Volume 51 | Issue 4 Article 3

June 1949

The Doctrinal Development of the Tenth Amendment

Dayton C. Casto Jr.
Civil Aeronautics Board

THE DOCTRINAL DEVELOPMENT OF THE TENTH AMENDMENT

DAYTON C. CASTO, JR.*

ONE of the oldest principles of constitutional law which the courts have applied in interpretation of the United States Constitution is that "real effect is to be given to every word, section and clause of the instrument."[1] However, in light of the language of the Supreme Court that "The Amendment (Tenth) states but a truism that all is retained which has not been surrendered"[2] it seems that the present Court has discarded this rule of interpretation. It is the purpose of this paper to inquire into the history and application of the Tenth Amendment to attempt to determine if it does express "but a truism", with all due respect for the Court which stated this, or whether there is and was intended to be a "real effect" in it with regard to our constitutional system of government.

In order to determine this answer it will be necessary to keep in mind the two predominantly conflicting provisions of the Constitution which have given the courts so much trouble. The conflict between "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 anything in the Constitution or laws of any State to the contrary notwithstanding"[3] and "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",[4] has been a major one in the United States' constitutional history.

This problem has been met principally in two ways by the courts and the way in which they disposed of the problem depended upon the individual court's philosophy of the Federal-State system of government. The political philosophies of the courts,[5] which caused them to choose one of these methods of interpretation of the

---

* With Civil Aeronautics Board, Washington, D. C.

1 See Marbury v. Madison, 1 Cranch 137, 174 (1803); Martin v. Hunters Lessee, 1 Wheat. 304 (1816); Hurtado v. California, 110 U. S. 516 (1883); STORY, COMMENTARIES ON THE CONSTITUTION § 451 5th ed. 1891).

2 Darby v. United States, 312 U. S. 100, 124 (1940).

3 U. S. CONST. Art. VI, § 2.

4 U. S. CONST. Amend. X.

Constitution, have come to be known as the Hamiltonian and Madisonian theories.[6]

The Hamiltonians hold that the Constitution established a National Government whose powers are sovereign and which is under no constitutional compulsion, either in the selection of means whereby to make its powers effective or in the selection of objects to be attained by their exercise, to take account of the coexistence of the states or to concern itself to preserve any particular relationship of power between itself and the states. The Madisonians look upon the Constitution as establishing a compact among the states which requires that its interpretation be directed to the preservation in the states of their accustomed powers and that the National Government concern itself with matters of external relationship while the states are left to regulate internal affairs.

In applying the former theory to a specific case the court determines if the law of Congress in question was made pursuant to any power granted in the Constitution and upon finding this it does not look further for under this view the supremacy clause overrides all constitutions or laws of the states to the contrary. In following the latter theory the court also has to determine if the law was made pursuant to a power of the Constitution, but upon such finding it then considers the powers reserved to the states by the Tenth Amendment to see if Congress has encroached upon them and if so the law must fail as being in conflict with the Amendment.

The courts which have followed the second method have based their logic upon another well-recognized rule of interpretation of constitutions, *i. e.,* if there is to some extent an inconsistency between a provision of the constitution as originally adopted, and another provision which has been added by amendment, so that one or the other must yield, the subsequent provision, being the last expression of the sovereign will of the people, will prevail as an

[5] See 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 1, *et seq.* (Rev. ed. 1937).

[6] See CORWIN, TWILIGHT OF THE SUPREME COURT 47, 48 (1934). However, see HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835 218 (1944). Professor Haines prefers to refer to the two theories as Hamiltonian and Jeffersonian. There was, however, a distinct difference in Jefferson's ideas of government and those of Madison and the Court seems never to have gone so far or rather restricted the government's power as much as Jefferson would have desired. See ELLIOTT, BIOGRAPHICAL STORY OF THE CONSTITUTION 29, 79, 103 (1910) for a comparison of the three men.

implied modification *pro tanto* of the former provision.[7] This basic fundamental in constitutional government has been grossly overlooked or ignored by those decisions which followed the Hamiltonian theory.

The Supreme Court has expressly recognized this rule of interpretation on numerous occasions[8] and on others has impliedly accepted it without comment.[9] In the large number of cases dealing with the Tenth Amendment the Court has but one time stated this rule: "Whilst undoubtedly both the Fifth and Tenth Amendments *qualify,* in so far as they are applicable, *all* the provisions of the Constitution nothing in those Amendments operates to take away the grant of power to tax conferred by the Constitution on Congress"[10] (emphasis added). The Court apparently presumes that this rule is so primary and well known that specific statement of it is not necessary when giving effect to an amendment over a previous conflicting part of the Constitution. The many decisions giving full effect to the Tenth Amendment must of necessity impliedly recognize its modification of the powers of Congress and the supremacy clause.

An amendment of the same import as the Tenth was foremost in the consideration of the constitutional ratifying conventions of the several states.[11] Many members of the conventions considered

[7] 1 COOLEY, CONSTITUTIONAL LIMITATIONS 129 (8th ed. 1927). See Monongahela Navigation Co. v. United States, 148 U. S. 312 (1892). "But like the other powers granted to Congress by the Constitution the power to regulate commerce, is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment . . . ."; McCray v. United States, 195 U. S. 27 (1903); Hammond v. Clark, 136 Ga. 313, 71 S. E. 479 (1911) (an excellent statement of this constitutional rule appropriately applied).

