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**TRUISMS THAT NEVER WILL BE TRUE: THE
TENTH AMENDMENT AND THE
SPENDING POWER**

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Logic, law, and perhaps even life would be neater if the text and history of the United States Constitution would hold still. Our constitutional past surely would be more usable if we could rely on history for answers to the kind of binary questions the adversary system tends to pose. In constitutional law, however, even constitutional truisms almost never will be true. The farrago of our federalism provides a prime example of how textual and historical ingredients, added intermittently to appeal to different tastes, have become difficult to penetrate and virtually impossible to swallow.

A good place to begin is the fundamental notion that our national government is confined to powers granted to it by the Constitution. It

* Professor of Law, Boston University. Many people share credit or blame for this article. I first developed some of these ideas at a conference on "The Federal Purse and the Rule of Law," sponsored by the Center for Constitutional Studies, Notre Dame Law School, held at the Smithsonian Institution in March, 1981. Comments and suggestions made there, particularly by Robert Bard, Kingman Brewster, Jr., Robert Cover, Edward Gaffney, Jr., and Robert O'Neil, Jr., were very helpful to me, as was the splendid research assistance of Lance Cassak.

To the extent that this article may have become somewhat coherent, progress is attributable largely to the challenge of being a scholar-in-residence at the University of Colorado School of Law in March, 1986, and to the kindness and hospitality extended to me there, even though I was someone whom earlier Coloradoans surely would have termed a "wind-broken blatherskite." In particular, Dean Betsy Levin and Professors Robert Nagel, Marianne Wesson, and Stephen Williams provoked, parried and partied most helpfully, as did staff members of the University of Colorado Law Review, including, most directly, Britt Clayton. In preparation for western slings and arrows, I presented a preliminary talk about these themes at the University of Connecticut School of Law Faculty Forum. The comments from old friends there and from the usual suspects at Boston University were invaluable, as was the research assistance of Steve Lincoln and Elizabeth Kuczynski.

It seems appropriate to dedicate this article about artificial barriers to a resourceful one-year-old young woman, Amira Shulamit Booth Soifer.

is also a truism, however, that the power granted to Congress to spend for the general welfare extends beyond purposes explicitly mentioned elsewhere in the constitutional text.¹ As a practical matter, this was perceived to be obvious at least from the 1790s, when Congress voted to subsidize the cod fisheries and when President George Washington proposed a national university; it generally remained a fact of political and constitutional life through internal improvements, land grant colleges and federal involvement in activities ranging, in the late nineteenth century, from aid to agriculture to acquisition of the Gettysburg battlefield.² Ironically, the United States Supreme Court formally endorsed an expansive view of the spending power a half-century ago in *United States v. Butler*, which invalidated the New Deal's Agricultural Adjustment Act on other grounds. The *Butler* majority said that to confine the spending power of Congress to powers otherwise expressly stated in the Constitution would make the spending power a "mere tautology."³

For a generation after World War II, it was assumed that the tenth amendment was "but a truism"⁴ which did not add the weight of constitutional text to state sovereignty claims. Yet the theory that the tenth amendment provides a separate constitutional barrier protecting state sovereignty, a theory invoked to invalidate federal law in *Butler*, has recently been resurrected and much debated.

After a brief revival in *National League of Cities v. Usery*, the specific claim that the tenth amendment creates an enclave for state

1. The best single source for public proclamations and practices indicating the extent of Congress' power to spend for the general welfare throughout the nineteenth century is a forgotten article by Edward Corwin, written to rebut constitutional arguments against the Sheppard-Towner Act ("Maternity Act") of 1921: Corwin, *The Spending Power of Congress—Apropos the Maternity Act*, 36 HARV. L. REV. 548 (1923). As far as I have been able to ascertain, this article has not been cited in any judicial decision for as far back as LEXIS goes. Even the book Corwin wrote on similar themes, E. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. (1941), is an almost entirely forgotten classic today.

The best contemporary treatment of the history of federalism is in the work of Harry Scheiber. See, e.g., Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC. REV. 663 (1980); Scheiber, *Federalism and the Constitution: The Original Understanding*, in L. FRIEDMAN & H. SCHEIBER, AMERICAN LAW AND THE CONSTITUTIONAL ORDER 85 (1978).

2. The Court unanimously affirmed inherent federal power to purchase the Gettysburg battlefield in *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668 (1896).

