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WHAT IS LEFT OF THE TENTH AMENDMENT?

LINDSEY COWEN*

The 1960 Platform of the Democratic Party was adopted over the formal protest of nine southern states whose representatives claimed that those who by this means and others were attacking the South "have ignored the fundamental law of the land—and, in particular the Tenth Amendment of the Constitution of the United States." In this same vein the dissenters charged that the provisions with respect to Civil Rights were "incompatible with the Constitution of the United States which undertakes to establish an indestructible union of indestructible states . . . ."[1] The Minority report reasoned that the "rights of man," which was the purported theme of the platform, could be protected only by the observance of the constitutional division of powers between the federal and state governments and by strict adherence to the basic premise of the tenth amendment. The dissenters regretted the alleged down-grading of the tenth amendment and suggested most vigorously that an executive, a court or a legislative group which was successful in violating its provisions would thereafter be successful in ignoring the provisions of the first and all others.

Virtually every speaker who rose in support of this report cited the tenth amendment in defense of his position, a technique which has been adopted time after time in recent years in the fight over desegregation of public facilities. "States' Rights," which the tenth amendment allegedly guarantees, has been the constantly recurring theme.

Obviously there is fundamental disagreement over its meaning. No responsible party would advocate a concededly unconstitutional course of conduct. And because our nation is constantly confronted with this question of "States' Rights," it is important to shed as much light (and as little heat) upon the subject as is possible. This article attempts to determine the significance of the tenth amendment today.

THE AMENDMENT'S ORIGIN

The tenth amendment to the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

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[1] N.Y. Times, July 13, 1960, § 1, p. 20 (City edition).

It was proposed by the Congress as part of the so-called Bill of Rights in September 1789, and ratified by the necessary ¾ths of the states in December 1791. It was another step, hoped to be a decisive one, taken by the American people in their struggle for a substantial measure of local self-government. It should be noted, however, that its inclusion was no isolated phenomenon; on the contrary, it was part of a long historical pattern. This country was originally populated by persons who in large measure were seeking escape from tyranny in one form or another. And even a casual reading of the Declaration of Independence reveals that, while the colonists were concerned with many specific abuses, their primary objection was to the exercise of arbitrary authority in London to the exclusion, wholly or in part, of popularly elected local legislatures.[2]

After the signing of the Declaration, when the Continental Congress met to draft the Articles of Confederation, the ingrained suspicion and fear of central authority gave birth to the second of the Articles which provided, "Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States in Congress assembled."[3]

Because there were no federal courts to interpret this or the other provisions of the Articles and because the Congresses had no real power of enforcement independent of the states, the meaning of this provision was never developed. But, it is generally agreed, this weakness proved to be a blessing in disguise, for the Articles as a whole were found to be inadequate as an instrument of government; and a convention, called to amend, instead began work on and produced the Constitution of the United States.[4]

[2] For example, the list of grievances includes the following:

"He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature: a right inestimable to them, and formidable to tyrants only. . . .

"He has kept among us, in time of peace, standing armies, without the consent of our legislatures. . . .

"He has combined, with others, to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation:

. . . For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever."

James Madison said, "The fundamental principle of the Revolution was that the colonies were coordinate members with each other and with Great Britain, in an empire united by a common executive, and not united by any common legislative sovereign. The legislative power was maintained to be as complete in each American Parliament as in the British Parliament." 6 WRITINGS OF JAMES MADISON 373 (Hunt ed. 1906).

[3] ARTICLES OF CONFEDERATION, art. II, in 1 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION (2d ed. 1836), and in JENSEN, THE ARTICLES OF CONFEDERATION 263 (1940).

[4] See generally FARRAND, THE FRAMING OF THE CONSTITUTION (1913); WARREN, THE MAKING OF THE CONSTITUTION (1937).

As presented to and as subsequently ratified by the states, the Constitution contained no provision similar to the old article II of the Articles of Confederation. It did, however, confer upon the Congress power—"to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[5] And it provided that

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[6]

These provisions were obviously designed to give significance and power to the central government. But ratification was not achieved until it was generally understood that once the Constitution had been ratified, a Bill of Rights including the substance of what became the tenth amendment would be added to the Constitution.[7] The informal agreement was honored, and the amendments became part of our basic law roughly three years after the ninth state had ratified the original instrument.[8]

A comparison of the language of the superseded Article II and of the tenth amendment reveals clearly that the new expression is not nearly as strong as was the old.

ARTICLE II

> Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States in Congress assembled.

TENTH AMENDMENT

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

And when the "necessary and proper" and "supremacy" clauses are weighed into the balance, it is abundantly clear that a fundamental

[5] ART. I, § 8, cl. 18.

[6] Art. VI, cl. 2.

[7] For a summary of the ratification debates as they related to the question of "states' rights" see BLOCH, STATES' RIGHTS, THE LAW OF THE LAND 17-25 (1958). See generally ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION (2d ed. 1836); Ames, *Proposed Amendments to the Constitution 1789-1889*, 2 AMERICAN HISTORICAL ASSOCIATION, ANNUAL REPORT FOR 1896, at 165 (1897).

[8] The first ten amendments were passed by Congress September 25, 1789, and ratified by the necessary three-fourths of the states December 15, 1791.

change in favor of a considerably strengthened central government had been effected by the Constitution, even as subsequently limited by the Bill of Rights.

Nevertheless, from the beginning there were those, led by Madison and Jefferson, who espoused the position that the basic governmental organization was a compact of free and independent states which had banded together for limited purposes and that this situation required that the Constitution as amended be construed as permitting activity of the federal government only in the fields of international and interstate matters, with the states left wholly free insofar as internal matters were concerned. They believed that any federal activity which interfered with the states' control over internal affairs violated the tenth amendment. Alexander Hamilton, however, and the Federalists generally, espoused the view that the federal government was supreme in its area of delegated power, however extensive or limited it might be, and that there was no obligation to preserve any particular relationship between the states and the federal government within this area. They sought merely a justification for federal action under one or more of the enumerated powers, ignoring any possible interference with state activity.[9]

The theories are obviously not at complete odds. For instance it was agreed by both that authority for federal action must be found among the powers specified in the Constitution. Yet consistent application of Hamilton's philosophy has promoted strong central government; and during the period of dominance of the ideas of Jefferson and Madison, the states have been relatively more powerful and influential.

It has been said that the decisions of the Supreme Court with respect to the tenth amendment follow a definite pattern.[10] While the Federalist judges, led by Chief Justice Marshall, were still on the bench, Hamilton's theories held sway; but as the personnel of the courts changed, Madisonian principles came to the fore. With some striking exceptions, these dominated the judicial scene for almost a century until in the 1930's economic and political crises demanded action by the central government, and a return to Hamilton became necessary to support such action. The existence of such a pattern is of historic interest; but because we are apparently going to live from one national crisis to another for some time to come, it is virtually certain that there

[9] For a summary of the competing positions taken see Casto, *The Doctrinal Development of the Tenth Amendment*, 51 W. VA. L.Q. 227, 228 (1949); Murphy, *State Sovereignty Prior to the Constitution*, 29 MISS. L.J. 115 (1958).