[8] Scranton v. Wheeler, 179 U. S. 141 (1900) (Fifth Amendment limits the commerce power); United States v. Lynch, 188 U. S. 445 (1902) (same); United States v. Cress, 243 U. S. 316 (1916) (same); United States v. Chambers, 291 U. S. 217 (1934) (the Twenty-first Amendment repeals the Eighteenth); United States v. Constantine, 296 U. S. 287 (1935) "So far as the reservations of the Tenth Amendment were qualified by the adoption of the Eighteenth the qualification has been abolished (by the Twenty-first Amendment)."

[9] Everards Breweries v. Day, 265 U. S. 545 (1923) (impliedly recognizes the Eighteenth Amendment modifies the Tenth with regard to Congress's "concurrent power" to control liquor traffic within the states); Patton v. United States, 281 U. S. 276 (1929) (Sixth Amendment and Art. III, Sec. 2, Clause 3 of the Constitution are not in conflict — impliedly recognizes the rule).

[10] McCray v. United States, 195 U. S. 27, 61 (1903).

[11] See 4 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 242, 244 (1836). The North Carolina Convention refused to ratify the Constitution until the amendments were made a part of it and first on their proposed list of amendments was one of the same effect as the Tenth. 3 *id.* at 625, 659. Virginia

it and the other proposed amendments as conditions precedent to their vote for ratification of the Constitution itself. Throughout the debates it appears that the greatest fear was that the Federal Government would, if no positive restrictions were stated as to the extent of its delegated powers, constantly usurp both the powers of the states and the freedom of individuals.[12] Apparently many believed that if the statement that "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", were in the document then the other amendments would not be so necessary as Congress would be so limited by this clause that it would have no power by implication over the liberties of the people. Soon it became obvious that the fight at the conventions was not between those who were against ratification entirely and those for it, but rather was between those who desired to ratify with a concurrent proposal of amendments to Congress and those who thought ratification should be withheld until the amendments were made a part of the Constitution.[13] By their actions the members of the conventions indicated they intended to give real effect to these limitations on the powers of the Federal Government. Considering the first ten amendments in the light of history it is hard to see how the Court can give a different interpretation to the Tenth than it does to the other nine and certainly no court would dare say the First or Fifth are "mere truisms".

In contrast, it is interesting to note how different the problem was at the Constitutional Convention at Philadelphia in 1787 where many of the delegates expressed fears such as Mr. Madison's that "I apprehend the greatest danger is from the encroachment of the states on the National Government."[14] It was principally

placed first on her list of amendments one equivalent to the present Tenth. See 2 *id.* at 177, 406, 545 and 550 for similar action by Massachusetts, New York, Pennsylvania, and Maryland respectively.

[12] See 3 ELLIOT, *op. cit. supra* note 11, at 608, for an example of this in the arguments of Mr. John Dawson of the Virginia Convention, that the unlimited powers of the Federal Government would result in "consolidated government", which is but symbolic of the fears expressed by most of the members of the various conventions who favored the adoption, but with amendments.

[13] See 3 ELLIOTT, *op. cit. supra* note 11, at 628. And see 4 *id.* at 242 for the final action of North Carolina in withholding ratification until amendment.

[14] See 1 ELLIOTT, *op. cit. supra* note 11, at 432. Also interesting is the changed views of Mr. Madison between the time of the Constitutional Convention and 1798 when he became the leader of the opposition to Hamilton's theories of the power of the National Government. See ELLIOTT, THE BIOGRAPHICAL STORY OF THE CONSTITUTION 111 (1910).

such attitudes as this which made it necessary for the members of the state ratifying conventions to propose the amendments which expressed the feelings of the majority of the people toward the National Government.

In submitting amendments to limit the power of the Federal Government the state conventions were not content with the wording of the Tenth Amendment as we know it today, but were intent on limiting the powers granted to the United States to those "expressly" or "clearly"[15] given it. It seems to be unanimous opinion that this wording was carried over from the Articles of Confederation, which in Article II stated, "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."[16]

However when the First Congress met and voted to submit twelve amendments, which had been proposed by the state conventions, to the state legislatures for their adoption the word "expressly" was omitted from the twelfth thereof.[17] The struggles which the Continental Congress had had with this word in the articles were doubtlessly present in the minds of many of the Congress sufficient to cause its withdrawal.[18] In spite of the omission of this word which a majority of the ratifying states had desired, the state legislatures eventually ratified ten of the twelve amendments as submitted by Congress.[19]

Although it is hard to set dates even as broad as a year when the Court changed from a Hamiltonian outlook to a Madisonian one or vice versa, yet it is possible to divide United States constitutional history into three definite periods when the major theory of the Court was one or the other of these doctrines. No claim is made that all the decisions within the years given to outline a per-

---

[15] 2 ELLIOT, *op. cit. supra* note 11, at 177, 406, 550, 545.

[16] 1 ELLIOT, *op. cit. supra* note 11, at 79.

[17] See 1 ELLIOT, *op. cit. supra* note 11, at 338. The present Tenth Amendment was number twelve on the list.

[18] See United States v. The William, Fed. Cas. No. 16,700, at 622 (D. Mass. 1808) "Congress would be continually exposed, as their predecessors, under the Confederation were, to the alternative of construing the term, expressly, with so much rigour, as to disarm the government of all real authority whatever; or, with so much latitude, as to destroy altogether the force of the restriction."

[19] See CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 148 (8th ed. 1946). The adoption of the first ten amendments took 810 days, considerably longer than the average of the subsequent eleven.

iod hold for that theory. Some cases start the gradual change from one to the other theory while others are merely interspersed exceptions that prove the rule.

