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TOWARD ONE AMERICA: A VISION IN LAW

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In his Madison Lecture, Judge Wilkinson urges a new purpose for American law: the explicit promotion of a stronger sense of national cohesion and unity. He argues that the judicial branch should actively seek to promote this nationalizing purpose and suggests seven different ways for federal courts to do so. He contends further that a nationalizing mission for law is needed at this moment in American history to counteract the demographic divisions and polarizing tendencies of our polity. This purpose need not entail the abdication of traditional values of judicial restraint, should not mean the abandonment of the traditional American credo of unity through pluralism, and must not require the sacrifice of the law's historic commitment to the preservation of order and the protection of liberty. But the need for a judicial commitment to foster a stronger American identity is clear. The day when courts and judges could be indifferent to the dangers of national fragmentation and disunion is long gone.

INTRODUCTION

The present age will go down in American history as a partisan and polarizing one. Indeed, that may be its defining characteristic. America has had deeply divisive eras before—the Federalist-Republican period and the Civil War spring to mind—but those eras divided over deeply consequential principles. The partisan differences of the present era are hardly insignificant, but these differences do not

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justify what can be described without exaggeration as the sheer magnitude of mutual hate. Thus again we have an America defined by colors—red and blue states—less portentous than the Civil War's blue and gray, but in their own way sapping the nation's common bonds and sense of strength.

It would be surprising if the acrimony of the political system had left the courts unscathed. Still no one anticipated *Bush v. Gore*.[1] "Although we may never know with complete certainty the identity of the winner of this year's Presidential election," reads the impassioned coda of Justice Stevens's dissent, "the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."[2] The expression capped a judicial era of deep factional divisions, contrary to the founding years of our Republic, when the partisan strife in the political arena was met by an extraordinary degree of unanimity in the Third Branch.[3]

If law is part of the problem of polarization, it should likewise be part of the solution. In other words, law should consciously aspire to promote a stronger sense of national cohesion and unity. We have not traditionally thought of law in these terms. The great purposes of law have historically been the preservation of order in which freedom may flourish and the protection of liberty itself from overreaching by the State.

To these must now be added a third great purpose—that of maintaining a concept of American nationhood in a divisive and rapidly evolving age. It is hard to overstate the need for a national purpose in law. The gravity of our divisions demands it. The structural manifestations of our divisions—the gerrymandering of congressional districts to reflect each party's political base; the constant electioneering that leaves less time and opportunity for governance; the twenty-four-hour news cycle replete with cable, blogs, talk radio, and online news sites; the bitter judicial confirmation battles; the willingness of partisans to impeach, to destroy character, or to criminalize political differences—all these have led to the disintegration of civility and the ascendancy of partisanship.

The divisions in the body politic tell but part of the story. The changing demographics of this country augur a future of rich and challenging diversity, in which no ethnic group is a majority and the boundaries of race and ethnicity may become increasingly less distinct. In an age of varied national origins and ethnic heritages, it

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1 531 U.S. 98 (2000).

2 *Id.* at 128–29 (Stevens, J., dissenting).

3 *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

becomes important for law to celebrate commonality as well as to appreciate difference.

And in a nation where liberal and conservative, secular and sectarian, sunbelt and rustbelt, senior and junior, manual and informational, expose ever sharper fault lines, it becomes imperative that law bridge, not broaden, America's new gaps.

It is much easier to posit the need for a unifying role for law than to say how the law should unify. Where one person sees unity, another may see only division. Perhaps then it is best to draw prescriptions from various sides of the current legal debate. Even then, suggesting how national identity might thrive among competing racial, ethnic, regional, generational, religious, and other loyalties is a perilous task.

I nonetheless have seven recommendations. I arrived at seven not because it is the number of the wonders of the ancient world or even the first number of the famous convenience store, but because seven imperatives naturally suggest themselves to me as prerequisites to maintaining even a modest sense of national identity throughout the twenty-first century. I recognize that many of you may dispute this or that point in my talk. My hope, however, is that these suggestions, taken as a whole, will make us a stronger and healthier country.

I

Let's respect judicial restraint. By restraint, I mean a healthy judicial regard for the roles and enactments of the coordinate branches of the federal government and the proper functioning of the states. Judicial restraint promotes the pursuit of national unity. The corollary is that judicial activism tends to undermine it.