3. 297 U.S. 1, 65 (1936).

4. *United States v. Darby Lumber Co.*, 312 U.S. 100, 124 (1941). This was not a new concept, of course, even before the change in the Court in 1937. See, e.g., *United States v. Sprague*, 282 U.S. 716 (1931) (tenth amendment added nothing to Constitution as originally ratified). The Court began to suggest that this truism, the tenth amendment, was "not without significance" in *United States v. Fry*, 421 U.S. 542, 547 n.7 (1975) and appeared to rely upon it in *National League of Cities v. Usery*, 426 U.S. 833 (1976), discussed *infra* 801-03. The tenth amendment 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."

authority once again, but just barely, fails to command a majority of the Court.⁵ Now, however, it is also embraced by a surprising number of otherwise quite sensible commentators.⁶ With considerable vigor, these scholars and dissenting Justices prophesy that the tenth amendment will not be interred again for long.⁷ Those Justices and commentators who bemoan the reburial of the tenth amendment in *Garcia v. San Antonio Metropolitan Transit Authority*⁸ claim that their vision of states' rights has an unbroken lineage in our constitutional history. There are precedents to support their position, to be sure, but a close look at the old chestnuts available to them — such as *Texas v. White*,⁹

5. *National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding application of federal Fair Labor Standards Acts to state employees unconstitutional for infringing authority of states *qua* states); *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985) (overruling *National League of Cities*).

6. The tenth amendment enclave approach is advanced with considerable passion by distinguished scholars today. See, e.g., Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985); Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789 (1985); Stewart, *Federalism and Rights*, 19 GA. L. REV. 917 (1985); Schwartz, *National League of Cities Again — R.I.P. or a Ghost that Still Walks?*, 54 FORDHAM L. REV. 141 (1985). But see Martha Field's critical comment: Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985).

7. Moreover, a majority of the Court, somewhat paradoxically, seems committed to constructing a broad and thickening wall elsewhere to defend the truisms of Their Federalism. Built in part of eleventh amendment materials, this anachronistic battlement rests on undefined structural assumptions which have little to do with our nation's history and almost nothing to do with our constitutional text. It is particularly difficult to explain Justice White's shifting alliances. He seems to reject the tenth amendment barrier theory, as he did by joining the majority in *Garcia*, yet seems quite fond of the metaconstitutional theories of Our Federalism. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *O'Shea v. Littleton*, 414 U.S. 488 (1974). White has also joined the current Court's crusade to secure an eleventh amendment fortification to protect state sovereignty. This campaign has advanced to the point that a majority now hints of willingness to launch offensive maneuvers, even unto reconsideration of *Ex parte Young*, 209 U.S. 123 (1908). See *Pennhurst State School & Hospital v. Halderman*, 104 S. Ct. 900, 909, 911, 915 n.25 (1984). But see the devastating critique of that decision in Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984).

Justice Powell's majority opinion in *Pennhurst II* strongly implies disagreement with Charles Alan Wright's view that *Ex parte Young*'s noble lie is "indispensable to the establishment of constitutional government and the rule of law." C. WRIGHT, *LAW OF FEDERAL COURTS* 292 (4th ed. 1983). Perhaps Justice White joined Justice Powell's majority opinion in *Pennhurst II* to work from within and thereby to restrain somewhat the zeal of the four *Garcia* dissenters, who seem little concerned about particular constitutional grounds but remarkably enthusiastic about expanding states' rights. They appear anxious to recapture some of the of judicial activism on behalf of separation of the spheres associated with the Gilded Age and to recapitulate the dual federalism approach which lasted through the 1920s. See generally S. WOOD, *CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA* (1968); E. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934).

8. 105 S. Ct. 1005 (1985).

9. 74 U.S. (7 Wall.) 700 (1869). *Texas v. White* is a favorite citation for its statement: "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Id.* at 725. That idea, of course, is hardly controversial. But the context of the case, and its actual holding, significantly reduces the relevance of that dictum. The litigated question in the case was whether Texas bonds issued before the Civil War but still in the Texas treasury after Union troops triumphed in Texas in 1864 were redeemable. When the case reached the United States Supreme Court

Lane County v. Oregon,¹⁰ *Coyle v. Smith*¹¹, and *Hammer v. Dagenhart*¹² — suggests the need for great caution before celebrating the revival of states' rights. Any accurate historical review of states' rights must include long traditions of racism and malapportionment, stretching well into the post-World War II era, even if the faithful are allowed to forget the nexus between states' rights and the Civil War.