As to the first period which was as unanimously Hamiltonian as Marshall and the other Federalist judges could make it, the period of its supremacy is sharply drawn starting with the adoption of the Amendment in 1791 and ending in 1837.[20] The second, though the starting point of its Madisonian philosophy is certain in 1837 and its closing date of 1936[21] is equally certain, has some decisions[22] in the latter forty years of the period which coincide with the Hamiltonian doctrine. The decisions from 1937[23] to the present day in some instances "out-Marshall Marshall" in their forceful assertion of the federal supremacy ideology.

It is not surprising that the first era in the development of the Amendment was Hamiltonian in outlook for it was but natural that Washington should appoint Federalists to the Court,[24] but it is unusual that that Court should succeed in maintaining its position thirty-six years after the party had lost power and the majority of the people had come to be strong advocates of states rights as symbolized by the Amendment.[25]

Although the first case which discussed and judicially disposed of the Amendment was not until 1808,[26] yet the Court had previously interpreted the Constitution on matters pertinent to the Amendment without mention of it.[27] This first decision was by a federal district court and concerned a controversy under the Em-

---

[20] See New York v. Miln, 11 Pet. 102 (U. S. 1837). This case can be taken as definitely putting an end to the theories of Chief Justice Marshall by its holding that the police powers of a state are not surrendered or restrained by the Constitution and in relation to those the authority of a state is complete, unqualified and exclusive.

[21] See Ashton v. Cameron County District, 298 U. S. 513 (1936); Carter v. Carter Coal Co., 298 U. S. 238 (1936) (strong assertions of the Madisonian doctrine but one year before the definite return to Hamiltonianism).

[22] See Champion v. Ames, 188 U. S. 321 (1903); Minnesota Rate Case, 230 U. S. 352 (1913); Everards Breweries v. Day, 265 U. S. 545 (1923); United States v. Sprague, 282 U. S. 716 (1931).

[23] See Stewart Machine Co. v. Davis, 301 U. S. 548 (1937); Darby v. United States, 312 U. S. 100 (1940); Wickard v. Filburn, 317 U. S. 111 (1942).

[24] 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 35 (1922).

[25] See CORWIN, THE COMMERCE POWER VERSUS STATE RIGHTS 132 (1936). "Unusual" compared with the Court of 1932 which could maintain its philosophy for only five years against contrary political views.

[26] United States v. The William, Fed. Cas. No. 16,700 (D. Mass. 1808).

[27] See Chisholm v. Georgia, 2 Dall. 419 (U. S. 1793); Ware v. Hylton, 3 Dall. 199 (U. S. 1796).

bargo Act of 1807. Although the Government was now under the administration of Jefferson, who was the strongest advocate of states rights of his day, the district judge in an opinion annotated with frequent references to the "Federalist", sustained this act of the Republicans at the expense of the Tenth Amendment by holding: "The general position is incontestable, that all that is not surrendered by the Constitution, is retained. The Amendment which expresses this is for greater security; but such would have been the true construction without the amendment."[28]

The honor for the first consideration of the Amendment by the Supreme Court[29] goes to Mr. Justice Joseph Story,[30] an advocate of Federalism equal almost in ardour to Chief Justice Marshall. Here the Justice merely cited the Amendment in proving his proposition that the Constitution was established by the people of the United States and not by the states and therefore if the people granted a power in the Constitution the states had no right to object to its exercise by the Federal Government, ignoring all the while the fact that the people had demanded a limitation on the power of the Federal Government and secured it by the first ten amendments.[31]

However, it was reserved to Chief Justice Marshall to express in binding words his theory of the Amendment and of the Federal-State system of government.[32] He disposed of the Amendment by

[28] United States v. The William, Fed. Cas. No. 16,700, at 622 (D. Mass. 1808. Compare these words with those of the Court 132 years later in Darby v. United States, 312 U. S. 100, 61 S. Ct. 451 (1940) quoted on page (1) *supra.*

[29] Martin v. Hunters Lessee, 1 Wheat. 304 (U. S. 1816).

[30] See 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 419 (1922) for the interesting history of Justice Story's change from Madison's to Hamilton's views. See also STORY, COMMENTARIES ON THE CONSTITUTION § 1908 (5th ed. 1891), for the extra judicial assertions by the Justice on the Amendment.

[31] See Fox v. Ohio, 5 How. 410, 434 (U. S. 1847) "The prohibition alluded to as contained in the amendments to the constitution, as well as others with which it is associated in those articles, were not designated as limits upon the State governments in reference to their own citizens. They are exclusively restrictions upon federal power, intended to prevent interference with the rights of the States, and of their citizens. Such has been the interpretation given to those amendments by this court, in the case of Barron *v.* The Mayor and City Council of Baltimore, 7 Peters, 243; and such indeed is the only rational and intelligible interpretation which those amendments can bear, since it is neither probable nor credible that the States should have anxiously insisted to ingraft upon the federal constitution restrictions upon their own authority, — restrictions which some of the States regarded as the *sine qua non* of its adoption by them"; Spies v. Illinois, 123 U. S. 131 (1887); Minnesota & St. Louis Ry. v. Bombolis, 241 U. S. 211 (1916).

[32] McColloch v. Maryland, 4 Wheat. 316 (U. S. 1819).

saying it "was framed for the purpose of quieting excessive jealousies which had been excited", and then further stated "that the government of the Union, though limited in its powers, is supreme within its sphere of action" and as to what is within that sphere "by this tribunal alone can the decision be made."[33] Given such premises and the background of the Chief Justice there could be little doubt as to the conclusion. He was also careful to point out that the word "expressly" had been omitted from the Amendment and thus the doctrine of implied powers was free to operate in determining what had been delegated to the United States. One cannot but question the logic of the Chief Justice in turning this Amendment, the primary purpose of which had been to restrict the Federal Government to its fields of granted powers, into another "proof" that the founders of the Constitution had intended that Congress have power to create a bank and therefore the states, to which the Amendment reserved essential sovereign powers, could not tax such bank. Although the ends which the Chief Justice achieved may be admired, the means may well be criticized.