[10] See CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 232-37 (11th ed. 1954); Casto, *supra* note 9, at 231. A detailed study of the Court's return to the Hamilton point of view is found in ROETTINGER, THE SUPREME COURT AND STATE POLICE POWER (1957).

will in the foreseeable future be no general return to the Madisonian philosophy in the construction of the tenth amendment.

It is important to bear in mind that the tenth amendment has a dual aspect. On the one hand it reserves to the states or to the people those "powers not delegated to the United States," and on the other it necessarily excepts from this reservation those powers prohibited by the Constitution to the states. Thus in any consideration of the amendment's substance, it is necessary to consider both aspects. On the one hand what may the federal government constitutionally do and, relatedly, what effect has the existence of federal power upon the power of the states? Are the states totally excluded? May they exercise a power so long as there is no interference with a federal exercise? May they exercise a power despite interference with a federal exercise? On the other hand the express constitutional prohibitions on the states must be considered; but in this connection it should be noted that a constitutional limitation on the states does not in and of itself increase the powers of the federal government, which may itself be impotent in the field. Both, for instance, are prohibited from depriving any person of "life, liberty, or property, without due process of law."[11]

Before considering these questions it is necessary first to indicate the authoritative voice in the matter of constitutional construction, a fundamental point in the consideration of any such problem.

THE RIGHT OF THE JUDICIARY TO CONSTRUE THE CONSTITUTION

It was earlier suggested that one of the problems under the Articles of Confederation was the absence of a federal judiciary to construe the instrument of government.[12] In drafting the Constitution the members of the convention agreed generally that a federal judiciary would be created[13] and that this judiciary would have the power to disregard legislative acts which it determined to be unconstitutional.[14] Legislation implementing the second of these propositions was never enacted; but the Constitution did provide for the Supreme Court, and the Congress did establish a system of inferior courts as it was authorized by the Constitution to do. In *Marbury v. Madison*[15] the Supreme Court, speaking through Chief Justice Marshall, claimed and employed the power to refuse effect to an act of Congress which the Court believed to be unconstitutional. It reasoned that the basic function of a court

[11] The fifth amendment and the fourteenth amendment.
[12] See text accompanying note 4 *supra.*
[13] See 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 432-33 (1911); MADISON'S JOURNAL 108 (Scott ed. 1895).
[14] HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 14 (1953). For a modern, contrary view see 2 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, chs. XXVII-XXIX (1953).
[15] 5 U.S. (1 Cranch) 137 (1803).

is to apply the rules of law to a particular case and that where two laws applicable to a case are found to conflict, the court must necessarily decide between them. It logically follows that where a particular statute is found to be in conflict with the Constitution, the Constitution being the superior instrument, it must necessarily control.[16] The Court held that a federal statute purporting to give the Court original jurisdiction to issue writs of mandamus was unconstitutional and dismissed the action.

Although the statute involved was a federal one, the language is broad enough to cover state statutes as well, and the Supreme Court, as well as the inferior federal courts, has on many occasions refused effect to state statutes on the ground that they were in conflict with the federal constitution.[17]

To make this power wholly effective, however, it was necessary that the Supreme Court have power to review decisions of state courts in cases arising under the Constitution, laws and treaties of the United States. The first Judiciary Act granted such appellate jurisdiction, but its constitutionality was soon challenged. In *Martin v. Hunter's Lessee*[18] the Court had before it on writ of error a decision of the Court of Appeals of Virginia by which a title to land was determined contrary to the provisions of a treaty with Great Britain. The Supreme Court of the United States, relying upon the treaty power and the supremacy clause, reversed and directed the Virginia court to enter a judgment consistent with the requirements of the treaty. The Virginia court declined to comply with this direction on the ground that the statute purporting to give the United States Supreme Court appellate jurisdiction in this case was unconstitutional.[19] Another writ of error issued; the Supreme Court affirmed its own appellate jurisdiction, reversed the judgment of the Virginia Court of Appeals and affirmed the judgment of the trial court. Mr. Justice Story, speaking for the Court, relied upon the fact that Article III of the Constitution, in its references to both the judicial power and appellate jurisdiction, speaks in terms of *cases* rather than *courts*. From this he reasoned that, whatever the court, if the case pending therein met the appellate jurisdictional requirements, it was reviewable by the Supreme Court of the United States with such exceptions and under such regulations as the Congress might make.[20]

This construction of the Constitution, coupled with that of *Marbury v. Madison*,[21] gives the Supreme Court a sweeping power to define fed-

[16] *Id.* at 177.
[17] *E.g.*, Brown v. Board of Education, 347 U.S. 483 (1954).
[18] 14 U.S. (1 Wheat.) 304 (1816).
[19] *Id.* at 323.
[20] *Id.* at 338.
[21] 5 U.S. (1 Cranch) 137 (1803).

eral-state relations. But it is important to note that both decisions are logical ones and require no strained interpretation of constitutional language. Today there is little dissent to the proposition that both are sound, and thus it seems fair to say that these powers of judicial review were delegated by the states to the federal government and that exercise of these powers is not a usurpation. Of course, any power can be abused; but, as was suggested by Mr. Justice Story, since the absolute right of decision on all questions of jurisdiction must inevitably rest somewhere, common sense and sound legal reasoning suggest that the highest appellate court have the last word.[22]

THE POWERS DELEGATED TO THE UNITED STATES

We come then to consider the powers "delegated to the United States by the Constitution." There are many; but for practical reasons the discussion will be limited to five: treaty, war, commerce, spending, and full faith and credit. The first three, treaty, war and commerce, have shown themselves capable of great growth. The fourth the spending power, is for all practical purposes unassailable; and the fifth, the power of the Congress with respect to full faith and credit, could conceivably outstrip them all.

The Treaty Power

With respect to treaties and other international agreements the Constitution provides:

> He [the President] shall have power, by and with the Advice and Consent of the Senate, to make Treaties, providing two thirds of the Senators present concur. . . .[23]
>
> No State shall enter into any Treaty, Alliance, or Confederation. . . .[24]
>
> No State shall, without the Consent of the Congress . . . enter into any Agreement or Compact . . . with a foreign Power.[25]

These clauses, plus the supremacy clause,[26] make it abundantly clear that the federal government has complete and virtually exclusive authority in this field. Whatever doubt may have existed because of the tenth amendment was dispelled in 1920. In that year, in *Missouri v. Holland,*[27] the Court was confronted with an argument to the effect that a statute enacted pursuant to the terms of a treaty was invalid because absent the treaty the Congress had no power to enact it. This

[22] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 344 (1816).
[23] Art. II, § 2, cl. 2.
[24] Art. I, § 10, cl. 1.
[25] Art. I, § 10, cl. 3.
[26] Art. VI, cl. 2; see art. I, § 8, cl. 18.
[27] 252 U.S. 416 (1920).

position was taken because prior to this litigation a predecessor statute on the same subject had been held to be unconstitutional as beyond the powers of the Congress.[28] But after this decision the President negotiated with Great Britain the treaty in question which called for implementing legislation on the part of the United States and Canada, the new statute was enacted by the Congress, and the State of Missouri sought to enjoin its enforcement. The trial court held the act constitutional, and the Supreme Court affirmed the judgment.