Several constitutional scholars recently advanced impressive new

in 1868, Texas was still considered unreconstructed; in fact, under several Reconstruction Acts passed in 1867, Texas had been and remained divided into 5 military districts. Chief Justice Chase's opinion, over dissents by Justices Grier, Swayne, and Miller, held that Texas could bring suit, although Congress still deemed it an illegal government, and that holders of Texas bonds who took with notice of want of title acquired no right to payment.

10. 74 U.S. (7 Wall.) 71 (1869). If read in its entirety, this decision gives little comfort to those who advocate use of the tenth amendment on behalf of states' rights; it gives absolutely none to those who would so read the tenth amendment to foster local autonomy. The dispute arose toward the end of the Civil War between Lane County, Oregon and the state of Oregon about whether the county could pay school and other taxes it owed the state in United States notes, rather than in gold or silver as demanded by Oregon. The case was thus one of the early rounds in the legal tender cases, treated in great detail in 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88 (1971). Even putting to one side the county's claim that it had collected the taxes in U.S. notes and was acting as a mere conduit, it is unthinkable today that the Court would hold, as Chief Justice Chase's unanimous opinion did in *Lane County*, that a state could reject U.S. notes denominated by Congress as "legal tender for all debts, public and private."

11. 221 U.S. 559 (1911). At first glance, *Coyle* appears to be one of the most dramatic examples of congressional overreaching imaginable. It is usually summarized somewhat the way Laurence Tribe does: "In *Coyle v. Smith*, the Supreme Court held that Congress cannot tell a state where to locate its capitol." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 301 (1978). On closer examination, however, the apparently bizarre congressional behavior becomes less peculiar and Oklahoma begins to seem somewhat less the innocent victim of egregious overreaching by the federal government. The tangled tale began with Congress' Enabling Act of 1906, allowing Oklahoma to become a state. That Act identified a provisional capitol in Guthrie and provided that the capitol should not be moved until 1913. The Oklahoma Constitution accepted Congress' Enabling Act ordinance as "irrevocable," and a popular referendum also ratified this congressional condition for statehood. The Sooners quickly decided to remove their capitol, however, and the issue which reached the United States Supreme Court in 1911 was a conflict between the earlier federal requirement and a 1910 Oklahoma capitol removal act. The case, therefore, could be viewed as a contest between a commitment Oklahoma solemnly and irrevocably made, and later insistence that Oklahoma need not wait the remaining 3 years because Oklahoma was now an independent sovereign state protected by the tenth amendment. This view of the conflict might explain why Justices McKenna and Holmes filed dissents, albeit without opinions. Holmes might have gone so far as to allow Congress to "tell a state where to locate its capitol," anyway, however, since he was hardly a believer in a tenth amendment basis for states' rights. See *infra* note 151.

12. 247 U.S. 251 (1918). *Hammer* remains a paradigmatic example of the perils of the dichotomous legal mind at work. Drawing a line between commerce and federal concern on one side and manufacture and state concern on the other, Justice Day's majority opinion invalidated Congress' attempt to bar interstate commerce in the products of child labor. In his stinging dissent, Justice Holmes's attack on the Court's formulaic insensitivity to the "ruined lives" at stake helped make the decision infamous even among lawyers. Thomas Reed Powell's unanswerable critique in Powell, *The Child Labor Law, the Tenth Amendment, and the Commerce Clause*, 3 SO. L.Q. (now TUL. L. REV.) 175 (1918) also contributed to *Hammer's* bad reputation. *Hammer* was overruled in *United States v. Darby Lumber Co.*, 312 U.S. 100, 112 (1941), yet the fall of *Hammer* begins to seem only cyclical today.

policy arguments in support of a structural constitutional approach to problems of federalism.¹³ None of them, however, has demonstrated any historical basis for proposed constitutional limitations on congressional power. An appealing, albeit somewhat utopian, vision of participatory democracy informs such arguments. Yet the underlying reality of a long and largely successful history of exclusion, discrimination, and economic domination in local government remains a bit sobering. Moreover, even in recent years, those Justices who would resuscitate the tenth amendment seem simultaneously willing to decide against bedrock claims of equality and participation of the sort relied upon by scholars who would add sophisticated localist content to a capacious tenth amendment view.¹⁴ Today, Carl Swisher's view of federalism is at least as accurate as it was 40 years ago. Even before the geometric growth of Big Brother in Washington which followed World War II, Swisher had an historical response to those who bemoaned centralized power at the expense of the proper balance of federalism: "[T]he answer, or one answer, at any rate, is that the Constitution does not provide for any such balance."¹⁵