In the famous case of *Gibbons v. Ogden,*[34] the Chief Justice further bantered the Amendment dismissing it in one sentence as "no limitation" on the commerce power. At first blush one wonders why counsel for Ogden failed to argue from the viewpoint of the Amendment to show the reserved power of New York over its waters, yet when one considers their closeness to the opinion in *McColloch v. Maryland*[35] and their knowledge of Marshall's personal feelings on the matter, it does not seem so logical. In language which epitomizes the Hamiltonian doctrine the opinion states "This power (over commerce) like all others vested in Congress, is complete in itself, may be exercised to its upmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."[36]

There is, however, one case[37] in which the Chief Justice found it necessary to modify in some degree the broad statements which he had made in *Gibbons v. Ogden,* and to recognize that there was

[33] *Id.* at 401, 406.

[34] 9 Wheat. 1 (U. S. 1824).

[35] 4 Wheat. at 374. Even counsel for Maryland regarded the Amendment as "merely declaratory". See 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 587 *et seq.,* for an excellent account of judicial and extra-judicial occurrences in connection with Gibbons v. Ogden.

[36] Gibbons v. Ogden, 9 Wheat. 1, 196 (U. S. 1824).

[37] Wilson v. Blackbird Creek Marsh Co., 2 Pet. 245 (U. S. 1829).

a field in which the states could exercise their powers even though it was within the domain of the all powerful power of Congress over commerce. The State of Delaware had granted a company permission to build a dam on a navigable stream within the state and the plaintiff, whose navigation on the stream was interfered with, argued that in *Gibbons v. Ogden* it was stated that the power to regulate commerce is exclusively granted to Congress and no state could interfere with any matter under that power. Chief Justice Marshall apparently recognizing that his dictum was too broad stated: "Measures calculated to produce these objects (health and wealth of the state's inhabitants) provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states,"[38] and that unless Congress had passed an act to control such streams the state could regulate them.

So completely was the Amendment relegated to the field of "truisms" by Marshall's Court that it seems never to have been raised again in the remaining years of his Chief Justiceship. However, the Court when relieved of his overwhelming control were not amenable to the nugatory effect he had given the Amendment and within two years of his death gave new life to the Tenth Amendment.

The decision which effected this was *New York v. Miln*,[39] in 1837. In holding that a law of New York was valid which required captains of ships arriving in New York from foreign ports to report in writing the names, ages and last legal settlement of every person on board their vessels the court stated:

> "We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely

[38] *Id.* at 251.
[39] 11 Pet. 102 (U. S. 1837).

> municipal legislation, or what may, perhaps, more properly be called *internal police,* are not thus surrendered or restrained; and that, consequently in relation to these, the authority of a state is complete, unqualified, and exclusive."[40]

The Court by Mr. Justice Barbour places its decision directly on the Tenth Amendment, but Mr. Justice Thompson, in his concurring opinion[41] prefers to show in addition that this is one of the subjects a state might exercise power over until Congress had acted, basing his opinion on *Wilson v. Blackbird Creek Marsh Co.*[42] This second ground is rather doubtful as several acts of Congress had attempted to control immigration of the nature New York was governing.

This decision had the effect of raising the Tenth Amendment back to a position equal to the other amendments and further gave the logical effect contended for by the rule that an amendment must serve the purpose for which it was intended, *i. e.,* to qualify preceding portions of the Constitution with which it conflicts which in this instance was undoubtedly the commerce power and the supremacy clause.[43] It further marked the beginning of a Madisonian era that was to last almost one hundred years with but a few contrary decisions in the latter third of its time.

The next approvals of the doctrine succeeded in strengthening the Amendment's position. First of these were the *License Cases,*[44] which involved laws of Massachusetts, Rhode Island and New Hampshire requiring licenses for the sale of liquor within the respective states, even when the liquor had been imported from other states or countries. The opponents of these laws contended they violated the doctrine of *Brown v. Maryland,*[45] another Marshall decision of 1827, which had set forth the "original package" doctrine in connection with the commerce power. Although there were six opinions by the Judges they were unanimous in holding

---

[40] *Id.* at 139.
[41] *Id.* at 143.
[42] 2 Pet. 245 (U. S. 1829).
[43] See CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 174. Professor Corwin admits that "the Court has at various time reiterated this or equivalent doctrine, although its logical incompatibility with the supremacy clause seems clear", but the Professor in none of his writings seems to recognize that an amendment controls where there is a "logical incompatibility" between it and a prior article.
[44] 5 How. 504 (U. S. 1847).
[45] 12 Wheat. 419 (U. S. 1827).

that such laws came within the reserved police power of the states and did not conflict with Congress's power over commerce.