Speaking for the Court, Mr. Justice Holmes said:

> To answer this question (validity vel non) it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid, there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government....
>
> The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment....
>
> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power.... We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the state....[29]

By the use of the words "a national interest of very nearly the first magnitude" the Court may have been inferring that perhaps there is some subject, non-national in character, which cannot properly be the subject of negotiation with a foreign country. However, no case has been found where the Court even suggests that the particular subject matter actually involved is not appropriate for foreign negotiations; and, as will be discussed later,[30] there is a definite tendency on the part of the Court to refrain from substituting its judgment for that of the President and Congress.

The Court in *Missouri v. Holland*[31] refused to recognize that the tenth amendment had any limiting effect whatsoever on the treaty power. Therefore, whatever limitations there are on it must be found in the dimensions of the grant itself or the specific prohibitions of the

[28] United States v. McCullagh, 221 Fed. 288 (D. Kan. 1915).
[29] Missouri v. Holland, 252 U.S. 416, 432 (1920).
[30] See text accompanying note 40 *infra*.
[31] 252 U.S. 416 (1920).

Constitution. In a prior decision, the Court had stated that the treaty power was unlimited except for the specific prohibitions of the Constitution and except for those restraints arising from the nature of the government itself and of that of the states. It was suggested that the treaty power could not be construed to authorize a change in the character of the government or a session of any portion of the territory of the states without their consent. But the court was unable to conceive of any other matter, properly the subject of negotiation with a foreign country, which was beyond the treaty power.[32]

The recognition of Soviet Russia by the President in the early '30's gave rise to litigation which demonstrates most clearly the overriding authority of the treaty power.[33] After the Russian revolution the Red government nationalized all property and purported to take title even to that which was located beyond the boundaries of the Soviet Union. Certain assets of Russian corporations were located in New York, and these were assigned by the Soviets to the United States government. In one instance suit was instituted to compel liquidation of the New York assets of one of these corporations. After all domestic creditors had been paid, the court ordered distribution to alien claimants. At this point, however, the United States sued praying that it "be adjudged to be sole and exclusive owner entitled to immediate possession of the entire surplus fund in the hands of the respondent. . . ." The choice was then between New York law, under which title to the property had not passed to the Red government, and federal law, under which it allegedly had. The New York courts found that state law applied; the Supreme Court of the United States, in *United States v. Pink*,[34] found that federal law applied. In reversing the New York court it held that power over external affairs is vested in the national government exclusively and that the policies of the states, whether expressed in constitutions, statutes or judicial degrees, become wholly irrelevant to judicial inquiry when the United States seeks enforcement of its foreign policy in the courts.[35] This was, however, merely an affirmance of the Court's 1937 position which was, in effect, that with respect to international negotiations and foreign relations generally the states do not exist.[36]

[32] Geofray v. Riggs, 133 U.S. 258, 267 (1890).

[33] An executive agreement is a "treaty" within the meaning of the supremacy clause. See United States v. Belmont, 301 U.S. 324 (1937).

For a suggested limit on the use of this device, see United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds,* 348 U.S. 296 (1955).

[34] 315 U.S. 203 (1942).

[35] United States v. Pink, 315 U.S. 203, 231 (1942).

[36] United States v. Belmont, 301 U.S. 324, 327 (1937).

Perhaps the most expansive statement of the extent of the treaty power was made by way of dictum in *United States v. Curtiss-Wright Export Corp.*,[37] decided in 1936. Mr. Justice Sutherland, speaking for the Court, took the position that the powers of external sovereignty passed at the time of the revolution from the British crown, not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. This being true, it followed that the power with respect to foreign affairs was never possessed by the states and that accordingly there could be no question about any reserved power in this area in the states.[38]

If this be an accurate statement of the source of the federal power over foreign affairs, it is clear that the tenth amendment could have absolutely no limiting effect on it, although it is at least arguable that the positive prohibitions of the Constitution would still be applicable.[39] But the source of the power need not concern us here. Assuming that the power over foreign affairs was granted by the states to the federal government, the court has clearly taken the position that the delegation is total. Nothing remains for reservation "to the States respectively, or to the people."

But even if this were not conceded, because it was suspected that somewhere there existed a subject which was inappropriate for treaty action, ascertaining it might very well run afoul of the political question doctrine enunciated by the court in 1948. In *Chicago & Southern Airlines v. Waterman S.S. Corp.*,[40] the Court stated that an order of the President relating to foreign affairs was not reviewable by the judiciary because such orders tend to be delicate, complex and, in many if not most instances, prophetic; they are therefore political in nature, not judicial. It was held that with respect to decisions of this kind the

[37] 299 U.S. 304 (1936).
[38] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315 (1936).
[39] For example, in Reid v. Covert, 354 U.S. 1, 16 (1957), the Court said:
"There is nothing in this language [supremacy clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in 'pursuance' of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined."
[40] 333 U.S. 103, 111 (1948).

judiciary has neither aptitude, facility nor responsibility and that consequently the courts should abstain entirely.

It is apparently true that to date this doctrine has been applied only to preclude judicial review of the wisdom of action taken. But quite clearly whether or not a particular subject matter is properly in the foreign affairs field at all may depend on the "secret information" mentioned here, and thus whether or not a treaty of any description is appropriate in all probability would be deemed a political question precluding judicial inquiry.

For these reasons it seems morally certain that no treaty will ever be struck down on the ground that it invades powers reserved to the states or to the people.

The War Power

The Constitution gives the Congress the power "to declare war"[41] and makes the President the "commander in chief of the army and navy of the United States."[42] These simple words, together with the necessary and proper clause,[43] have been the basic for an almost unbelievable concentration of power in the federal government, at least on a temporary basis. The theoretical justification for such concentration has never been better stated than it was in a commerce case, *McCulloch v. Maryland*,[44] decided by the Supreme Court in 1819. Chief Justice Marshall, speaking for the Court, said,

> The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave those powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.... Its means are adequate to its ends.[45]

President Lincoln presumably had this same thought in mind when he suggested that he "felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation."[46] Certainly many acts, legislative and executive, justified in the name of the war

[41] Art. I, § 8, cl. 11.
[42] Art. II, § 2, cl. 1.
[43] Art. I, § 8, cl. 18; authorities cited note 4 *supra*.
[44] 17 U.S. (4 Wheat.) 316 (1819).
[45] *Id.* at 415.
[46] Letter of April 4, 1864, to A. G. Hodges, in 10 COMPLETE WORKS OF ABRAHAM LINCOLN 66 (Nicolay and Hay ed. 1894).

power, would have been unconstitutional except for the fact that they were conducive to the constitutional end of successful prosecution of the war or, in the words of Lincoln, conducive to the preservation of the nation.

