

Federalism after the Election

By Michael S. Greve

Federalist Outlook No. 3 discussed contemporary Germany's unhappy experience with "cooperative federalism." This issue was to apply the lessons learned abroad to the domestic context and to argue that what American federalism needs above all is less cooperation. Without abandoning that important program, we interrupt it for a timely consideration of federalism's fate after a bitter and messy election.

The 2000 presidential election and ensuing events seem to have left federalism bruised and battered. The evident inability of local officials to count votes or to design an intelligible ballot has generated a raft of proposals for comprehensive national reforms. The fact that Vice President Gore won the popular vote and yet lost the election has prompted calls for the reform or even the abolition of the Electoral College—a federalism-preserving institution par excellence. A modern democracy, it is said, cannot tolerate an institution that distorts the collective voice of the people.

The election may in fact have weakened federalism—but not necessarily and not in the way a short-term, impromptu analysis of recent events would suggest. A longer-term view points to a renewed and probably very harsh and partisan confrontation between liberal, Democratic nationalism and conservative, Republican federalism. While the debate will not always be conducted under those banners, the confrontation between nationalism and federalism will shape policy disputes from electoral reform to welfare and education policy to judicial nominations. The confrontation need not leave federalism defeated. It may even provide an opportunity for a new profederalist campaign against nationalist impositions—provided the Republican Party

has the unconventional wisdom to see that opportunity.

The Federalism Divide

The election, as everyone knows, was exceedingly close—not just nationwide and in Florida, but in many other diverse states, from New Mexico to Iowa, Wisconsin, Oregon, and New Hampshire. Many House and Senate races were equally close. The election left the Senate evenly divided and the House very nearly so. The picture is that of an evenly but sharply divided nation. The divide is cultural, not economic. It has a strong geographical and regional component.

Culture Matters. Francis Fukuyama argues, persuasively, that the partisan divide maps a pronounced cultural divide in American politics.¹ The Republican side is comfortable with a large public role for religion, emphasizes sexual restraint, and distrusts government. The Democratic side tends towards secularism, extols sexual tolerance and self-determination, and likes government—a kind, nurturing government, but much more of it.²

The sharp dichotomy obscures countless complexities, caveats, and shades of gray. Some conservatives are secularists; some liberals may proclaim, as Messrs. Gore and Lieberman virtually did, that the Lord Himself supports Democratic Party positions on racial quotas and health care reform. Americans seem more torn on hot-button lifestyle

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issues like abortion—and still more so on questions such as women's roles at home and in the workplace—than the absolutist rhetoric of advocates would lead one to suppose. Independents and iconoclasts exist.

Even so, the cultural divide is real. Genuine Independents are far fewer in number than is commonly assumed. (In the course of the election campaign, every one of them must have served on a focus group.) And, while few citizens will admit to themselves or to others that they are party animals at heart, political values and positions do come in clusters. If your cocktail party hostess serves soy milk, she will declare Anita Hill a saint before the evening is out. The chap who tells a Lewinsky joke will pontificate, after the next bourbon, on the right to bear arms. The single social marker, the casual utterance, reliably predicts cultural-political attitudes across a broad range of issues.

Cultural issues were suppressed in the election campaign because the two sides are so cemented and evenly matched that the marginal voters in the middle became a near exclusive focus of campaign rhetoric and positioning. The yawning cultural divide becomes visible, however, in high-stakes battles that force the combatants and spectators to choose sides. The Clarence Thomas nomination. Impeachment. The Florida imbroglio. Voters may profess “pox on both houses” to pollsters, and many seem resentful when asked to pay attention to political events. But, in the end, they want one side or the other to prevail.

Location, Location. The cultural divide has a strong geographical dimension. Large cities and small-town America split by astonishing margins: Gore carried large cities (over 500,000 population) by a seventy-one to twenty-six margin. Bush prevailed fifty-nine to thirty-eight in rural areas and small towns (except the Scandinavian midnorthern plains, which might as well be Sweden). Despite the tight race in many states, most produced landslide victories of 54 percent or better—eighteen states for Bush, ten states and the District of Columbia for Gore.