In advancing this thesis, I have no wish to point a finger. Both right and left have had their fling. *Lochner v. New York* advanced the notion of a personal freedom of contract as part of the liberty protected by the Fourteenth Amendment.[4] *Roe v. Wade* transported substantive due process from the economic to the personal realm.[5] The Rehnquist Court did not break with the notion that substantive due process applied to state legislation,[6] and the Court struck down federal legislation as well under the commerce power[7] and Section 5 of

[4] 198 U.S. 45, 53 (1905).

[5] 410 U.S. 113, 153–54 (1973).

[6] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[7] *E.g.*, United States v. Morrison, 529 U.S. 598 (2000) (striking down civil damages provision of Violence Against Women Act); United States v. Lopez, 514 U.S. 549 (1995) (striking down federal statute regulating gun use).

the Fourteenth Amendment.[8] The point here is not whether some forms of activism are more or less justifiable than others. That question is surely debatable, but what is not debatable is that all forms of activism gild the scepter of judicial power.

But why is activism so inimical to national unity? One could argue that a national constitutional standard actually serves a unifying function on occasion by reminding us of the fundamental personal freedoms and governmental structures for which we stand. This is true to some extent—the invalidation of the poll tax, for example, is a valuable reminder that the franchise is something that is open to all.[9]

Taken sufficiently far, however, the idea of a unifying constitutionalism is nothing more than a neat rationalization for judicial supremacy. Such supremacy is deeply divisive, and not just because of the commonly given reason that unelected judges serving for life should not lightly displace the will of the people's chosen representatives.[10]

The underlying reason for the divisiveness of judicial activism is as much cultural as it is legal or political. Judges are drawn from the ranks of one profession only. There are no plumbers or flight attendants or school teachers or investment bankers or firefighters or insurance salesmen in our midst. It is odd, to say the least, that the members of one privileged profession should be making the most intimate and important decisions for the family and the workplace of all other professions. That one entire branch of government has been populated by the members of one profession only is no testament to the innate superiority of lawyers. It is a reminder that with great responsibility goes greater humility, lest the arrogance of legal authority drive resentments through our national heart.

Nor does the divisive potential of an activist bench end there. The courts reflect not only one profession, but the elite reaches of that profession to boot. Many judges—and I do not exempt myself—have been educated at the most exclusive colleges and law schools, have spent their careers in the upper ethers of legal practice or academia, and have served in the upper echelons of state and national government.

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[8] *E.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that Religious Freedom Restoration Act exceeds Congress's power under Section 5).

[9] *See* Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (holding that poll tax imposes unconstitutional restriction on franchise).

[10] *See, e.g.*, Connor v. Finch, 431 U.S. 407, 431 (1977) (Powell, J., dissenting) ("[L]egislative plans are likely to reflect a State's political policy and the will of its people more accurately than a decision by unelected federal judges.").

This training is superb in several respects. It may acquaint us with the workings of government and it may hone first-rate analytical and intellectual skills. It equips us well to perform the important interpretative and courtroom tasks we do. But our backgrounds have not by and large given birth to a breadth of human experience. We judges are as a class bereft of acquaintance with the variegated and pluralistic country that we serve. While we may project and empathize, that is no substitute for first-hand life experience or even the eye-and-ear contact with the electorate that a career in elective politics can bring. The courtroom and the bar conventions and the symposia and those proverbial embassy parties provide detachment and impartiality of a sort, but they regrettably shelter us from the bumps and bruises that attend our fellow citizens' daily lives. Those who enjoy the habit of deference should not acquire the taste for dictation. Judicial activism is no long-run strategy for national wholeness; the inevitable elitism of a judicial ruling class will spawn a populist rancor in America that will frustrate the attempt to bridge our most basic divides.

II

My next three recommendations have to do with how we regard our Constitution. This is critical, because how citizens regard their founding charter will influence how they view America itself.

Let's be sparing in what we seek to constitutionalize. Our Constitution sets forth a structure of governance and those basic rights the state may not abridge. It is a document of inclusion that welcomes all citizens into the American fold. Perhaps that is what makes the recent spate of same-sex marriage amendments (federal and state)[11] so at odds with the generous and unifying spirit any constitution must achieve. To forbid same-sex marriage through legislation is one thing. To assign second-class status to gay citizens in our founding charters is something else. Passing amendments whose character will so plainly be perceived as punitive is not the way to One America. Our constitutions must bind wounds, not rub them raw.

