to respond to them.¹⁹⁵ In such circumstances, the national government could be strengthened in response to a different assessment of economic costs. Finally, if liberal moralism is on the political decline, there remains the possibility of a strengthened New Right moralism. Efforts by some congressional Republicans to restrict the eligibility of single mothers' benefits indicates the possibility of a renewed commitment to political centralization on behalf of a different set of moral principles.¹⁹⁶ Similar centralizing dynamics can be seen on such specific issues as environmentalism and drugs, where a politics of principle has resisted decentralizing efforts. Such tendencies did not underlie the original development of the modern state and the growth of centralized federalism, but they may form new supports for centralization even as the inherited modern state is significantly altered. Given the transitional nature of current politics, continued centralization cannot be assumed, but rather the relevant dynamics

192. See, e.g., THE FEDERALIST No. 17 (Alexander Hamilton).

193. See, e.g., DYE, *supra* note 61, at 38-42; JOHN SHELTON REED, THE ENDURING SOUTH 1-7, 83-102 (1986); John J. Fitzpatrick & Rodney E. Hern, *Political Culture and Political Characteristics of the American States: A Consideration of Some Old and New Questions*, 41 WEST. POL. Q. 145-53 (1988).

194. See generally Chubb, *supra* note 18; James A. Reichley, *The Rise of National Parties*, in THE NEW DIRECTION IN AMERICAN POLITICS (John Chubb & Paul Peterson eds., 1985).

195. See generally BENJAMIN BARBER, JIHAD V. MCWORLD (1995); PATRICK J. BUCHANAN, THE GREAT BETRAYAL (1998).

196. See generally Jeffrey L. Katz, *Uneasy Compromise Reached on Welfare Overhaul*, CONG. RES. WKLY. REP., Sept. 16, 1995, at 2804.

determining centralizing pressures need to be identified and examined.

This analysis of the changing foundations of federalism also indicates that a shift toward decentralized federalism would not simply be reactionary. Federalism cannot be effectively understood through the currently dominant dichotomy of idealized nationalism versus dual federalism.¹⁹⁷ The particular historicized meaning of federalism is determined by its development across time, not by shuttling between the two ends of a stable spectrum of relative centralization. Focusing on the political structures that underlie federalism emphasizes that relative decentralization is not closed off by past constitutional settlements. Bruce Ackerman's theory of constitutional moments, for example, usefully points to the political influences on constitutional meaning, but both his particular narrative and his reliance on an amendment theory of constitutional change creates a overarching sense of unidirectional, progressive constitutional development.¹⁹⁸ This essentially whiggish version of American constitutional history leaves little sense that decentralization is a realistic possibility or that, if accomplished, it could be anything other than a reversal of earlier achievements.¹⁹⁹ The "new" decentralized federalism would not simply be a recreation of the old. Changes in the federal structure incorporate past developments, even if they shift the basic trajectory of the political system.²⁰⁰ Thus, our understanding of constitutional change or the future dynamics of federalism will not be advanced very far if we are locked into comparisons with earlier variations on decentralization.²⁰¹ The future of federalism will respond to emerging political forces, such as new political ideologies and economic commitments, that will not replicate old patterns, but will rather react to their own historic logic. A new decentralization will not create, and does not depend upon creating, either a nightwatchman state or rigid separate spheres of governmental function.

197. See generally Nathan, *supra* note 11.

198. See generally ACKERMAN, *supra* note 2. Ackerman's approach also emphasizes changes in judicial doctrines. But changes in federalism need not be accompanied by substantial doctrinal innovation, especially in the case of decentralization, which does not impinge on the constraints of existing constitutional law.

199. See generally SAMUEL H. BEER, *TO MAKE A NATION* (1993); DAVID F. ERICSON, *THE SHAPING OF AMERICAN LIBERALISM* (1993).

200. See KARL, *supra* note 62; GRIFFIN, *supra* note 2, at 72-87.

201. See, e.g., E.J. DIONNE, JR., *THEY ONLY LOOK DEAD* 203-07 (1996); Jess Bravin, *Confused About the Constitution*, WASH. POST, June 30, 1996, at C7.

V. Conclusion

The conception of federalism inherited from the early twentieth century was the consequence of a particular set of historical, economic, and political conditions that encouraged the development of centralization as one incident of the development of the modern state. Although political and judicial actors of the late nineteenth and early twentieth centuries occasionally considered the structure of federalism explicitly, alterations in the constitutional understanding of federalism were often the indirect result of other struggles. The coming together of several basic tendencies in American politics put in place a distinct logic that biased the political system toward greater centralization during much of the past hundred years. Enduring alterations in the role of government in American society and the relative public standing of the various levels of government gave a political advantage to the national government vis-à-vis the states. Twentieth century centralization was characterized by the shifting of important policy decisions and state capacity to the national government at the expense of the states. That centralizing logic was consistent with the design and language of the Constitution but was not required by it.