13. See, e.g., Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341; Stewart, *Federalism and Rights*, 19 GA. L. REV. 917 (1985); Beschle, *Defining the Scope of State Sovereignty Under the Tenth Amendment: A Structural Approach*, 34 DE PAUL L. REV. 165 (1984); Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81; Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979); Michelman, *States' Rights and States' Roles: The Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977); Note, *On Reading and Using the Tenth Amendment*, 93 YALE L.J. 723 (1984).

14. See, e.g., *Ball v. James*, 451 U.S. 355 (1981) (no constitutional violation in "one acre, one vote" franchise scheme for municipal corporation which supplies water and electricity to much of Arizona); *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60 (1978) (no constitutional violation when nonresident subject to municipality's police power without being entitled to vote in the city).

15. C. SWISHER, *THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES* 36 (1946). The recent publication of additional James Madison papers confirms that the clichéd understanding of Madison as a consistent believer in states' rights is an artificial construct. Madison's private correspondence and public statements verify and bolster interpretations by Irving Brant, Adrienne Koch, and Gordon Wood in which Madison emerges as a vigorous advocate of national power. At the time of the Constitutional Convention, Madison considered a dominant national government to be absolutely necessary to avoid the "centrifugal tendency of the States." He feared that states could easily be captured by special interests and tyrannical majorities. In 1787, Madison certainly was not celebrating an enclave of state sovereignty, safe from federal spending power. Instead, Madison fought for a congressional veto over all state laws and for the power of Congress to legislate in all cases in which Congress deemed the states incompetent to act. He also battled for a host of other measures to strengthen the federal government.

Among numerous examples in the massive project involving Madison's papers, *PAPERS OF JAMES MADISON* (W. Hutchinson, W. Rachal et al. eds. 1962), see, for example, in Volume 9: letter to Thomas Jefferson (March 19, 1787) (p. 317); Memorandum on the Vices of the Political System of the United States (April, 1787) (p. 345); letter to Edmund Randolph (April 8, 1787) (p. 368); letter to George Washington (April 16, 1787) (p. 382). In Volume 10, particularly revealing statements by

We are accustomed to conflicts among parts of the Constitution but the text generally provides no tie-breaker.¹⁶ Our usual arguments about federalism assume a basic conflict between state sovereignty and the power of the federal government: a battle of truisms. Careful consideration of history will demonstrate, however, that the truisms of the tenth amendment and the spending power, as well as our practice of federalism and our amendments to the Constitution, point in the same direction. Any perceived conflict between Congress' spending power and a states' rights theory of the tenth amendment actually presents a false dichotomy. Indeed, the very perception of such a dichotomy is instructive as an example of a remarkably tenacious error. It is a mistake about federalism akin to what historian Jack Hexter termed the fallacy of "the conservation of historical energy."¹⁷ Hexter described how historians, motivated by "a desire for simple order over a desire to face the facts," fall into the unconscious trap of using a seesaw theory to describe the world. If there is an increase in something, it is assumed there must necessarily be a corresponding decrease in a competing something else.¹⁸

Today, it is all too obvious that it is possible to suffer under the yokes of both federal and state bureaucracies, and that both sometimes grow in tandem rather than in a zero-sum relationship. Nevertheless, our current constitutional debate is full of bitter exchanges premised

Madison about the power of the federal government include: letter to his father (May 27, 1787) (p. 10); notes on his speeches to the constitutional convention on June 6th (pp. 32-36), June 8th (p. 41) (in which he discusses the problem of the "centrifugal tendency of the States,") June 19th (p. 55), and June 21st (pp. 67-70); letter to Thomas Jefferson (September 6, 1787) (p. 163); letter to Thomas Jefferson (October 24, 1787) (p. 205).