After this case there were several which expressed complete approval of the "reserved powers of the States" position, yet they are but repetitions of the doctrine of *New York v. Miln,* and the *License Cases* regarding the Amendment so that extended discussion of them is not necessary.[46] The attitude of the Court in these cases may best be summed up by the statement of Mr. Justice Daniel in the *License Cases* where he says: "Every power delegated to the federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the general government."[47]

The next decision of importance to the vitality of the Amendment was *Collector v. Day,*[48] in 1870, in which the Court basing its opinion primarily on the Amendment held that the Federal Government could not tax the income of a state judge. The force which the Amendment has gained by this time relative to the supremacy clause is illustrated by the words of the Court: "It (the taxing power) is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the

[46] See The Passenger Case, 7 How. 283 (U. S. 1849) (although the laws of New York and Massachusetts taxing aliens arriving at their ports were held unconstitutional, in a 5-4 decision, the Madisonian theory stands out vividly even in some of the majority opinions); Scott v. Sanford, 19 How. 393 (U. S. 1857) (the Dred Scott decision, a strong presentation of states rights ideology); Kentucky v. Dennison, 24 How. 66 (U. S. 1860) (another emphatic view of the right of a state official to refuse to give up a fugitive from justice from another state in spite of Art. IV, Sec. 2, Par. 2 of the Constitution); Lane County v. Oregon, 7 Wall. 71 (U. S. 1868). "In many articles of the Constitution the necessary existence of the states, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not *expressly* delegated to the national government are reserved" (emphasis added — which indicates very definitely how the Court of this era thought); Texas v. White, 7 Wall. 700 (U. S. 1868) "It may not unreasonably be said that the preservation of the States and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government"; United States v. Dewitt, 9 Wall. 41 (U. S. 1869) (the commerce power of Congress does not extend to police regulations within the states).

[47] 5 How. at 613.

[48] 11 Wall. 113 (U. S. 1870).

general government as that government is independent of the States. The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality. . . ."[49]

That even the Civil War and the resulting Thirteenth, Fourteenth, and Fifteenth Amendments did not change the Supreme Court's view of the Amendment as a guarantee of reservation of power to the states to control persons and things within their borders is illustrated by the *Slaughter House Case*[50] and the *Civil Rights Case*.[51] In the former decision it was the Tenth Amendment which saved to the state the right to regulate business within its area regardless of the effect on interstate commerce and the privileges and immunities clause of the Fourteenth Amendment. In the latter the power of Congress to compel individuals within the states to grant equal privileges to all persons was denied because "it is repugnant to the Tenth Amendment of the Constitution."[52]

These two cases further serve to illustrate the ideology which regarded the Amendment as an effective part of the Constitution and which placed certain things commonly within the power of the states beyond the power of Congress. The Court since 1837 had firmly expressed this idea without any encroachment. However, in 1872, once again the commerce power was given some force by the *State Freight Tax Case*.[53] The holding of this case can be fitted into the pattern of the Amendment's power and purpose for the Court was careful to point out that this was the negative purpose[54] for which the commerce clause was provided, *i. e.,* to prevent state laws which would burden the commerce between the states. The few decisions[55] on this subject in the following years limited the powers of the states only in that state laws which were a burden on interstate commerce were held void and did not extend the power of the Federal Government into fields reserved to the states.

[49] *Id.* at 126.
[50] 16 Wall. 36 (U. S. 1872).
[51] 109 U. S. 3 (1883).
[52] *Id.* at 15.
[53] 15 Wall. 232 (U. S. 1872).
[54] See Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, at 475 (1941). "All the extant contemporary evidence thus tends to confirm Pickney's and Madison's recollection that the power as to commerce between the states was in the main a negative and preventive provision: It was a shield against state exactions and no two-edged sword of positive federal attack."

The fact that the *Slaughter House Case* was contemporaneous with the *State Freight Tax Case* and the *Civil Rights Case* was later is a further indication that this case was amenable to the Court's idea of the Amendment.

The Court a few years later in a most emphatic manner showed it had no thought of reducing the effect of the Amendment.[56] The power of Congress by the Sherman Anti-Trust Act to end a sugar monopoly was denied solely because "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."[57]

In the same year the famous *Income Tax Case*[58] was handed down which, among other things, reaffirmed the doctrine of *Collector v. Day,* that the income from a municipal corporation's bonds could not be taxed by the Federal Government as such would be a burden upon the states and their instrumentalities.

However, in 1903 the first real encroachment upon the Madisonian ideology, which had preponderantly controlled the decisions of the Court since Marshall's death, occurred. In that year *The Lottery Case*[59] held that the commerce power of Congress was sufficient to prevent the carrying from one state to another of lottery tickets even though neither state in question prohibited sale of such tickets. The principal argument against this statute had been that the matter was one within the so-called "police powers" of the state to allow or prohibit as it saw fit and that Congress could not

[55] See Henderson v. New York, 92 U. S. 259 (1875) (tax on passengers landing at New York City port —— void); Inman Steamship Co. v. Tinker, 94 U. S. 238 (1876) (tonnage charge by state on ships docking in New York —— void); Robbins v. Shelby Tax District, 120 U. S. 489 (1887) (state tax on out-of-state drummers and merchants——void).

[56] United States v. E. C. Knight Co. (The Sugar Trust case), 156 U. S. 1 (1895).

[57] *Id.* at 13.

[58] Pollock v. Farmers Loan & Trust Co., 157 U. S. 429 (1895).

[59] Champion v. Ames, 188 U. S. 321 (1903).

enter the field. That the question was a hard one is indicated by the five to four decision. This decision meant that the positive power of Congress over matters in interstate commerce had returned to the scene.

Those persons who saw in this opinion a rise of national power with a resulting limitation of the Tenth Amendment were soon to be disappointed for three years later the Court[60] reaffirmed its belief in the power of the Amendment in such a manner that there could be no doubt as to its "real effect". The Court in denying the power of the Federal Government to intervene in a dispute between Kansas and Colorado over the waters of the Arkansas River because the subject of irrigation of arid lands was for the states said: "This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise power which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future powers seemed necessary they should be granted by the people in the manner they had provided for amending that act. . . . This Article X is not to be shorn of its meaning by any narrow and technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning."[61] In this case the Court was not bothered with the commerce clause for the Federal Government was attempting to assert a power over this arid land without reference to its power over navigation of the river. Although the opinion is a strong proponent of the Amendment's power it did not settle the conflict raised by *The Lottery Case, i. e.,* commerce power versus police power.