If law is to express a national purpose, a constitution must cover very few things. The Second Amendment doesn't need to be read to

[11] *See, e.g.*, Kevin Simpson, *Marriage, Gay Rights: Amend. 43 Supporters Revel in Double Victory*, DENVER POST, Nov. 9, 2006, at B06 (noting that seven states passed constitutional amendments banning same-sex marriages in 2006). While the proposed Federal Marriage Amendment has not passed, the fact that it has been so vigorously debated as a constitutional option was bound to deepen social division. *See* Alan Cooperman, *Gay Marriage as 'the New Abortion': Debate Becomes Polarizing as Both Sides Become Better Organized, Spend Millions*, WASH. POST, July 26, 2004, at A03 (describing debate).

assign judges the final say over questions of gun control. The Equal Rights Amendment doesn't need to be passed to give judges the final word over relations between the sexes. National unity means a Constitution that embodies only surpassing common values around which citizens can unite. In fact, the Framers bequeathed a document that did not partake of most particulars because each generation must be free to seek its own way and because the most difficult subjects—volatile social issues, tax and budgetary disputes, even war and peace—are most amenable to political compromise which promises today's losers the prospect of tomorrow's change.

To constitutionalize our differences is to up the ante gravely. Legislation implies temporary winners and temporary losers. Constitutionalizing implies permanent winners and permanent losers, the most divisive of all worlds. Constitutionalizing tampers with our legal birthright and common heritage—with what we as a nation hold most dear. It is thus unfortunate when judges decree unenumerated rights to privacy or when legislators seek constitutional status for restrictions on personal rights. The American Constitution should not reflect the agenda of the NRA or NOW or Focus on the Family or NARAL Pro-Choice America. Interest-group politics are fine for Congress, but they threaten to tarnish our national constitutional trust.

III

Let's value the nationalism in our Constitution. It is, of course, too simple to say the Constitution is a nationalistic document. It is rather a charter of tensions, most notably between the three branches of federal government and between the federal government and the states. But the Constitution has a strong nationalist component—it was, after all, "to form a more perfect Union" that "[w]e the People of the United States" did "ordain and establish" the Constitution in the first place.[12]

At the core of constitutional nationalism are the enumerated powers of Congress in Article I, Section 8. And at the core of the enumerated powers are the commerce and spending powers, the latter being couched as a provision "for the common Defence and general Welfare."[13] The commerce power in particular has recently been the

[12] U.S. CONST. pmbl.

[13] U.S. CONST. art. I, § 8, cl. 1.

subject of debate, and its exercise by Congress has not received complete deference from the courts.[14]

So far, so good—a reminder that Congress's powers are enumerated, not residual, is a salutary thing. But there is also a danger here, best illustrated by efforts to weaken Congress's authority to protect the national environment. It is tempting, I suppose, to see the states as sovereigns of their own resources, be they lands or animal species or bodies of water that have their chief locus within a single state. It is further tempting to say such things are not really commerce, at least in the sense that trucks and trains and roads and canals or production processes are. It is tempting finally to see federal officials as far-off policemen, out to handcuff property owners and developers from exercising basic rights.

There is force to these arguments, but pushed too aggressively, they unwind the fabric of national life. The scarce and migratory quality of natural resources surely permits the constitutional exercise of national conservation measures. Inimical to national unity are judicial decrees that resources which all America may cherish are constitutionally beyond the power of Congress to preserve.

The issue, in fact, goes far beyond the environment. Imagine a scarce mineral or medicinal property found largely within the borders of one state. Imagine Congress further deems such resources important to the national defense or prevention of pandemic. The happenstance of property location should not place it beyond the power of Congress to protect: The same Constitution that rightly limits government's ability to take property[15] likewise furnishes government the tools to guard against its dissipation and to preserve it for the longer haul and larger good.

And while we are at the business of constitutional nationalism, let's raise a toast to the dormant commerce clause. Often maligned as lacking an explicit textual basis or requiring judges to subjectively balance burdens against benefits,[16] the silent commerce clause is an indispensable ingredient of national unity. It has in fact persevered for

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14 The Rehnquist Court invalidated the civil damages provision of the Violence Against Women Act and the entire Gun-Free School Zones Act as exceeding Congress's Commerce Clause powers. United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995). *But see* Gonzales v. Raich, 545 U.S. 1 (2005) (holding that federal Controlled Substances Act does not exceed Commerce Clause).