Apt illustrations of Madison's fear of state government and his hope for republican principles to be realized on a national scale may be found in *THE FEDERALIST* Nos. 10, 45, 46, and 51 (J. Madison). A statement that appears to point in the other direction may be found in *THE FEDERALIST* No. 39 (J. Madison). It is this *Federalist* Paper which Martin Diamond uses for his argument in Diamond, *The Federalist on Federalism: "Neither a National Nor a Federal Constitution, But a Composition of Both,"* 86 *YALE L. J.* 1273 (1977).

For Madison's views generally, see I. BRANT, *JAMES MADISON, FATHER OF THE CONSTITUTION* (1950); A. KOCH, *JEFFERSON AND MADISON, THE GREAT COLLABORATION* (1950); A. KOCH, *MADISON'S "ADVICE TO MY COUNTRY"* (1966); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* (1969); and several of Douglass Adair's essays about Madison in *FAME AND THE FOUNDING FATHERS: ESSAYS BY DOUGLASS ADAIR* (T. Colburn, ed. 1974). See also G. WILLS, *EXPLAINING AMERICA: THE FEDERALIST* (1981) and Edmund S. Morgan's review of Wills's book, *Refining the Public Spirit*, (Book Review), 184 *NEW REPUBLIC* 26 (January 14, 1981).

16. See generally Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 *COLUM. L. REV.* 1022 (1978).

17. Hexter's elegant essay on A.F. Pollard, *FACTORS IN MODERN HISTORY* (1907) appears in J. HEXTER, *REAPPRAISALS IN HISTORY* 26, 40-44 (1962). Thomas Bender provides a useful commentary and expansion upon Hexter's point in T. BENDER, *COMMUNITY AND SOCIAL CHANGE IN AMERICA* 29-43 (1978).

18. Hexter, *supra* note 17 at 33, 40.

on a fundamental constitutional clash between nation and states over a fixed pie¹⁹ of sovereignty.

In exploring the perceived conflict between a grant of national spending power and an affirmative protection for reserved state power, I will make an old-fashioned claim that constitutional history and text actually may aid understanding. It seems fitting to discuss history, the spending power, and the tenth amendment in tandem now for several additional reasons. Most obviously, the Supreme Court's change of heart or mind in *Garcia v. San Antonio Metropolitan Transit Authority*²⁰ — more precisely the switch by Justice Blackmun — is couched in language reminiscent of the bitterness which accompanied the temporary resurrection of the tenth amendment in *National League of Cities v. Usery*.²¹ The initial outpouring of scholarly comment on *Garcia* — surely soon to become a flood — is also unusually impassioned. William Van Alstyne, for example, recently wrote that *Garcia* apparently contains an idea “fundamentally pernicious to the integrity and morale of American constitutional law.”²² In *National League of Cities v. Usery*, “[t]he Court, in some small measure, had come home,” but in *Garcia*, the majority committed “a mistake of historic proportions,” according to Van Alstyne.²³

The opinions in *Garcia* exemplify how both sides in the constitutional debate about federalism tend to abuse history. Moreover, any case is surely worthy of notice when four Justices argue that “the Court's action reflects a serious misunderstanding, if not an outright rejection, of the history of our country and the intention of the Framers of our Constitution.”²⁴

It is against this background of charged rhetoric that I wish to review briefly the history of the tenth amendment and the notions of

19. The image of American federalism as a “chaotic marble cake” generally is credited to Morton Grodzins. See Grodzins, *Centralization and Decentralization in the American System*, in *A NATION OF STATES* 1, 4 (R. Goldwin ed. 1963). In his *Federalism and Legal Process* article, *supra* note 1, Harry Scheiber indicates that Joseph E. McLean may have been responsible for the “layer cake” image, which Grodzins attacked with his marble cake metaphor. Grodzins argued that “all areas of American government are involved in all functions,” Grodzins, *supra*, at 3, and also cautioned that “[t]hose who attempt to decentralize by order are far more likely to produce centralization by order.” *Id.* at 21-22.

20. 105 S. Ct. 1005 (1985).

21. 426 U.S. 833 (1976).

22. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1722 (1985).

23. *Id.* at 1733, 1731. A.E. Dick Howard is only slightly more restrained in his article about *Garcia*, see *supra* note 6. Howard says, for example, “[t]he Court in *Garcia* abdicates a function that history, principle, and an understanding of the political process strongly argue that the federal judiciary should undertake.” *Id.* at 790. Once warmed up, Howard accuses the *Garcia* majority of “a glaring disregard of a basic truth about American constitutionalism” and of “read[ing] an important part of the Founders' assumptions out of the constitutional order.” *Id.* at 791, 795. In fact, *Garcia* “leaves an important constitutional sentry post unmanned.” *Id.* at 796.