Although Bush won, or nearly won, states where he had no business competing—West Virginia, Tennessee, Oregon—and although Gore made unexpectedly strong showings in other states, the election confirmed the regional pattern of American politics. The Democrats own the West Coast and the Atlantic seaboard north of Washington, D.C. The Midwest is competitive. The rest of the country is Republican. The pattern holds for

presidential elections and, increasingly, for congressional seats. If Republicans can still hold governorships in states like New York, Michigan, Pennsylvania, Wisconsin, and Illinois, that is so because they govern like Democrats. Despite extraordinary efforts, not one of them could deliver for Bush.

True, the cultural divide does not reliably trace state lines. It runs through the three West Coast states and separates their coastal cities from their inland areas; and through Pennsylvania, where Philadelphia and its genteel suburbs prevailed over westerners who think of Attila the Hun as a liberal. Moreover, factors that are largely independent of geography shape the divide and the electoral outcome, sex being the clearest example. (The election showed an eleven-point gender gap, with unmarried women accounting for much of Gore's advantage among women.) Still, what state one lives in has a lot to do with what neighbors and what politics one is going to get. Topography and climate aside, no one would mistake Texas for New York, or Nebraska for Massachusetts.

Cultural Federalism?

The acrimonious presidential election has spawned a lot of hopeful speculation about national unity, coalition government, and olive branches. That is a conceit. The election and its aftermath have left both parties more distrustful and bitter than ever.

A more realistic—and actually more appealing—possibility is that the election outcome, and especially the geographical, jurisdictional dimension just sketched, may prompt the parties and their followers to settle for a kind of cultural federalism. Instead of attempting to tackle vexing, divisive lifestyle and moral issues at the national level, let us agree to disagree and settle them on a state-by-state basis.

Professor Alan Wolfe, author of a highly acclaimed book on Americans' public attitudes, has argued that a cultural (or, as he says, “moral”) federalism would be very beneficial to the country.³ Such federalism would enable us to manage our differences on important questions in a tolerant, sensible fashion. Instead of attempting to find a uniform, rigid compromise for a vast and diverse country in an all-or-nothing national battle on moral issues that make it hard to “split the difference,” we would face the easier task of finding varying acceptable compromises in a series of relatively more homogeneous states. Dissenters who feel strongly

about the matter could and would move. Most Americans, hard-core partisans, moderates, and the conflicted and confused alike, should find an experimental and fluid patchwork politics preferable to a national politics of one-size-fits-all, now and forever.

The election should by all rights have made cultural federalism more attractive to citizens. Its contentious aftermath compelled citizens to choose sides and induced large numbers to view the other side as intransigent and loathsome. At the same time, the close electoral outcome shows that neither side can reliably prevail and govern over the other. Those circumstances, in combination, may render a standoff along state lines a plausible, if partial, alternative to a permanent national standoff and deadlock—perhaps now or perhaps when the hope for unity has proven a chimera.

While Professor Wolfe may be right that cultural federalism is a win-win game for citizens on all sides, a political federalism debate is bound to be highly partisan. Democrats are fiercely nationalist, especially on cultural and moral issues, and the election has strongly reinforced that commitment. Republicans are ambivalent and equivocal in endorsing a federalist pluralism, but the election may have persuaded them that they would gain from a more resolute commitment. The confrontation between Democratic nationalism and Republican federalism is the battle the country is going to get.

Democratic Nationalism

The election has reinforced the Democrats' ideological commitment to cultural nationalism in three ways.

Too Many Hostile States. As noted, the Democrats' empire looks like the Pakistan of old. Their blue coastal dominions on the election-return map are separated by a sea of opposition red. To concede the right of inland citizens to govern themselves through state politics is to concede a great deal.

The Forum Determines the Winner. Many conservative positions on cultural issues that are unmentionable in Washington, D.C., play well in many states, while many liberal positions spell doom. Having started out as a proud gun controller, candidate Gore reversed course and posed as a proud huntsman—his earlier position garnered votes in Massachusetts, where he did not need them, while costing support in hard-fought midwestern states. States are the places where citizens enact ideas that are

anathema to the cultural-political Left, from concealed weapons permits to banning partial-birth abortion.

Elitism. Citizens who hold intense conservative preferences on a social or cultural issue are usually unperturbed if citizens elsewhere hold a differing view. A Nebraska gun enthusiast will shake his head over the control freaks in Massachusetts, but he is not going to lose sleep over them. The prospect of homosexual marriages in Hawaii caused little public concern until it appeared that other states might have to recognize such unions. Contrast that disposition with the scene at the American Civil Liberties Union's headquarters in New York City, where folks spill their coffee over school prayer in Santa Fe.