15 U.S. CONST. amend. V.

16 *See, e.g.*, Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200 (1995) (Scalia, J., concurring) ("[T]he 'negative Commerce Clause' . . . is 'negative' not only because it negates state regulation of commerce, but also because it does *not* appear in the Constitution.").

generations,[17] a testament to its enduring utility as a unifying instrument. The last thing we need in a more global marketplace is a revival of efforts to parochialize at home. The vision of American states compelled to negotiate their own little NAFTAs with one another is no doubt an exaggerated fear. And yet it should sensitize us to the danger of burdening free trade within our national marketplace.[18]

It is the genius of our system that even a strong dose of constitutional nationalism will not enfeeble the states. The Supremacy Clause of Article VI and the preemption doctrines derived from it[19] provide a hefty boost for *economic* nationalism; it is far less certain that they should be utilized to assert a federal *cultural* supremacy or to erode the benefits of diversity and experimentation within our federal system. Constitutional nationalism will be most effective if, like good parenting, it does not attempt to regulate every subject under the sun.

IV

Let's restore a constitutional respect for community. It is futile to expect a healthy nation in the absence of a healthy sense of community. Community instills within us the sense that we live for something larger and more meaningful than just ourselves. This sense of something larger than the self underlies the successful formation of all communities, be they the village or the nation. Communities are built around shared purposes and values, one of which is surely a respect and appreciation for individual rights. But there must likewise be the sense that individuals contribute to, as well as take from, this larger whole of which we as single persons are but parts.

Today the adjective "constitutional" is invariably associated with the noun "rights." The linkage itself is hardly automatic (the noun might be "structure" or "governance," for example), and the rights revolution that began not coincidentally in the 1960s has left the balance between the individual and society out of whack. For quite a while now, constitutional law has placed a strong emphasis upon rights, often at the expense of community, whether the rights be those of the accused or the victims of discrimination or the practitioners of

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[17] *See* Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319 (1851) (recognizing dormant aspect of Commerce Clause).

[18] *See* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997) ("The negative or dormant implication of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace." (internal citations and quotations omitted)).

[19] *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" (quoting Felder v. Casey, 487 U.S. 131, 138 (1988))).

intimate choice. The Warren Court began the constitutional rights revolution; the Burger Court extended it; and the Rehnquist Court did not curtail it, at least not in any significant way.

Much of this development was decidedly good, because a society that fails to accord respect and dignity to each of its members is not a society worthy of the name. It must still be asked whether the notion of free-floating, i.e., non-textual, constitutional rights of personal autonomy has not helped to deprive us of a sense of connectedness that is indispensable to the formation of collective identity. There is a limit to which individual intimacies should be at the sufferance of majorities, but there are likewise limits to the extent that democratic majorities in a state or nation can be deprived of the communal right to promote cherished values. To enshrine a sanctity of self in our founding charter without textual or historical warrant may be just as pernicious as the attempt to enshrine discrimination against those whose personal choices may for good and legitimate reason fail to conform to the majority's own.

On many of the great questions of the day, our Constitution is consciously agnostic. Its enumeration of rights is significant, but finite. Its grant of powers to representative government is formidable, but it does not prescribe what substantive ends the exercise of those powers must embody. To bend our Constitution in the direction of autonomy or collectivity is detrimental to our national health. I have argued earlier that the rash of constitutional bans on same-sex marriage risks the destruction of the spirit of welcome and inclusiveness on which a sound republic rests.[20] Similarly, the judicially spearheaded rights revolution has left America in too much of a vacuum, where "I" and "me" trump all else.

Each of us can without much trouble compose a lengthy list of rights. But wish lists of rights may be grounded less in law than in desire. So while one might not wish to wear a seat belt, a community is not constitutionally precluded from asserting its prerogative to save others the costs of serious accidents.