The full scope of the war power was demonstrated during the Civil War. As a war measure the Congress passed a statute which tolled the running of all statutes of limitation in cases where service of process was made impossible because of the hostilities. The case which ultimately came before the Supreme Court involved a promissory note given by citizens of Louisiana to citizens of New York, payable in March 1861. Payment was refused on demand at maturity, and shortly thereafter war broke out. Plaintiffs were unable to prosecute their case against defendants for several years, but finally in April 1866 an action was commenced in a Louisiana state court and service of process achieved. Defendants pleaded the Louisiana "prescription of five years," in effect a five year statute of limitation, and the state courts sustained the defense, despite the federal statute. The Supreme Court in 1870 held the federal act applicable to state litigation as a valid exercise of the war power on the theory that this power is not limited to victories in the field and the dispersion of insurgent forces but rather it carries with it inherently power to guard against the immediate renewal of conflict and to remedy the evils which arise from war and its progress.[47]

Quite clearly Louisiana had the power to enact rules of procedure, including statutes of limitation, for its own courts. Just as clearly the Congress had no general authority to promulgate such rules for state courts. In most situations then this would be a power "not delegated to the United States by the Constitution, nor prohibited by it to the States" and would thus be one "reserved to the States respectively, or to the people." Under the specific facts an undiluted Madisonian approach might well have resulted in a holding that the federal statute was unconstitutional. However, Congress having determined that such a statute was necessary and proper in the execution of the war power, it was held by the Court that the delegated power extended at least that far.

World War I gave rise to additional illustrations of the scope of the power. For example, a statute duly enacted by the Congress prohibited the sale for beverage purposes of any distilled spirits

> until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to

[47] Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 506 (1870).

> increase efficiency in the production of arms, munitions, ships, food and clothing for the Army and Navy.[48]

Interestingly enough the statute was enacted ten day after the armistice was signed. In due course the plaintiff brewery corporation sought to enjoin the enforcement of the statute on the ground that it was unconstitutional, and the trial court so held. The Supreme Court reversed on the ground that the statute was a valid exercise of the war power.[49]

On the tenth amendment issue the Court said:

> That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose....[50]

World War II brought a similar problem before the Court. In 1948 there came before it for review a judgment of a federal district court by which the Housing and Rent Act of 1947 had been held to be unconstitutional on the ground that peace-in-fact existed. In reversing, the Court said:

> We conclude, in the first place, that the war power sustains this legislation.... Whatever may be the consequences when war is officially terminated, the war power does not necessarily end with the cessation of hostilities....
>
> We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflict on our society, it may not only swallow up all other powers of Congress, but largely obliterate the Ninth and Tenth Amendments as well.... Any power, of course, can be abused. But we cannot assume that Congress is not alert to its constitutional responsibilities. And the question whether the war power has been properly employed in cases such as this is open to judicial inquiry.[51]

In his concurring opinion Mr. Justice Jackson stated that he could not accept the argument that war powers last as long as the effects and consequences of war, that at some point of time short of this the reason for the exercise of the power ceases to exist. But he found it unneces-

[48] War-Time Prohibition Act, ch. 212, 40 Stat. 1045 (1918).
[49] Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919).
[50] *Id.* at 156.
[51] Woods v. Cloyd W. Miller Co., 333 U.S. 138, 141 (1948).

sary to set an outer limit because this particular legislation, he believed, was a valid exercise of the war power.[52]

A superficial examination of the Court's opinions construing the war power might lead to the conclusion that a war emergency created in the federal government a power to do things it otherwise could not do and that a termination of the emergency terminated the power, returning it to the states or to the people from whence it came. But this is a false construction. In 1934 the Court, in discussing the relationships between emergency situations and the powers of the federal government, made the point that while emergency does not create power it may very well furnish the occasion for the exercise of the power. More specifically, with respect to the war power it suggested that the war power of the government is not created by the emergency of war out of the reserved powers of the states, but the emergency of war justifies the exercise of the pre-existing power.[53] In other words the delegation of authority is complete, except for the specific prohibitions of the Constitution, leaving nothing "reserved to the States respectively, or to the people."[54]

In recent years the attacks on the exercise of the war power have been based primarily on the specific prohibitions of the Constitution rather than the powers reserved to the states by the tenth amendment. Thus, in 1955 the Court invalidated a statute which purported to make ex-servicemen subject to federal court-marital in certain circumstances for crimes allegedly committed while in service. The Court held this to be in conflict with article III and the fifth and sixth amendments.[55]

But such decisions are rare, and particularly in war time the Court has gone far to uphold the exercise of the war power. For instance in 1943 the Court had for review the conviction of a native-born citizen of Japanese ancestry for violation of a curfew imposed by a military commander on the west coast. This order had been issued pursuant to an executive order authorizing and directing the Secretary of War and his military subordinates to prescribe military areas from which any or all persons might be excluded and with respect to which the right of any person to enter, remain in or leave should be subject to whatever restrictions might be imposed in the discretion of the Secretary or his subordinates.[56] Congress made violations of such orders

[52] *Id.* at 146.
[53] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934).
[54] A casual glance through the index of 50 U.S.C.A. app. will reveal the extent to which the Congress has exercised the war power. Among the acts covering subjects which "invade" the powers traditionally reserved to the states are: Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178; Emergency Price Control Act of 1942, 56 Stat. 23; Stabilization Act of 1942, 56 Stat. 765; Universal Military Training and Service Act, 62 Stat. 604 (1948).
[55] United States *ex rel* Toth v. Quarles 350 U.S. 11 (1955).
[56] Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942).

misdemeanors punishable by imprisonment.[57] Emphasizing that the executive and legislative branches of the government had cooperated in the exercise of the challenged power, the Court said:

> The war power of the national government is "the power to wage war successfully.... Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.[58]

In response to the charge that the orders violated the fifth amendment as discriminating against citizens of Japanese ancestry, the Court pointed out that the fifth amendment contained no equal protection clause and held that only if the order could be deemed a denial of due process could the challenge be successful. The Court limited its inquiry to a consideration of whether, in light of all the relevant circumstances preceding and attending the promulgation of the challenged orders and statute, there was a reasonable basis for the action taken. It held that the action taken was reasonable in view of the risks involved.[59]

Mr. Justice Murphy concurred reluctantly, stating that he did not mean to be understood as intimating that the military authorities in time of war are subject to no restraints whatsoever. He stated his belief that the Court had a protective function to exercise even in wartime but that in the instant case adequate protection to individual rights had been given.[60]

In 1946 the Court ordered the discharge from custody of two civilians who had been convicted of essentially civilian crimes by courts-martial while martial law was in effect in Hawaii. The decision was based upon an interpretation of the Organic Act of Hawaii, and so the constitutional issue was avoided. Nevertheless, the Court's opinion gives cause for belief that somewhere there is a definite limitation on the war power at least where personal liberties are concerned. It reflects the ideas of Mr. Justice Murphy, expressed in the *Hirabayashi* case, and recognizes the power of the judiciary to protect against complete military dominance.[61]

Optimism should perhaps be tempered by the fact that before this order of discharge one defendant had served three and one-half years, the other two years, of his sentence; and all hostilities had ceased. Mr.

[57] Act of March 21, 1942, 56 Stat. 173.
[58] Hirabayashi v. United States, 320 U.S. 81, 93 (1943).
[59] *Id.* at 101.
[60] *Id.* at 113.
[61] Duncan v. Kahanamoku, 327 U.S. 304, 322 (1946).