The historical variables that encouraged political centralization have been changing in recent years. As a result, the structural logic that impelled the country toward greater centralization has been weakened, and a rather different logic is taking form in its place. More specifically, the modern state was built on several national trends: the rise of an administrative ethic that valorized bureaucratic management and centralized decision-making, the development of a regulatory and redistributive logic that required enhanced state capacity and national reach in order to control the economic forces of the industrializing corporate economy, and the transformation of the public morality that contrasted the deficiencies and mendacity of the state governments with the relative purity of the national government. Those foundations of the modern state have gradually eroded, and with them the driving force for centralization.

Most prominently, modern liberalism—as the ideology that underwrote the development of the modern state—has suffered a crisis of public authority. The economic conditions and understandings, to which the modern state was a response, have been replaced through the rise of post-industrialism and globalization. The public morality has undergone changes that have elevated the relative status of the states while undermining the moral authority of the national government. As a result, the constitutional meaning of federalism has

reached a transition point, when the old logic is increasingly inapplicable and a new has yet to take firm hold.

A fundamental shift in the structure of federalism is possible, but not yet certain. Existing constitutional structures can be understood, but their future development is open to political choice and disrupting events. Although the emerging tendencies discussed above are real, they are not yet fully established and can be reversed. Moreover, even as the centralizing logic of the modern state is eroding, no positively decentralizing logic has clearly emerged to take its place. Certainly, many of the forces that supported decentralization in the eighteenth and nineteenth centuries, such as an active substantive belief in the value of localism or the existence of strong federated political parties, are no longer present to reassert themselves.²⁰² Additionally, since the centralizing modern state was the result of the interaction of several variables, it is likely that any decentralizing momentum would also be the result of a confluence of forces.

The preconditions for a reconsideration of federalism are set. Significant decentralization need not follow from these ideological, institutional, and socioeconomic changes, but those changes create an opening for decentralization and offer some encouragement for doing so. The Court's recent rulings are most appropriately seen as calling attention to that opening rather than threatening to initiate radical decentralization on its own. To this extent, the current Court has shown itself to be relatively concerned with maintaining the independence of the states as policy-making entities capable of responding to their own diverse constituencies. Congressional efforts to coerce or commandeer state governments to achieve national policy goals are inconsistent with the increased quality, capacity, and responsiveness of state governments of recent decades. The Court has been more willing to remind national policy-makers of the independence of state and local governmental officials.²⁰³ Somewhat differently, the Court has also suggested a renewed willingness to define the boundaries of national authority. Although the Court in *United States v. Lopez*²⁰⁴

202. See Wildavsky, *supra* note 157, at 58-62. See generally Reichley, *supra* note 194.

203. See *Printz v. United States*, 521 U.S. 98 (1997) (holding the Brady Act's provision requiring local law enforcement to conduct background checks unconstitutional); *New York v. United States*, 505 U.S. 144 (1992) (holding a provision requiring state to take title of nuclear waste unconstitutional); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); see also *National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that minimum wage standards in Fair Labor Standards Act cannot apply to state employees performing traditional governmental functions).

204. 514 U.S. 549 (1995).

refused to break from post-New Deal formulations of the commerce clause powers, it also clearly emphasized the idea of the federal government as one of “enumerated powers” in a fashion that would not have been considered in the immediate postwar period. The Court is revitalizing the notion that some matters are “local” in character, in which national intervention is neither desirable nor manageable.²⁰⁵ The key to future decentralization will not be in whether the Court is willing to actively enforce such a constitutional vision, but rather in whether future political actors accept it as a framework for American politics.

Past changes in the structure of federalism highlight the importance of political analysis to the understanding of constitutional meaning. Although judicial opinions play a significant role in representing and formalizing conceptions of the Constitution, the focus should not be on judicial leadership. The judiciary is only one actor in the creation of the constitutional order. A purely legal analysis obscures as many of the changes taking place as it illuminates. The present Court is gingerly responding to the same forces that are reshaping federalism in a number of arenas. Moreover, even though the Court may hedge the boundaries of permissible national or state action, it cannot determine the extent to which states recapture the political initiative or the degree of political responsibility and public authority that the states can claim for themselves. A new era of a less centralized conception of federalism will be unlikely to return to the rigid separation of functions and national inactivity characteristic of the nineteenth century. Rather, a shift in our image of federalism is more likely to reflect a reorientation in the political agenda, in which state and local governments take a more prominent role in public affairs and the activities of the federal government are less important to the lives of the citizenry. Recent tendencies suggest a return to the nineteenth century only in that centralization now appears to carry less advantage than it had through much of the twentieth century, when it promised to restore the effectiveness of public power and to bring public policy in line with a new moral sensibility. A more political analysis reveals the shifting logic of federalism, exposing the biases that are built into the inherited political structure and the foundations of those tendencies. The constitutional order is not simply a legal artifice that is imposed on the chaos of politics, but is also an emergent architecture that operates within and through politics itself.

205. See, e.g., *id.*