When we next drive through the countryside or take a moment's pause, we might reflect on what we get from living in society: We did not build our own home; make our own car or clothes; or invent the computers, phones, lights, or appliances we now take so much for granted. Left alone, we could not enjoy a concert, educate our children, put out a fire, raise capital, or take a trip. We would, in short, be both miserable and helpless. So this unmoored, evolving constitutional notion of the supremacy of the individual is really quite at odds

[20] *See supra* Part II.

with reality as we experience it. The great exhortation in President Kennedy's inaugural address[21] may seem to some an obsolete plea, but if so, the fault is not that of our forebears. It is not somehow anti-constitutional to think in terms of obligation and responsibility. That document protects democratic prerogative as well as individual liberty. In so doing, it enhances the collective consciousness on which a vital nation must in the end depend.

V

The search for One America requires less polarization, but not necessarily less partisanship. The two must be distinguished. Polarization is the accumulation of personal animosities that is presently tearing us apart. Partisanship is more of a mixed bag. It can easily proceed too far, but it can also promote vigorous debate and frame electoral choices.

In a polarized age, the judiciary must assume the duty of lowering national temperatures. National unity requires that courts counteract both partisanship and polarization in the body politic. The judiciary fulfills this mission not only through allegiance to principles of law that transcend political division, but in its demeanor and approach, which should consciously lower volume as political discourse raises it.

It is good for a vital nation to be noisy; it is good for appellate courts to be places of some quiet. By quiet, I do not mean agreement, but civility, decorum, and restraint. The civility and restraint that should mark the judicial calling help satisfy the yearning for some institution of governance that serves the national interest in a non-ideological way.

Are we in the courts fulfilling our charge of counteracting the tendencies of a polarizing age? The answer would depend on whom you ask. On the one hand, it is reassuring that the rank partisanship of the day has not permeated judicial deliberation to a greater degree. On the other hand, the rhetoric in judicial opinions is sometimes personalized to an extent that obscures rather than clarifies real differences. The media identify judges as Republican or Democrat; the confirmation process sends nominees through bruising partisan disputes in which underlying merit is obscured; law clerks are too often chosen with their ideological proclivities uppermost in mind; and new statutes on controversial subjects, as well as eras of past activism, have

[21] "[A]sk not what your country can do for you—ask what you can do for your country." John F. Kennedy, Presidential Inaugural Address (Jan. 20, 1961) (transcript available at http://www.yale.edu/lawweb/avalon/presiden/inaug/kennedy.htm).

brought an unprecedented level of interest-group participation in cases as well as confirmations.

All this makes it more difficult for courts to speak calmly, and to fulfill the civilizing and conciliatory function that national strength and unity require.

VI

My sixth recommendation involves the reaffirmation that a unified nation cannot be one in which public allocations and benefits are premised on ethnicity and race. This principle should not be unfamiliar to us. Neutrality as to speech, neutrality as to faith, neutrality as to race. Our country rests on the pillars of neutrality that are the First and Fourteenth Amendments.

The temptations to compromise this principle are ever-present. In the Michigan higher-education cases, the Supreme Court took notice of the need to develop diversity in the nation's future ranks of leadership.[22] And in the challenges to pupil assignment plans in the Louisville and Seattle public school systems, it was argued that race could be contemplated in non-meritocratic settings, and especially in elementary schools where the need to experience the benefits of diversity at a young age was undeniable.[23]

I respect this view. Many good people contend that affirmative action is unifying, not divisive, and that it will help America become a more integrated whole.[24] And others who may subscribe to the general or ultimate value of race neutrality nonetheless find compelling reasons to deviate from the principle in particular contexts,[25] including those noted above.

The need for contextual deviation is often argued sensibly in the singular, but the cumulation of contextual exceptions threatens to swallow the rule of race neutrality whole. Where does that leave us as a nation? It is the rapid diversification of our demographic profile

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[22] Gratz v. Bollinger, 539 U.S. 244, 268–71 (2003); Grutter v. Bollinger, 539 U.S. 306, 332 (2003).

[23] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2755 (2007).

[24] For example, Justice Breyer predicated much of his dissent in *Parents Involved* on the idea that affirmative action would produce "one America." *Id.* at 2824 (Breyer, J., dissenting).

[25] *See Grutter*, 539 U.S. at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 403 (1978) (Blackmun, J., concurring) ("At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary.").

that should render race-based preferences obsolete. Seeking to identify preferred groups and to parcel preferences among them will be a dangerous and divisive enterprise in our multi-ethnic nation. It will become a path to balkanization that America can ill afford. In fact, the increasing numbers of interracial and interethnic marriages make it ever more difficult to ascertain who belongs in what category. And the effort to categorize will prove in itself to be uncomfortably reminiscent of racial engineering efforts undertaken in the darkest hours of human history.