Justice Burton, in dissent, posed a pertinent question when he asked what the Court would have done with the petitions had they been presented on the original days of arrest or conviction "with the war against Japan in full swing." The suggested answer is that the writs either would have been refused to start with or, if issued, would have promptly been discharged under the theories presented in *Hirabayashi v. United States.*[62]

One thing is clear—the tenth amendment has never been an effective barrier to the exercise of the war power. And should we again be faced with total war, particularly war of the nuclear variety, it is predictable that the entire country would be designated a military area and governed wholly or in large measure by the military. Save as military districts, the states for practical purposes would cease to exist for an indefinite period of time during actual hostilities and recovery. In the light of past decisions and modern day necessities such subordination of the states would in my judgment be held to be constitutional.

The Commerce Power

The Constitution grants to the Congress the power "to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."[63] Unlike exercises of the treaty and war powers, which are clearly international in character and therefore have been subjected only occasionally to attacks based upon the tenth amendment, exercises of the commerce power have been the targets of many judicial actions raising the question of federal-state relations.[64] And until the late '30's the tenth amendment was frequently cited as a ground for striking down national legislation. For instance, in nullifying the National Industrial Recovery Act in 1935 the Court said,

> The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment. . . .[65]

However, following the abortive court-packing plan of 1937, the Supreme Court began taking a broader view of the commerce power. For instance in *National Labor Relations Board v. Jones & Laughlin*

[62] 320 U.S. 81 (1943).
[63] Art. I, § 8, l. 3.
[64] See generally ROETTINGER, THE SUPREME COURT AND STATE POLICE POWER (1957).
[65] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 528 (1935).

Steel Corp., the Court took the position that Congress had the power to control even those activities which were intrastate in character when separately considered if they had such a close and substantial relation to interstate commerce that their control was essential and appropriate to protect that commerce from burdens and obstructions.[66] And four years later in *United States v. Darby* the Court construed the tenth amendment as stating merely a truism that all is retained which has not been surrendered and then held that the commerce power extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.[67]

The crucial decision modernizing the definition of the power was rendered in 1942[68] when the Court had for review an order of a federal district court enjoining the enforcement of marketing penalties against a plaintiff who had grown more wheat on his small Ohio farm than was permitted under AAA regulations. One of the arguments made for the plaintiff was that such production was purely local and at most its effect on interstate commerce was indirect and that therefore it was beyond the scope of the commerce clause. The government, with prior decisions in mind, insisted that the act did not control production or consumption but instead was concerned with marketing or was "necessary and proper" in the control of marketing. Mr. Justice Jackson, speaking for the Court in response to this contention, said that the Court could not permit terminology to foreclose the consideration of the actual effects of the activity in question upon interstate commerce. He then repeated the substance of Chief Justice Marshall's dictum that effective restraints on the exercise of the commerce power must proceed from political rather than from judicial processes.[69]

He continued by making the point that after Marshall's decision in *Gibbons v. Ogden*,[70] the Court for nearly a century had been concerned with the negative aspects of the power, that is, with questions of what the states could not do, and little attention had been paid to what the federal government could do. These cases created a "condition," he suggested, that led the Court in the '20's and early '30's to declare acts of Congress unconstitutional as being in excess of the commerce power. But he professed to see another line of authority developing concurrently and culminating earlier that year in an opinion by Mr. Justice Stone in which he emphasized the affirmative aspects and in

[66] N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36 (1937).
[67] United States v. Darby, 312 U.S. 100, 118 (1941).
[68] Wickard v. Filburn, 317 U.S. 111 (1942).
[69] *Id.* at 120.
[70] 22 U.S. (9 Wheat.) 1 (1824).

which it was held that the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.[71]

Mr. Justice Jackson applied these principles to the case at hand, saying,

> That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. But even if the appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."[72]

The Court held that because growing wheat for home consumption took that consumer from the market, to that extent it competed with wheat in interstate commerce, thus bringing the activity within reach of the commerce power. It takes a little imagination to see that this particular farmer's crop could produce a "substantial economic effect on interstate commerce," but undoubtedly the sum total of all wheat produced by all farmers for home consumption would have such an effect. This, however, leads to the conclusion that a congressional determination that certain activity has a "substantial economic effect on interstate commerce" will be accepted by the Court, and this conclusion is supported by the fact that not since the late '30's has the Supreme Court held a federal statute unconstitutional on the ground that it exceeded the commerce power.[73]

The Court too has participated actively in this redefinition of the scope of the commerce power. For instance in 1945 it held that the Congress by the Fair Labor Standard Act,[74] covering employees of "industries engaged in commerce or in the production of goods for commerce," intended to protect elevator men and other maintenance employees in an office building in which no manufacturing was done.

[71] United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942).
[72] Wickard v. Filburn, 317 U.S. 111, 124 (1942).
[73] In United States v. Haley, 166 F. Supp. 336, 339 (N.D. Tex. 1958), Chief Judge Davidson held the Agricultural Marketing Act unconstitutional as applied to the facts of the case, saying: "If this law is finally upheld, I think it should be definitely stated by our courts that intrastate commerce has been abolished and that the states have no control over even their domestic commerce."
The Supreme Court summarily reversed without opinion. United States v. Haley, 358 U.S. 644 (1959).
[74] Fair Labor Standards Act of 1938, 52 Stat. 1060.

The Court reasoned that their activities made them participants in or were necessary to the manufacturing process since tenants in the building were executives and administrative officers of a company which did manufacture goods for shipment in interstate commerce.[75] That same year the FLSA was held applicable to the employees of an independent window washing contractor on the ground that since the greater part of the work was done on premises used in the production of goods for interstate commerce the washing of the windows was an occupation necessary to the production of the goods produced in those plants.[76]

The broad exercise of the power by the Congress and the liberal interpretations of congressional action by the Court emphasize and confirm Marshall's belief that political activity is in the end the only effective control on the exercise of the commerce power.[77]

There are, of course, a great many cases which are concerned with the validity of state action in the commerce field. These involve, in general, two questions: (1) whether the state has any power at all in the field; and (2) whether, assuming that there would be power absent congressional action, Congress has by acting preempted the field. There are normally no clear-cut answers to these questions. But as late as February 24, 1959, the Court, sustaining certain state income taxes levied against foreign corporations, repeated the following principle as a basis for answering the first of the questions:

> It has long been established doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the States.[78]

This seems to be the latest statement of the principles laid down by Mr. Justice Hughes in the *Minnesota Rate Cases*[79] where it was held that, while the states had no power to regulate directly interstate or foreign commerce, their police and taxing powers over local affairs permitted action which might incidentally or indirectly regulate such

[75] Borden Co. v. Borella, 325 U.S. 679 (1945).

[76] Martino v. Michigan Window Cleaning Co., 327 U.S. 173, 176 (1945).

[77] In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824), Chief Justice Marshall said, "The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

[78] Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959).

[79] 230 U.S. 352 (1913).

commerce, subject always to the superior power of Congress to modify or annul such action insofar as it exerted any substantial economic effect on interstate commerce. Mr. Justice Jackson was undoubtedly referring to this body of law when in *Wickard v. Filburn*[80] he suggested that a determination that an activity was local in character might be helpful in determining whether or not Congress intended to regulate or that it might be helpful in determining whether or not the state could act absent congressional action but that it was not relevant in determining whether or not a federal statute admittedly applicable to the situation was constitutional.