Put more generally, the case for cultural federalism presumes that citizens hold divergent but legitimate preferences and values. The Democratic leadership and its partisans, however, have persuaded themselves that their enemies' values are illegitimate, belonging to a racist, sexist, homophobic conspiracy. Witness impeachment; witness the election. If one's picture of the country is that of Democratic adviser Paul Begala, the case for federalism evaporates.⁴ The decent and humane must drain the swamp through national intervention.

Democratic nationalism comes with so much sweet talk that we tend to overlook its tyrannical nature. Advocates for "choice" will not let a single state legislature choose to express its respect for life, let alone enact laws that would encourage women to think before having an abortion. Having demolished traditional sexual morality (which was enforced, by and large, gently and informally), liberalism has erected in its stead a rigid national regime of laws, regulations, agencies, and lawsuits to enforce its new morality against sexual harassment. When Democrats enthuse about diversity, they mean that every single college must be racially balanced; when they shout "tolerance," they are getting ready to shut down the Boy Scouts. Democratic nationalism may occasionally, for tactical reasons, fight in state or local arenas. But it must in the end be *nationalism*, for it must close off the exits where half the country is headed.

Republican Federalism?

While Democratic nationalists comprehend and act upon the logic of their politics, Republican antinationals tend to be half-hearted and confused in the pursuit of federalist solutions.

That is to some extent inevitable. The federalist option typically looks like only a second best when compared with the prospect of winning it all—and the election and its aftermath may suggest that Republicans can, after all, beat Democrats at their own game. A sustained political strategy for a more federalist politics also seems mildly schizophrenic since it must of needs be fought at the national level. Then, too, every time Republicans lift their eyes from the Tenth Amendment, they discover another nifty thing that Washington, D.C., could do, from banning gender-based violence to requiring teacher testing. Even the most devoted Republicans tend to view federalism as an abstract principle, not as something that has to do with power, politics, and constituencies.

The election should have cured Republicans of those tendencies. They own some thirty states; the Democrats own the coasts. The GOP's constituencies own small-town America; the Democrats own Hollywood, New York, and Washington, D.C. George W. Bush was saved by the Electoral College, a quintessentially federalist institution that forces Democrats to troll for votes in states and among citizens they detest, while it enhances the voice and the vote of those states and citizens.

Republicans had better learn to make the case for federalist institutions against the impending nationalist offensive. Over the coming years, the fight between federalists and nationalists will shape the political debate in three arenas: electoral reform, state-federal relations, and judicial nominations. In each arena, Democratic nationalists will press their case unflinchingly. In each arena, a confident argument for federalism may carry the day and produce political rewards.

Electoral Reform

Before the elections, Mr. Gore and his camp speculated about the prospect of winning a majority in the Electoral College while losing the popular vote. No suggestion was made that such an election might be illegitimate. But once Mr. Gore appeared to have carried the popular vote, with the Electoral College vote still uncertain, the demagogic appeal to the collective will of the people—in derogation of the forms and formalities of a federalist republic—found its natural home on the Left. “Popular majority” became a standard refrain among Democratic loyalists.

The appeal to the popular vote culminates in a call for the abolition of the Electoral College—the most

definitive step to nationalize, homogenize, and urbanize American politics. Senator-elect Hillary Clinton volunteered that proposal as her first legislative priority the day after the election.

Mrs. Clinton's proposed amendment will go where identical proposals in earlier decades have gone—nowhere. The divergence of the popular and Electoral College majorities has failed to alarm the public, and the resistance of the smaller states that benefit from the Electoral College will doom any reform proposal. Mrs. Clinton's announcement, however, should not be dismissed as a casual utterance.

The source of the proposal indicates that a debate over the Electoral College, or indeed over any electoral reform proposal, will be an intensely partisan affair. In fact, Mrs. Clinton's public call to abolish the college resembles the “vast right-wing conspiracy” remark she made in the midst of the impeachment debate. Widely dismissed as hyperbolic slip, that remark was a deliberate and, as it turned out, successful call to rally liberal constituencies for a Hobbesian politics of us against them. So now, Mrs. Clinton is smart enough to know that her proposed constitutional amendment will fail—and quick enough to have grasped, before anyone else, that the red on the electoral map (and hence the college) shows the geographic vastness of the right-wing conspiracy. That political reality is the target of Mrs. Clinton's seemingly quixotic proposal.