24. 105 S. Ct. at 1032.

federalism which surround it. First, I will suggest that the most compelling interpretation of the original intent behind the tenth amendment does not include its use as a judicially-enforced barrier to protect states' rights. Even if I am wrong in my interpretivist claim, however, in the second part I will argue that there is an important, relevant pattern to be found in the constitutional amending process since 1791. This pattern, though generally unnoticed, strongly suggests that when Americans engage in the serious business of constitutional amendment, we tend to enhance federal power. Additionally, actual practice helps confirm my claim that the tenth amendment provides no constitutionally enforceable barrier against congressional action.

I will conclude with the Court's responses to the perceived clash between the spending power and the tenth amendment in *United States v. Butler*.²⁵ This focus is particularly appropriate now, exactly fifty years after that peculiar decision. The Supreme Court announced both a broad view of the spending power and a broad construction of the tenth amendment in *Butler*. The spending power has been squared many times in the intervening years, while the tenth amendment has nearly disappeared. Yet it was in *United States v. Butler* that Justice Roberts's majority opinion explained that the Court's duty really is quite simple:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty, — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.²⁶

Invalidation of the Agriculture Adjustment Act for its failure to square with the Court's idea that farming somehow is, by definition, a local concern makes little sense today. But other aspects of the mystery of what the *Butler* actually did are more relevant to our concerns. *Butler* remains an important modern cautionary tale. Today, we are again well-launched into a period when "loose conceptions with halos over them"²⁷ seem to dominate. As in days of old, the tenth amendment is now advanced to provide a constitutional hook. As in cases such as *Butler* and *Hammer v. Dagenhart*, many again leap to renewed

25. 297 U.S. 1 (1936) *see infra* notes 108-13.

26. *Id.* at 62. *See also* Graglia, *Judicial Review on the Basis of 'Regime Principles': A Prescription for Government by Judges*, 26 S. TEX. L.J. 435, 439 (1985) (embracing Roberts's view described as a "famous modern restatement of the *Marbury* rationale").

27. Powell, *supra* note 12, at 189. The introduction of the tenth amendment, according to Powell, "brings to play loose conceptions with halos over them, and thereby confuses the mind in dealing with the genuine issue."

faith in the ability of judges to hold the line of federalism. Using nostalgia combined with true belief, the faithful divine hidden meanings and proclaim penumbral boundaries, even as they preach strict construction.

I. THE RECENT TENTH AMENDMENT DEBATE: THE FALLACY OF FUNDAMENTAL FEDERALISM

The modern high-water mark for judicial invocation of states' rights as a restraint on congressional action came in the mid-1970s. The Court expanded notions of comity and federalism to restrict federal courts in their use of civil rights statutes and to narrow the reach of federal habeas corpus.²⁸ Simultaneously, the Court established a broad eleventh amendment prohibition. It is a barrier strong enough to deny a plaintiff in federal court his federal right if the remedy he seeks can be classified as retrospective relief, even if a state clearly has flaunted federal statutory commands.²⁹

The most dramatic, most discussed example of the Court's renewed devotion occurred in *National League of Cities v. Usery*.³⁰ In that decision, the Court found a constitutional limit to Congress' commerce clause power for the first time in 40 years. Although Justice Rehnquist's majority opinion was vague about the constitutional source of protection for "integral," "essential," and "traditional" state functions from the perceived congressional threat in the application of

28. There has been extensive commentary on the phenomenon, to understate the point. For a survey, see C. WRIGHT, *LAW OF FEDERAL COURTS* 22A, 53, 53A (4th ed. 1983). My favorite on the equitable powers issues, perhaps not surprisingly, is still Soifer & Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 *TEXAS L. REV.* 1141 (1977). On restrictions of the availability of habeas corpus, see Yackle, *Explaining Habeas Corpus*, 60 *N.Y.U. L. REV.* 991 (1985); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 *YALE L.J.* 1035 (1977). For an impressive general rethinking of many of these issues, see Resnik, *Tiers*, 57 *S. CAL. L. REV.* 837 (1984).