However, a short time later a somewhat analogous situation[62] arose in which the power of Congress over aliens as derived from Article I, Section VIII, Paragraph 4 of the Constitution came in conflict with the reserved power of the states. Congress provided that whoever kept an alien woman for purposes of prostitution within three years of her entry into the United States should be subject to fine and imprisonment. The Court held the Act un-

[60] Kansas v. Colorado, 206 U. S. 46 (1906).
[61] *Id.* at 90.
[62] Keller v. United States, 213 U. S. 138 (1908).

constitutional on the basis that the control of individuals, either citizens or aliens, after they were within the states was a matter of state power "for, as stated there is in the Constitution no grant to Congress of the police power."[63] In saying "While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should be fairly and reasonably enforced,"[64] the Court was giving effect to the Amendment over the supremacy clause for here was a direct struggle between a granted power and a power reserved to the states.

The proponents of strong national government basing their plans on decisions such as *The Lottery Case, The Minnesota Rate Cases*[65] and others[66] of like import, determined that Congress had power to prevent an article manufactured by child labor from being transported in interstate commerce.[67] Here the Court was faced with the bare problem of allowing the extension of the commerce power to control manufacture within a state or to restrict the power because the matter was one within the state's power to forbid or allow as it saw fit. Mr. Justice Day, for the Court, started by distinguishing the cases on which the law was based by saying they gave Congress power to prohibit things harmful in themselves while the articles manufactured by child labor were not *per se* harmful. He concluded saying: "The far reaching result of upholding the Act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus

[63] *Id.* at 148.

[64] *Id.* at 149. However, *cf.* Zakonate v. Wolf, 226 U. S. 272 (1912), where without mention of *The Keller* case the Court said "The appellant (an alien prostitute) raises some other constitutional questions, viz.: that the Immigration Act vests in the federal authorities the power to try an immigrant for a violation of the penal laws of the State of which he has become a resident, and so interferes with the police power of the State; . . . . These are without sutstance and require no discussion."

[65] 230 U. S. 352 (1912).

[66] See Northern Securities Co. v. United States, 193 U. S. 197 (1904); Adams Express Co. v. Kentucky, 214 U. S. 218 (1909); Hoke v. United States, 227 U. S. 308 (1912). But see Employers Liability Cases, 207 U. S. 463 (1908), which attempted a similar control over employees of interstate businesses and was held to be unconstitutional.

[67] Hammer v. Dagenhart, 247 U. S. 251 (1917).

our system of government practically destroyed."[68] Although this case was severely criticized from all sides, the viewpoint of the critics was principally humanitarian. There was adequate constitutional authority for the decision and as Mr. Justice Day pointed out, ". . . . all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States."[69]

The decade and a half which followed this decision saw somewhat of a see-sawing for power between the commerce clause and the Amendment. The Court apparently recognized the validity of Justice Day's distinguishing factor of *The Lottery Case* for it approved similar regulations of things *per se* harmful[70] as well as harmful acts done in interstate commerce,[71] but in other instances disapproved extensions of the power of Congress in matters similar to that in *The Child Labor Case.*[72]

During this era a new form of restriction on the powers reserved to the states and a yet unexplored power of the Federal Government entered the scene via *Missouri v. Holland.*[73] Mr. Justice Holmes by combining the wording of the treaty power with that of the supremacy clause reached the astonishing conclusion that "acts of Congress are the supreme law of the land when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States."[74] Using this as a premise he arrived at the result that "no doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power."[75] One could conjur up a thousand horrible examples of how tremendous such

[68] *Id.* at 276.

[69] *Id.* at 272. See also Abel, *supra* note 54, at 432 *et seq.*

[70] See United States v. Daremus, 249 U. S. 86 (1919) (Narcotic Drug Act).

[71] See Brooks v. United States, 267 U. S. 432 (1925) (Stolen Automobile Act).

[72] See United States v. Wheeler, 254 U. S. 281 (1920) (The Federal Criminal Code did not apply to acts done within a state); Bailey v. Drexel Furniture Co., 259 U. S. 20 (1922) (Child Labor Tax Case—Congress by the taxing power could not achieve what the commerce power tried in Hammer v. Dagenhart); Linder v. United States, 268 U. S. 5 (1925) (the Federal Narcotic Act could not control a physician's prescription because "Obviously, direct control of medical practice, in the States is beyond the power of the Federal Government").

[73] 252 U. S. 416 (1919).

[74] *Id.* at 433.

[75] *Id.* at 434.

a power is, but it is sufficient to note that in his explanation of the supremacy clause Mr. Justice Holmes made something that is perhaps far greater than Chief Justice Marshall's commerce clause as an instrument for depriving the states of their reserved powers. With all due respect for the reasoning of Justice Holmes it can be pointed out that he did not consider the limiting effect to be given an amendment when there is a conflict between it and a prior portion of the instrument. At some not too distant date it may be necessary to call upon this rule of constitutional construction to overcome this heretofore unknown power of the supremacy clause for if carried to its logical conclusion it could change many of the established concepts of the power of the Federal Government.