Her troops, certainly, missed neither the point nor a beat. On November 10 an “Emergency Committee” of “Concerned Citizens” published an unctuous full-page advertisement in the *New York Times* that implored Florida officials to “preserve the dignity and legitimacy of American democracy.” The celebrity signers found “good reason to believe that Vice President Gore has been elected President by a clear *constitutional majority of the popular vote*” (emphasis of the nonexistent entity added).⁵

Concurrently, law professors began peddling various proposals to nationalize, rationalize, modernize, and democratize America's presidential election system, perhaps through a constitutional amendment or through federal funding and legislation under the Spending Clause.⁶ The usual good government suspects from Common Cause to John Anderson have joined the rant against the Electoral College as an “18th century anachronism.”⁷

The temptation on the Republican side will be to breathe relief at the certain fizzling of Mrs. Clinton's Electoral College initiative and to consider, in a bipartisan spirit, some more modest and federalism-friendly

reforms. That would be an accommodation to creeping nationalism. The right course is this: drag the Electoral College abolition program into full public view, make it the centerpiece of the post-Florida reform drama, hold elaborate, nationally televised hearings, and kill the proposal.

That exercise would be a useful rehearsal of federalist arguments for the more difficult debate on modest reforms. Blocking those proposals is equally important for three reasons. First, federal funds for “improving” voting procedures will inevitably be accompanied by a web of regulations, lest the locals print up illegible ballots or purchase second-hand machines. Since state and local governments would find it cumbersome to administer separate election mechanisms for their own contests, the federal regime would inevitably govern state and local elections along with federal ones.

Second, modern voting tools, such as computers or variants of automated teller machines, will undoubtedly confuse both voters and election officials. (This year Oregon used a novel mail-in ballot to democratize and rationalize its electoral process; it may still be counting its returns.) Diversity in voting arrangements, if nothing else, promises that there will be no debacles of national proportions. (Think of the implications of a national butterfly ballot.) Nothing that happened in Florida or elsewhere undermines federalism’s logic: a bunch of relatively small mistakes is preferable to a single big one.

Third, any standardization will inevitably favor Democrats, since it is disproportionately Democratic voters who cannot seem to get to the polls or handle ballot sheets and machines. Democrats, of course, clearly understand the benefits of national standards and democratization: passage of the recent federal motor-voter law had far more to do with partisan politics than a philosophic commitment to citizen participation.⁸

The federalism case against national “solutions” will require some courage and ingenuity. But it is a case that federalists can win.⁹

Federal-State Relations

The next four years will likely feature federal budget surpluses and a closely divided government. Those conditions are conducive to federal block grants for educational, welfare, environmental, and other purposes. The federal government has the money that the states say they lack, and general-purpose block grants (as distinct

from categorical grant restrictions) facilitate legislative compromise. The Republican idea of fiscal federalism has been to expand the states’ administrative autonomy under federal programs, to devote more federal money to ostensibly conservative objectives, and to crow about the beneficial results. The time has come, though, to rethink block grants and their political economy. Serious federalism frees states to be autonomous and competing power centers against national schemes. It gives states—both as political institutions and as groupings of self-governing citizens—the means and incentives to resist federal impositions. Block grants do no such thing. Instead, they turn states into bloated participants in nanny statism.

Consider welfare reform, a block-grant showpiece and a widely heralded policy success. Welfare rolls have been cut in half since 1994, and the 1996 reform contributed measurably to that result. The political consequences, however, are not nearly so attractive as the policy outcome. The combination of reduced case loads and federal welfare funds, fixed at a generous level to prompt recalcitrant states and federal legislators into accepting the reforms, generated a lot of loose cash—upwards of \$20 billion by most estimates. States used a good chunk of it to provide the welfare-to-work clientele with armies of child care workers, job counselors, and drug therapists, with the principal effect of funding and expanding a reliably Democratic voter base.

Republicans have been too enamored with block grants, and too busy extolling the virtues of state and local flexibility over “unfunded mandates,” to realize that any federal grant, block or categorical, will first and foremost finance governmental policy cartels. The federal money sticks where it hits, and whatever benefits may eventually reach the ostensibly intended citizens are incidental and accidental. Federal education grants—now 7 percent of all government spending on education—bring armies of affirmative action officers, bilingual teachers, child nutrition specialists, special education experts, compliance officers, and grants administrators. “It’s for the children.” Perhaps, but what the federal money actually buys is a bureaucratic, unionized, Democratic fighting force for further centralization. Such policies are not a notable victory for Republicans—or for federalism.