There is a striking parallel between the operation of the war and treaty powers and of the commerce power. By specific prohibition the states are precluded from engaging in war and from entering into any treaty, alliance, or confederation.[81] By implied prohibition the states are precluded from regulating interstate commerce.[82] Nevertheless they may exercise their normal powers, primarily the police power and the power to tax, until such time as a superior federal power is asserted. Then the state power yields. But this is not an invasion of reserved powers. The powers delegated to the United States are superior to the powers of the states.[83] They are complete and sufficient to achieve the ends for which the Constitution was created. In view of the broadened scope of the commerce power, effected by activity participated in by the executive, legislative and judicial branches of the federal government, it seems safe to predict that the tenth amendment will never again be successfully used to nullify an act of Congress based on the commerce power.

The Spending Power

The Constitution confers upon Congress the power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."[84]

In 1936 the Court stated by way of dictum that the spending power was not confined or limited by the other powers but was instead limited only by the terms of the specific grant. In ascertaining the extent of the spending power it reasoned that because funds in the treasury can never accomplish the objects for which they were collected unless the power to appropriate is as broad as the power to tax, it is necessary

[80] 317 U.S. 111 (1942).
[81] Art. I, § 10, cls. 1 and 3.
[82] *E.g.*, Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).
[83] Art. VI, cl. 2.
[84] Art. I, § 8, cl. 1.

that the spending power be and it therefore is as broad as the taxing power.[85]

Thus the Congress may under this construction constitutionally appropriate funds to pay the debts and provide for the common defense and general welfare of the United States.

The Court has not had many occasions to construe the meaning of the general welfare, but in 1937, in ruling on the validity of the federal social security statute, it took a broad view of the concept, saying:

> The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law.
>
> "When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress. . . ." Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times.[86]

Whether or not in theory there could be an appropriation which was so local or private in nature that it was unconstitutional, there is little doubt that a congressional finding that a particular expenditure was made to provide for the general welfare is virtually unassailable. But even this strong position has been buttressed by the holdings of the Supreme Court that no federal taxpayer and no state has the necessary status to challange directly the validity of federal expenditures because neither can show a particular wrong to it. In 1923 a federal taxpayer challenged a federal expenditure on the ground that it would "increase the burden of future taxation and thereby take her property without due process of law." The Court held that in order for one to have standing to sue he must show that he has sustained or is immediately in danger of sustaining some direct injury and not merely that he suffers in some indefinite way in common with people

[85] United States v. Butler, 297 U.S. 1, 65 (1936). Despite this favorable view of the spending power, the act in question was held to be unconstitutional. See text accompanying note 89, *infra*.

[86] Helvering v. Davis, 301 U.S. 619, 640 (1937).

generally. Under this test it was held that this particular plantiff had no standing to sue.[87]

An original action by the state of Massachusetts against the Secretary of the Treasury was disposed of in the same opinion, also on the ground that plaintiff was without standing to sue because it had called upon the Court "to adjudicate, not rights of persons or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government." In response to the claim that by the grant-in-aid device the federal government was attempting to exercise a power of local government reserved to the state by the tenth amendment, the Court responded that, analytically, the plaintiff state was contending that Congress had usurped reserved powers by the mere enactment of a statute though nothing was to be done without the consent of the states. As framed, it held that this was a political not a judicial question and therefore could not properly be the subject of a case in the federal courts.[88]

Liability for taxes can, of course, be litigated, and on occasion taxpayers have successfully challenged the validity of a federal program involving expenditure where a tax was an integral part of the scheme. Thus in *United States v. Butler*,[89] although the Court took a broad view of the meaning of the general welfare, the taxpayer successfully challenged his liability for an excise tax on the processing of cotton on the ground that it was an integral part of an unconstitutional scheme of regulation of agricultural production. By this decision he was permitted to do indirectly what he could not do directly. But there is evidence that even this loophole may be closed. In 1937 the Court had two cases involving the social security laws. In one[90] a stockholder was unsuccessful in an attempt to enjoin his corporation from making social security payments and deductions required by the act. Although his status to sue was recognized, the Court held that the social security program requiring the payment of taxes and the disbursement of benefits *did* provide for the general welfare of the United States and was therefore constitutional. The other suit[91] was by an employer who had paid his tax and sought to recover it. His status as a plaintiff was also recognized but he lost on the merits for the reasons stated in the prior opinion.

It follows that there is no direct judicial restraint on appropriation

[87] Frothingham v. Mellon, 262 U.S. 447, 488 (1923).
[88] Massachusetts v. Mellon, 262 U.S. 447, 479 (1923).
[89] 297 U.S. 1 (1936).
[90] Helvering v. Davis, 301 U.S. 619 (1937).
[91] Steward v. Davis, 301 U.S. 548 (1937).

of funds from the general treasury and virtually none even where particular taxes can be tied to a particular program of appropriations. Perhaps theoretically there is a power to spend for purely local or private purposes that is reserved to the states or to the people because not delegated to the United States. But if judicial tests were possible, in all probability the extent of this power would be developed in much the same way as has the extent of the commerce power. The Constitution speaks in terms of interstate commerce and general welfare. But just as any local matter which substantially affects interstate commerce is subject to congressional regulation, so local welfare which substantially affects national welfare could be provided for.

The spending power can be exercised in many ways, but it is when Congress makes conditional grants to the states[92] that their reserved powers are most seriously threatened. By conditioning the grant of federal funds upon state compliance with federal regulations, the federal government is able to "legislate," albeit indirectly, on a variety of subjects which are admittedly the proper concern of the individual states. Theoretically there is nothing compulsory about the typical grant-in-aid program; but the economic pressure for compliance with the federal conditions is exceedingly strong. For one thing people in all the states must pay federal taxes, and acceptance of grants-in-aid is one method of recovering part of these taxes for local purposes, although admittedly a price has to be paid.

This is not the place to discuss whether or not the states should assume full responsibility for the many activities now covered by grants-in-aid. Suffice it to say, the states have demonstrated a marked willingness to sell and the federal government a marked willingness to buy power over many subjects.[93] The Court has said that the voluntary nature of the transaction eliminates conflict with the tenth amendment;[94] and so short of some remarkable self-denial on the part of individual states, political activity seems to be the only effective method of limiting the exercise of the spending power.

[92] For a general discussion of grants-in-aid see ANDERSON, THE NATION AND THE STATES, RIVALS OR PARTNERS 175-190 (1955). The book also contains a short reading list.

Federal grants-in-aid programs in operation in 1949 are listed and discussed briefly in Notz, Acts of Congress Providing for Grants-in-Aid to States, Public Affairs Bulletin No. 70, The Library of Congress Legislative Reference Service (1949).

The economic aspects of grant-in-aid programs are considered in WATKINS, ECONOMIC IMPLICATIONS OF STATE GRANTS-IN-AID (1956).

Federal grant-in-aid programs are discussed briefly in CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 86 (11th ed. 1954).