The years of 1935 and 1936 were the most fruitful in the Amendment's history judged both by the number[76] and importance of the decisions regarding it. The power of the Amendment during these years is best demonstrated by the following summary of the powers of the Federal Government which it limited together with brief excerpts from the opinions which indicate exactly how much "real effect" the Court gave the Amendment during these years: the commerce power as applied in the National Recovery Act — "But the authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce among the several states' and the internal concerns of a state";[77] the taxing power as applied under the Revenue Act of 1926 — "The affirmative of such a proposition would obliterate the distinction between delegated powers of the Federal Government and those reserved to the States and to their citizens";[78] the monetary power under the Federal Home Owners Loan Act of 1933 — "In this there is an invasion of the sovereignty or quasi-sovereignty of Wisconsin and an impairment of its public policy which the State is privileged to redress as a suitor in the courts so long as the Tenth Amendment preserves a field of autonomy against fed-

[76] See Schechter Corp. v. United States, 295 U. S. 495 (1935); United States v. Constantine, 296 U. S. 287 (1935); Hopkins Federal Saving Ass'n v. Cleary, 296 U. S. 315 (1935); Butler v. United States, 297 U. S. 1 (1935); Carter v. Carter Coal Co., 298 U. S. 238 (1936); Ashton v. Cameron County District, 298 U. S. 513 (1936).

[77] Schechter Corp. v. United States, 295 U. S. 495, 550 (1935).

[78] United States v. Constantine, 296 U. S. 287, 296 (1935).

eral encroachment";[79] the taxing and commerce powers as combined in the Agricultural Adjustment Act of 1933 — "From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary the Tenth Amendment was adopted. The same proposition otherwise stated, is that the powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden";[80] the same two powers as presented in the Bituminous Coal Conservation Act of 1935 — "The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired self-government in all matters not committed to the general government is one of the plainest facts which emerge from the history of their deliberations. And adherence to that determination is incumbent equally upon the Federal Government and the states";[81] the bankruptcy power in the Bankruptcy Act Amendment of 1934 — "The sovereignty of the State essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by any form of legislation . . . . But nothing in this tends to support the view that the Federal Government acting under the bankruptcy clause, may impose its will and impair state powers — pass laws inconsistent with the idea of sovereignty".[82]

Inextricably associated with each of these powers of Congress was the supremacy clause which attorneys for the Federal Government urged as a controlling factor. In thus rejecting these arguments the Court impliedly if not expressly recognized that all previous portions of the Constitution in conflict with the reserved powers of the states are restricted by the Amendment. The Court in these cases rounded out almost a century during which the great majority of decisions were completely in accord with the purposes and acts of the Constitutional Ratifying Conventions, as indicated by their debates and resolutions. In so doing the Court did not have to give a strained interpretation to the Constitution, but could give normal effect to all recognized rules of

[79] Hopkins Federal Savings Ass'n v. Cleary, 296 U. S. 315, 337 (1935).
[80] Butler v. United States, 297 U. S. 1, 68 (1935).
[81] Carter v. Carter Coal Co., 298 U. S. 238, 295 (1936).
[82] Ashton v. Cameron County District, 298 U. S. 513, 531 (1936).

constitutional law which are inherent in a system of government founded on the belief that more freedom and justice will result when the organic act is reduced to writing and which can be modified only by the people by amendments.

The year of 1937 has been chosen as indicating a rebirth of Hamiltonian ideology rather than an exception to the general doctrine prevalent in the previous ninety-nine years, because it is impossible to say that cases such as *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[83] *Stewart Machine Co. v. Davis*,[84] and *Helvering v. Davis*[85] and others of like import which were reported in that year, are anything but contra to the general rule of those cases starting with *New York v. Miln*[86] in 1837 through *Ashton v. Cameron County District*[87] in 1936. An equivalent to the extension of the powers of the National Government which these 1937 cases created can be found only in *Gibbons v. Ogden* and *McColloch v. Maryland.*

Mr. Chief Justice Hughes in the *National Labor Relations Case,* while giving lip service to the Amendment,[88] interpreted a statute containing the words "affecting commerce" in such a manner that subjects heretofore reserved to the states came within the jurisdiction of the Federal Government. In spite of statements of Mr. Justice Cardozo in *Stewart Machine Co. v. Davis* and in *Helvering v. Davis,* that the Social Security Act did not violate the Amendment, these decisions laid the foundation for overruling of all the pro Amendment cases of the previous century. Although the Court had sufficient authority for a tax system as the statute in the former case provided with its connected system of credits to the states,[89] yet this system was so interwoven with the unemployment plan in the latter case that had the Court chosen to consider the Act as a whole as it did those in *Butler v. United States* and *Carter v. Carter Coal Co.,* it would have arrived at a different result. Further in *Helvering v. Davis,* Mr. Justice Cardozo states he is accepting "The conception of the spending power advocated by Hamilton and strongly reinforced by Story (which) has pre-

[83] 301 U. S. 1 (1937).
[84] 301 U. S. 548 (1937).
[85] 301 U. S. 619 (1937).
[86] 11 Pet. 102 (U. S. 1837).
[87] 298 U. S. 513 (1936).
[88] 301 U. S. at 30.
[89] See Florida v. Mellon, 273 U. S. 12 (1926).

vailed over that of Madison, which has not been lacking in adherents",[90] but in actuality he is accepting the entire Hamiltonian theory of the powers of the National Government. Dissenting opinions[91] to all three of these cases are based on the contention that the Acts involved violated the Tenth Amendment.