A good place to change course would be with the pot of welfare money that sits unspent in the federal accounts. The disposition of those funds will be a big bone of contention when the welfare law must be

reauthorized in 2001. Governors and other state officials fear a federal “clawback” and will argue vehemently for a “federalist” option of leaving the money to the states for—what? More nannies? A truly federalist reform would leave the money with the states and permit them, by statute, to pass the money on in the form of general-purpose tax cuts. (Existing law prohibits that option.) While the governors could continue to build welfare or workfare states, the tax cut permission would at least invite a public debate, in the states, on the disposition of the cash. A small step, to be sure—but one that would intensify policy competition among the states, strengthen their independence, and give citizens an opportunity to challenge the intergovernmental welfare cartel.

Judicial Appointments

A confident federalist posture is most urgent in the area of judicial and especially Supreme Court nominations. President Bush’s narrow and highly contested victory, coupled with the deadlock in the Senate, will make it difficult to find a confirmable nominee who would, first, support the current Supreme Court majority’s efforts to enforce federalism restraints against Congress and, second, work to curb the Supreme Court’s very unfederalist ardor to serve as national arbiter of our moral concerns and dilemmas. The Left will accuse any plausible candidate as a potential supporter of the Supreme Court’s “judicial activism,” and the federalism precedents will be Exhibit A. Professors Jeffrey Rosen, Laurence Tribe, and Cass Sunstein and columnist Anthony Lewis have already rehearsed the theme in the op-eds. Senators Leahy and Biden have done so on the Senate floor. President Clinton has inveighed against a “new form of ultraconservative judicial activism that rejects the government’s right to protect the rights of our citizens.”

Republicans are ill-prepared to counter such charges. The easiest response—that Tribe & Co. should kindly shut up about “activism” until they are ready to renounce *Roe v. Wade*—would turn a nomination fight into a brawl over abortion, which would be unpromising even if Republicans had the stomach for it. Republicans will instead be tempted to protest that they and their nominee are actually “strict constructionists.” That tack, however—another belated attempt to defeat William Brennan—overlooks that the Supreme Court’s federalism cases are quite activist in style. They are defensible, but only as a form of principled constitutionalism. Republi-

cans, unfortunately, are accustomed to arguing judicial style instead of constitutional substance and may be unable to switch gears.¹⁰

Safe judicial choices that avoid the conundrum may not exist. The widely expected nomination of a conservative Hispanic would prompt advocacy organizations to denounce the nominee as an insult to the Latino community, much as they denounced Justice Clarence Thomas’s nomination as an insult to blacks. The nomination of a potential fourth Catholic justice (in addition to Justices Kennedy, Scalia, and Thomas) poses a risk of even nastier invective. The tempting option of nominating a former or sitting senator, who may benefit from senatorial courtesy, would bode ill for federalism. The Supreme Court’s federalism precedents treat Congress with a commendable lack of deference. A senator-turned-justice would probably opt for more deference and hence less federalism: He will have voted for the statutes that might become a target of federalism litigation, and he will sympathize with legislators who feel compelled to vote for constitutionally problematic but symbolically appealing laws.

In the event of a sitting justice’s retirement, the Supreme Court’s federalism and, consequently, the fate of federalism itself will come to hang on the Republicans’ ability to defend a robust, judicially enforced federalism: not as a nettlesome technicality but as a central, wholesome, freedom-enhancing part of the constitutional culture. The sooner they prepare for the task, the better off we shall be.

Onward—and Upward? My account of a cultural divide, its interplay with political institutions, and the parties’ relative political stakes in nationalism and federalism will strike many readers as oversimplified and contentious. Having previously expounded on cultural federalism’s considerable attractions to citizens of widely varying views and persuasions,¹¹ I would much prefer a symmetrical and consensual scenario of its emergence to the partisan, knock-down brawl described in this *Outlook*. But I see no way around the hard reality that the Democratic Party and its organized constituencies leave no room for federalism, cultural or otherwise.