[93] For the intelligent and realistic views of a state governor see Underwood, *Usurpation's a Myth,* 47 NAT'L MUNIC. REV. 504 (1958).

[94] See text accompanying note 88 *supra.*

The Latent Power in "Full Faith and Credit"

The full faith and credit clause of the Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.[95]

The first sentence of this section in effect limits the powers of the states. In the terminology of the tenth amendment the states are prohibited by the Constitution from denying full faith and credit to the public acts, records, and judicial proceedings of every other State. This aspect of the section will be discussed subsequently.[96]

The second sentence is a delegation of power to the United States. At first blush it seems innocent enough, applying primarily to matters of proof. And the fact is that the Congress has not in the past made extensive use of this power. Until 1948 the statute requiring full faith and credit was limited to records and judicial proceedings,[97] and under it only the law with respect to sister-state judgments was widely developed. However, with the Judicial Code of 1948 the statute was expanded to require full faith and credit not only to the records and judicial proceedings of every other state but also the acts of the legislatures of the sister-states.[98] While the Supreme Court has on occasion in the past required full faith and credit with respect to the statutes of sister-states,[99] this amendment may well reflect an increased awareness on the part of the Congress of its potential power under the full faith and credit clause. It is possible, for instance, that this statute now "takes over substantially the whole field of choice of law in interstate conflict of laws,"[100] as had previously been done with respect to the

[95] Art. IV, § 1.

[96] See text accompanying note 104 *infra*.

[97] 28 U.S.C. § 687 (1940).

[98] 28 U.S.C. § 1738 (1950). Although the statute is part of the United States Judicial Code of 1948, it applies to "Every court within the United States and Its Territories and Possessions."

[99] In his dissenting opinion in Carroll v. Lanza, 349 U.S. 408, 414 (1955), Mr. Justice Frankfurter classified into three main groups "the Court's decisions touching the constitutional requirements for giving full faith and credit to statutes of a sister state" as follows:

(1) Those in which the forum was called upon to give effect to a sister state statute and declined to do so.

(2) Those in which the forum applied its own statute rather than that of a sister state because the latter was not of limiting exclusiveness or in which the forum applied the sister state statute because the forum's was not exclusive.

(3) Those in which the forum applied its own substantive law, statutory or judicial, when clearly in conflict with the out-of-state statute.

He then went on to classify the principal fields in which this question arises and to comment briefly on the development of law in each.

[100] See CHEATHAM, GOODRICH, GRISWOLD & REESE, CONFLICT OF LAWS CASES 584 (4th ed. 1957).

enforcement of sister-state judgments. The courts have not so far, however, indicated that this is a correct construction. But even if it were, this would merely be federal dominance in choice of law, leaving the power to determine substantive law where it now is.

However, it has been suggested that Congress might have the power to pioneer in new fields of substantive law by means of the full faith and credit clause. Professor Corwin has said:

> [T]here are few clauses of the Constitution, the literal possibilities of which have been so little developed as the full faith and credit clause. Congress has the power under the clause to decree the effect that the statutes of one State shall have in other States. This being so, it does not seem extravagant to argue that Congress may under the clause describe a certain type of divorce and say that it shall be granted recognition throughout the Union, and that no other kind shall. Or, to speak in more general terms, Congress has under the clause power to enact standards whereby uniformity to State legislation may be secured as to almost any matter in connection with which interstate recognition of private rights would be useful and valuable.[101]

Assume for the moment that Congress would undertake to draft a statute specifying the grounds for divorce, and no others, which would be valid for full faith and credit purposes. These might be more liberal than those of New York, for example, less liberal than those of Nevada. Presumably New York would not have to liberalize the grounds for divorce in that state; but it is not so certain that Nevada could continue to apply a more liberal set of standards. A divorce valid in Nevada but nowhere else would lead to undesirable results, and it is suggested that the Congress might compel a more conservative approach on the part of Nevada as "necessary and proper" in the exercise of its full faith and credit power.

This is all highly speculative, of course, and the practical fact is that there is a limit to what Congress has time to do. It is true, as Professor Wechsler has said, that the federal law is still largely interstitial in character, rarely occupying any field completely, building normally upon legal relationships established by the states.[102] And on the whole this arrangement has proved to be a satisfactory one.

The point is, however, that the power suggested by Professor Corwin may very well exist; and should the need for uniformity in a par-

[101] CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 164 (11th ed. 1954). See also Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L. J. 421, 434 (1919).

[102] Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

ticular subject ever become acute and the other powers prove themselves incapable of achieving the result sought, Congress may resort to full faith and credit. The tenth amendment would pose no bar should the Court determine that the power had been delegated to the United States.

THE POWERS PROHIBITED TO THE STATES

Having examined some of the delegated powers which have demonstrated a capacity or potential for growth, we turn to a consideration of the powers prohibited by the Constitution to the states. Some are expressed, some implied. Some are specific, some general.[103] For present purposes we consider only two general but expressed limitations, those found in the full faith and credit clause and in the fourteenth amendment.

The Negative Aspects of Full Faith and Credit

As was suggested earlier,[104] the full faith and credit clause limits the ways in which the states may act. Although the language is affirmative—"Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State"[105]—it effectively prohibits the denial of full faith and credit by the states. Insofar as the language of the Constitution is concerned, the subject matter of the public acts, records and judicial proceedings is immaterial. The provision applies to all subjects. Nevertheless certain exceptions have been recognized by the Court. These are all related in one way or another to a strong public policy on the part of the forum state. But a state's own determination of the strength of its public policy is not controlling, and the Supreme Court has grown increasingly reluctant to accept public policy as an excuse for refusing full faith and credit.

In 1935 it stated that the purpose of the full faith and credit clause was to make the states integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right irrespective of the state of its origin. And the Court went on to suggest that this purpose ought not be set aside out of deference to a local policy unless the local policy could be said to outweigh the national interests, which presumably would occur only rarely.[106]

[103] In general the prohibitions are contained in Article I, Section 10, of the Constitution; but there are others, including, for example, the fifteenth amendment which reads in part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

[104] See text accompanying note 96 *supra*.

[105] Art. IV, § 1.

[106] Milwaukee County v. M. E. White Co., 296 U.S. 268, 276 (1935).

But as late as 1951, even while holding that full faith and credit must be given under the particular circumstances of the case before it, the Court acknowledged that public policy might still be a justification for refusing full faith and credit if in the particular case the Supreme Court concurred in the "weights" assigned to the competing public policies involved.[107]

At the moment the only safe exception to full faith and credit appears to be in the penal field. Penal statutes and judgments of one state need not be accorded full faith and credit in another.[108] Tax obligations which have not been reduced to judgment may be another;[109] but state courts in recent years have shown an increasing willingness to enforce such obligations arising under the laws of sister states.[110] It would not be overly surprising to learn in the near future that such results are mandatory under the full faith and credit clause.

Regardless of the dimensions of the exception,[111] full faith and credit does require that in certain circumstances a state in the exercise of its admitted powers must subordinate them to those of another state. The Constitution prohibits them from doing otherwise, and to this extent such powers are beyond the reservation of the tenth amendment.