In spite of the changed attitude of the Court as indicated by these cases, it was not until 1941 that the Court had become so firmly Hamiltonian that it could repeat in essence the words of a Federalist Court of 1808,[92] *i. e.*, "The Amendment states but a truism that all is retained which has not been surrendered."[93] The foundation had been firmly laid for these words by several decisions[94] of the previous four years. The actual interpretation of the powers of Congress was no broader than it had been in the foundation cases, but the Court took this opportunity to set forth its philosophy of the powers of the National Government. As a result this decision has been considered as somewhat of a death knell of the Tenth Amendment.[95] With this case as a premise it is not surprising that the Court in later decisions while extending the power of Congress into all fields previously reserved to the states gave but cursory attention to the Amendment saying repeatedly, "It follows that no form of state activity can constitutionally thwart the regulatory powers granted by the commerce clause to Congress."[96]

The Court has not been content with merely extending the power of Congress wherever the Congress saw fit to expressly say its power should extend, but has further extended by implication

---

[90] 301 U. S. at 640.

[91] See National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 76 (1937); Stewart Machine Co. v. Davis, 301 U. S. 548, 598 (1937); Helvering v. Davis, 301 U. S. 619, 646 (1937). The total dissent in the latter two cases is "Mr. Justice McReynolds and Mr. Justice Butler are of opinion that the provisions of the Act here challenged are repugnant to the Tenth Amendment."

[92] See United States v. The William, Fed. Cas. No. 16,700, at 622 (D. Mass. 1808). See note 28 *supra.*

[93] Darby v. United States, 312 U. S. 100, 124 (1940).

[94] See Kentucky Whip & Collar Co. v. Illinois Central R. R., 299 U. S. 334 (1937); Cincinnati Soap Co. v. United States, 301 U. S. 308 (1937); Wright v. Union Central Ins. Co., 304 U. S. 502 (1938); United States v. Bekins, 304 U. S. 27 (1938); Mulford v. Smith, 307 U. S. 38 (1939).

[95] See Feller, *The Tenth Amendment Retires,* 27 A. B. A. J. 223 (1941); Dodd, *The Decreasing Importance of State Lines,* 27 A. B. A. J. 78 (1941); CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 174.

[96] United States v. Wrightwood Dairy Co., 315 U. S. 110, 119 (1941); Wickard v. Filburn, 317 U. S. 111, 124 (1942).

acts of Congress so as to limit the States in their exercise of necessary governmental functions.[97] Just how far these cases have created a reduction of the States to co-equals with common citizens of the United States instead of co-equals with the Federal Government is demonstrated by the doctrine of *New York v. United States*[98] which the Court stated to be: "so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State."[99] Decisions such as this can never be made to coincide with the constitutional doctrines on which the United States federal-state system of government was founded.

The scope of this paper is too brief to state the arguments pro and con with regard to the benefits and detriments in the Madisonian and Hamiltonian theories of government. That the problem is one on which the minds of reasonable men can differ can be shown by listing the famous men who have been outspoken in favor of each theory or by merely reading the decisions cited herein.

In concluding it is sufficient to point out that the doctrinal development of the Tenth Amendment lends itself readily to an outline in which those decisions favoring the supremacy clause over all else in the Constitution are on one side and those holding the Amendment modified that supremacy clause are on the other. This is due to the fact that the courts have given effect to their political philosophy in reaching their decisions and this in some cases was achieved even to the extent of ignoring fundamental rules of interpretation.

The rule of constitutional law which requires that a court consider always the amendments to a constitution to see if they have modified the main body of the document is more than a mere rule of interpretation, it is a basic fundamental in the system of government based on a written constitution which can be modified only by written amendments. That the Constitutional Convention recognized this is demonstrated by Article V of the Constitution which prescribes the only method whereby the effect

[97] See California v. United States, 320 U. S. 577 (1943); New York v. United States, 326 U. S. 572 (1946); Case v. Bowles, 327 U. S. 92 (1946).

[98] 326 U. S. 572 (1946).

[99] *Id.* at 582.

of any portion of the organic law can legally be changed. When "the people" add amendments they are exercising their prerogative of sovereignty which as the preamble indicates is theirs alone. If by the act of modification they see fit to limit any or all of the powers previously given that is their privilege and no person elected or appointed under the Constitution has the right to gainsay that act.

One cannot read through those portions of Elliot, *Debates on the Federal Constitution,* recording the actions of the state ratifying conventions and arrive at the conclusion that by the first ten amendments the people did not intend to seriously limit the Constitution as it came from the Constitutional Convention in Philadelphia. A court should never consider the body of the Constitution without consulting the first ten amendments because the two taken together establish the form of government we have today. Had it not been for the assurances of all concerned that the Constitution would be amended as soon as the First Congress met there are indications that more states would have taken action such as North Carolina did in refusing to ratify until the amendments were made a part of the basic law. Neither can one read the history of federal-state governments in general nor that of the United States in particular without seeing the real effect intended by the Tenth Amendment. Admitting the bias of the man, yet there is a fundamental truth in the words of Jefferson that "When all government shall be drawn to Washington as the center of all power it will become venal and oppressive."

While admittedly some decisions by the Court following the Madisonian theory may have gone too far in that they created a blank space in the law between the jurisdiction of the National Government and that of the state governments, yet this defect could be remedied without making the states mere geographical subdivisions of the United States as some of the recent Hamiltonian minded courts have apparently done. Were such a change as this latter desired by the people, Article V provides a method whereby it can be achieved, but until such a change is effected, which would no doubt necessitate the removal of the Tenth Amendment from the Constitution, the courts should interpret "every word, section and clause to give it real effect" and upon finding such is impossible due to a conflict between the Consti-

tution as originally adopted and another provision which has been added by amendment that provision last established by "the people" should modify *pro tanto* the former provision.