Republicans have a stake in strengthening federalist, antinationalist institutions and policies, but they may lack the requisite resolve and strategic sense. Democrats think systematically about the political and constituency-building implications of their positions. Republicans do not. Federalist policies that would discipline government

and strengthen states as power centers, not federal welfare partners, seem to be beyond their imagination. The election, however, may yet compel federalism's natural allies to recognize the stakes. At the national level, Francis Fukuyama has observed, the conservative cultural cause is probably lost. Therein lies liberalism's strength—and its hope of clubbing traditionalist outlier states into obedience. Liberalism's weakness is that it confronts some thirty such states—excellent places, one and all, to run traditionalist experiments from school choice to tax cuts and excellent places to preserve and revitalize organizations and institutions that will, if nothing else, get to fight another day.

If Republicans can act on that recognition, they will be able to give the nationalists a run for their money. A firm conservative defense of a federalist, experimental polity would make for a very confrontational, partisan politics. In the long run, however, federalism's attractions might command and hold broad appeal—broader appeal, certainly, than a blanket defense of traditionalist positions that will have to be surrendered in any event. Federalism would thus marry political expediency with a principled defense of constitutionalism. That defense, come to think of it, has often been the Republican Party's proud responsibility. Now is the worst time to shun it.

Notes

1. Francis Fukuyama, "What Divides America," *Wall Street Journal*, November 15, 2000, p. A26.
2. For an elaboration on this point, see David Frum, "Back to the 1880s," *Weekly Standard*, vol. 6 (December 4, 2000), pp. 12–14.
3. Alan Wolfe, "Uncle Sam Doesn't Always Know Best," *Wall Street Journal*, March 29, 2000, p. A22. Professor Wolfe's book is *One Nation, After All* (Viking, 1998).
4. "You see the state where James Byrd was lynched—dragged behind a pickup truck until his body came apart—it's red. You see the state where Matthew Shepard was crucified on a split-rail fence for the crime of being gay—it's red. You see the state where right-wing extremists blew up a federal office building and murdered scores of federal employees—it's red. The state where an Army private who was thought to be gay was bludgeoned to death with a baseball bat, and the state where neo-Nazi skinheads murdered two African-Americans because of their skin color, and the state where Bob Jones University spews its anti-Catholic bigotry: they're all red too." This was from Mr. Begala's MSNBC Internet column, posted a week after the election but shortly thereafter removed.
5. "The Election Crisis" (advertisement), *New York Times*, November 10, 2000, p. A29. The ad also called upon Florida officials to explore the option of new elections in Palm Beach County—another constitutional impossibility.
6. See Lani Guinier, "Making Every Vote Count," *Nation*, December 4, 2000 (arguing against winner-take-all elections and for a gaggle of participation-enhancing reforms); Kathleen M. Sullivan, "One Nation, One Standard Way to Ballot," *New York Times*, November 15, p. A31 (proposing constitutional amendment to permit congressional regulation of presidential elections); David Kairys, "What's the Fix? Take Your Pick," *Washington Post* ("Outlook"), November 19, 2000.
7. John B. Anderson and Steven Hill, "Give Voters a Bigger Voice," *New York Daily News*, November 12, 2000. Also visit the Web site of the Center for Voting and Democracy (John B. Anderson, president), www.fairvote.org, which provides a smorgasboard of proposals for electoral reform—all in the name of a more "democratic" nation.
8. For a discussion of how the National Voter Registration Act disproportionately favors Democratic candidates, see Steven Knack and James White, "Did States' Motor-Voter Programs Help the Democrats?" *American Politics Quarterly*, vol. 26 (July 1998).
9. While Congress possesses the constitutional authority to regulate the "places and manner" of congressional (but not presidential) elections, it has used that power only sparingly. The probable reason is that legislators obviously know how to win under the existing procedures and may thus be reluctant to create an alternative system with unpredictable effects on their own electoral chances. For reasons mentioned in the text, federal regulation of presidential elections would in practice govern state, local, and congressional elections. That spillover effect should temper the legislators' reformist ardor.
10. Candidate Bush described Justice Thomas and Justice Scalia, each in his own way a vigorous advocate of a real federalist Constitution, as model jurists—and then promised to appoint "strict constructionists," a very un-Scalian and non-Thomsonian species. "I am not a strict constructionist, and no one ought to be. . . . A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." Antonin Scalia, *A Matter of Interpretation* (Princeton University Press, 1997), p. 23.
11. See Michael S. Greve, *Real Federalism: Why It Matters, How It Could Happen* (AEI Press, 1999), especially pp. 4, 97–113.