The Fourteenth Amendment

The second limitation to be discussed, and perhaps the most important in the Constitution, is that contained in the fourteenth amendment which provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[112]

These words have been subjected to a volume of construction rivaling that given to those of the commerce clause; but no useful purpose would be served by attempting to list the various fields on which there have been Supreme Court rulings construing the fourteenth amend-

[107] Hughes v. Fetter, 341 U.S. 609, 611 (1951).
[108] See Huntington v. Attrill, 146 U.S. 657 (1892).
[109] See Moore v. Mitchell, 28 F.2d 997 (S.D.N.Y. 1928), *aff'd on other grounds* 30 F.2d 600 (2d Cir. 1929), *aff'd*, 281 U.S. 18 (1930); City of Detroit v. Proctor, 44 Del. 193, 61 A.2d 412 (1948).
[110] See, *e.g.*, Ohio *ex rel* Duffy v. Arnett, 314 Ky. 403, 234 S.W.2d 722 (1950); State *ex rel* Oklahoma Tax Comm'n. v. Rodgers, 238 Mo. App. 1115, 193 S.W.2d 919 (1946).
[111] The role of "public policy" in conflict of laws is fully discussed in Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).
[112] The fourteenth amendment was proposed by the Congress on June 16, 1866, and declared ratified on July 28, 1868. An account of the ratification is contained in BLOCH, STATES' RIGHTS, THE LAW OF THE LAND 50-60 (1958).

ment. The important thing for present purposes is that the language is without limitation insofar as subject matter is concerned. In other words whatever powers the states may have, they are in no case absolute. In every field the states must respect the privileges and immunities of citizens of the United States; in every field persons are entitled to due process of law; and in every field persons within a state's jurisdiction are entitled to equal protection of the laws. Thus the power to act in certain ways is prohibited by the Constitution to the states, and it necessarily follows that this power is not reserved to the states by the tenth amendment.

The segregation cases[113] present a current illustration. Opponents of the original decision still refer to its unconstitutionality, most of them on the theory that the federal constitution confers no power on the federal government with respect to the education of children in the several states. This may or may not be true. But the real point is that the federal government was not exercising an affirmative power; it was and is enforcing the prohibitions of the fourteenth amendment. The tenth amendment reserves to the states respectively, or to the people, only those "powers not delegated to the United States by the Constitution, nor *prohibited by it to the States.*" (Emphasis supplied.) The Court in essence found that the states concerned were exercising a power prohibited to them by the Constitution. The decision might have been erroneous; it certainly was not unconstitutional.

The difficulty lies in the generality of the language of the amendment. Privileges and immunities, due process of law, and equal protection of the laws are terms not easy of definition. Yet to be applied they must be defined, and the courts, particularly the Supreme Court of the United States, have that continuing responsibility. This is not an appropriate place to attempt to define these terms; it is enough for present purposes to note that there is no inconsistency between the tenth and the fourteenth amendments. And even if there were, the fourteenth, ratified subsequent to the tenth, should prevail. It necessarily follows that the amendment, whatever it may mean, is applicable to every type of state activity.

CONCLUSION

Having examined in this somewhat cursory fashion several of the major powers of the federal government and the principal general prohibitions of the states, we revert to this question: What is left of the tenth amendment? The question implies that there was something of substance to it at the beginning, and this simply resurrects the Hamil-

[113] Brown v. Board of Education, 347 U.S. 483 (1954).

ton-Madison controversy as to meaning.[114] There is, in my judgment, no provable solution to this problem, and any attempt to find one is futile inasmuch as we have adopted clearly, and apparently permanently, the Hamiltonian philosophy.

As things now stand, we have a federal government whose theoretical powers are, save for the specific prohibitions of the Constitution, virtually unlimited. We also have state governments wielding vast powers which in large measure overlap those of the federal government. The states, too, are limited by the Constitution's prohibitions, express and implied, and where there is an actual exercise of a federal power, the "supremacy" clause[115] requires that the states yield. Perhaps there is a theoretical limit to this; certainly if the federal government sought to exclude all state taxation on the ground that it interfered with federal taxation, the federal activity would have to be held unconstitutional or for all practical purposes the states would disappear. But such an eventuality will not materialize, for the political check provides the states with a weapon sufficient to ward off any such attack. Consequently our real problem is to maintain voluntarily the most efficient distribution of powers between the federal and state governments.

The geographical extent of this nation and the consequent diversity of problems requiring governmental solution compels disposition at different governmental levels. Some problems are appropriate for national solution, in fact may even require it; others are more appropriately handled at the state level; while still others are solvable most efficiently at the local level. For some problems the appropriate level of control will vary from time to time, and this requires that someone or some group be competent to make decisions as to where authority actually lies. Contrary to the thoughts and wishes of some, this cannot be done in one place at one time for all time. Fortunately the framers of the Constitution did not try to do it; they drafted the instrument in general terms so that it is capable of construction to meet changing circumstances. As was so aptly stated by Chief Justice Marshall, the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[116] For entirely practical reasons the ultimate decisions in these matters must be in federal hands; otherwise the conflicting decisions of the states would render us governmentally impotent.

The primary agency for decision may be Congress, the Executive or the Judiciary, depending upon the subject matter, although ultimately

[114] See text accompanying note 9 *supra*.
[115] See text accompanying note 6 *supra*.
[116] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

the Judiciary has the final word in litigation which comes before it. Whatever the agency it should have uppermost in mind the purposes for which the Constitution was ordained and established—"to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[117]

There can be and is wide disparity of opinion on how best to achieve these ends. Ultimately it is for the people to say, and their opinions are implemented most effectively through the ballot box. To a considerable extent the Supreme Court and the other federal courts are immunized from this control, although it has been said that the Court does follow the election returns. In any event the Court has in recent years in large measure deferred to the other branches of the government with respect to the scope of the powers which they exercise. Consider the treaty, war, commerce and spending powers. In each of these areas it is the executive and the legislative branches working together which have expanded the definitions of the powers. On the whole the Court has merely confirmed their judgment. These two branches are, of course, subject to political controls; and if the people are dissatisfied with these broad definitions of federal powers, they can correct it at the ballot box.

Where the Court does act more or less independently is in the area of the specific prohibitions. Here, because of the absence of effective political controls, the Court should proceed with extreme caution, being as certain as it can that the particular problem must be settled at the national level before imposing a federal solution to it.[118]

But whether effective controls exist or not, all branches of government should be constantly alert to the task of maintaining the most efficient distribution of authority. Before any federal power is exercised, even when that power admittedly exists, an answer should be received to the question whether or not such additional centralization is desirable.

As things now stand, there may not be any powers which are "not delegated to the United States by the Constitution"; nevertheless the tenth amendment stands as a constant reminder that the states were not intended to deteriorate into historical oddities, that they have broad governmental experience, that they are willing and able to carry efficiently a major portion of the governmental load, and that in many if not most instances the purposes for which the Union was founded will be best furthered by permitting the states to act.

[117] Preamble to the Constitution of the United States.

[118] In general see ANDERSON, THE NATION AND THE STATES, RIVALS OR PARTNERS 136 (1955); HAND, THE BILL OF RIGHTS (1958); JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1955).