How much better to repair to the bright text and clear command of the Fourteenth Amendment, designed to rejoin us after the searing conflict of the Civil War. It says, ever so simply, that the State shall not "deny to any person within its jurisdiction the equal protection of the laws."[26] It does not speak of groups or of group entitlements. We should not suppose, however, that the Framers meant to embrace through this language a vision of radical individualism. Instead, the Amendment's explicit prohibition of the denial of equal protection to *any person* reflects the view that the strongest nation will be one in which each and every human being is freed from the yoke of identification and discrimination based on race. Only through this recognition of our common humanity and irreducible dignity will Americans come to see that each of us is one of us, that we journey together, not apart, along history's all too treacherous trail.

VII

My last principle of unity lies in an appreciation of the importance of process. At times, process falls victim to impatience. It is in the nature of ruling classes to want results, and process just seems to get in the way. Process is a particular nuisance to authoritarian temperaments, a reproach to their theory that the end justifies the means. Why bother with warrants and hearings and procedures and trials? And, say the autocrats, why not just snuff out those opposition views and voices that might lead to something so embarrassing as an open debate? Process means accountability, which is why those who exercise power periodically try to hold it in contempt.

A democracy, of course, lives by process. Our nation is held together not only by common values and traditions, but by a mutual respect for the rules of the game. If process is respected, losers can absorb defeat and hope to be winners tomorrow. Process, properly understood, leaves even losers with power—the ability to form a vocal opposition and the chance to mobilize for the next election. Thus

[26] U.S. CONST. amend. XIV, § 1.

does process promote unity. With process open, the doors in a democracy never slam shut.

There has been a great deal of confusion lately about what process actually means. It definitely does not mean litigation above all else. Too much litigation is an utter distortion of process, because it takes decisions from Congress, from state and local governments, from school systems and business organizations, and plops them into federal court, where they were never meant to be. There is a thin line between courts making sure that others abide by law and hijacking the decisionmaking process from them. It is also one thing to preserve civil liberties in wartime and quite another to distort the constitutional process for waging war and conducting foreign affairs. Process involves not only a respect for rights but also a respect for constitutional structure—a profound tension as we adapt the paradigms of criminal justice to suspects in our struggle against terror.

So the process that promotes unity does not have a love of litigation at its core. Rather, it embodies above all the idea of tolerance for others and their points of view. Process requires that legislative bodies, for example, respect the rights of the minority to offer floor amendments and to participate in conference committees, and that judicial bodies honor the rights of the dissenter in internal deliberation as well as external expression. Unity contemplates not some unattainable ideal of homogenization, but that we as a people afford process—that is to say opportunity—for those whose views and perspectives we may not share. When I hear someone say, "We are a Christian nation," that is not right. We are a nation that respects the expression of all religious faiths, including the faith of our Muslim friends. It is that process, that bedrock opportunity for expression of difference, that promotes unity through diversity, and it is that ideal of process that must animate both courts and country.

CONCLUSION

I end where I began. Law has two historic purposes: the protection of liberty and the preservation of order. It is time to add to those a third: the maintenance of One America. This is not a call for homogeneity or hollow patriotism. It is rather a plea for a legal framework within which the dynamics of diversity can be put to their most productive use.

In every way one can imagine, Americans are more different from one another than ever before. That is no cause for despair. It is simply a recognition that law can help us to acknowledge and appreciate all we have in common. Or it can drive us irretrievably apart.

Some may question why a sense of national unity is so necessary. It is not simply that national identification helps America present a stronger front against its global adversaries. It is not just that national allegiance helps to overcome the impulse of racial and ethnic separatism. What truly matters is that the great national goals of strength, prosperity, freedom, and humanity become impossible without the capacity to summon some sense of America itself.

It has long been assumed that the promotion of unity was purely a political task, and that law and the judiciary were meant to sit on the sidelines. That is no longer true. Promoting mutual respect, if not agreement, among Americans should figure in judicial judgment. A greater commitment to national unity can properly be expressed through the noble medium of the law. Indeed it must be. One America is too important for one entire branch of government to ignore.