29. See, e.g., *Green v. Mansour*, 106 S. Ct. 423, 426 (1985) (compensatory or deterrence interests insufficient to overcome dictates of eleventh amendment); *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981) (severely limiting construction of federal bill of rights for the handicapped in shadow of eleventh amendment); *Edelman v. Jordan*, 415 U.S. 651 (1974) (eleventh amendment permits only prospective relief against state officials). The Court clearly has come a long way from the brave proclamation in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) that "the very essence of liberty" as well as the "high appellation" of "a government of laws, and not of men" depends upon assuring that the laws provide "remedy for the violation of vested legal right." (This "high appellation" may represent the summit of American faith in law, but it presumably was not a reference to mountains near the eastern seaboard). See also *Davidson v. Cannon*, 106 S. Ct. 668 (1986); *Daniels v. Williams*, 106 S. Ct. 662 (1986). The binary approach within many of the Court's recent decisions is reminiscent of Chief Justice John Marshall's idea in *Marbury* that "[b]etween . . . alternatives there is no middle ground," 5 U.S. at 177. Of course, comparing what Marshall said and what he actually did in that great case somewhat undermines both his assertion about remedies for rights and his dichotomous view of legal reasoning.

30. 426 U.S. 833 (1976).

federal minimum wage and overtime provisions to state employees,³¹ a passing reference to the tenth amendment, combined with the lack of any other textual basis, made *National League of Cities* appear to be a tenth amendment decision.

Less noticed, however, was Justice Rehnquist's cryptic footnote cordoning off the issue of whether Congress might ignore or otherwise evade the barrier erected in *National League of Cities* simply by invoking the spending power or some other source of congressional power perceived to give authority broader than that which the commerce clause provides.³² Indeed, within weeks of the *National League of Cities* decision, Justice Rehnquist himself wrote for a unanimous Court in *Fitzpatrick v. Bitzer*³³ that Congress could overcome states' rights objections to the extension of civil rights protections to state employees when federal legislation rested on section 5 of the fourteenth amendment. Moreover, the *National League of Cities* majority depended on a concurring opinion by Justice Blackmun which initially appeared, and certainly proved to be, good for that day and that day only.

Attempts to apply *National League of Cities* underscored its narrow basis.³⁴ In fact, the Court generally seemed less dedicated to the expansion of states' rights after the mid-1970s, though the application of federalism to particular cases remained quite unpredictable. When the Court requested reargument and briefing on the issue of the appropriate scope of the tenth amendment,³⁵ the outcome in *Garcia v. San Antonio Metropolitan Transit Authority* hardly came as a great surprise. In addition to similar results in other cases, the Court had decided in favor of federal power in a case involving a state mass transit system,³⁶ and initially remanded the *Garcia* case for reconsideration on the basis of that decision.³⁷ It was easy to predict, therefore, that San Antonio could not first accept \$51 million in federal transit aid and then successfully claim a constitutional shield from federal control.

What is surprising about the *Garcia* decision, however, and what makes it important for our general consideration of possible conflict between the spending power and the tenth amendment, is more what

31. *Id.* at 845, 851-2, 854.

32. *Id.* at 852 n.17.

33. 427 U.S. 445 (1976).

34. See, e.g., Equal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226 (1983); Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982); United Transportation Union v. Long Island R.R. Co., 455 U.S. 678 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

35. 104 S. Ct. 3582 (1984).

36. United Transportation Union v. Long Island R.R. Co., 455 U.S. 678 (1982).

37. 457 U.S. 1102 (1982) (vacating and remanding *Garcia* and companion cases).

the majority opinion by Justice Blackmun said than what it did. Even more significant is the tenth amendment approach found within Justice Powell's bitter dissent.

A. The Garcia Majority: Process, Not Results

We can almost picture that wily old magician, Justice Brennan, rubbing his hands as he assigned the *Garcia* majority opinion to Justice Blackmun. With some of the fervor of a convert, Justice Blackmun's opinion rests primarily on his argument that the attempts to apply *National League of Cities* demonstrate that no clear constitutional boundary can be drawn between state and federal functions. His pragmatic pessimism is reinforced by his glance back at the complex doctrinal entanglements of the bad old days of dual federalism. Therefore, according to Justice Blackmun, it is necessary to rely on process rather than results to decide federalism questions. The *Garcia* majority assumes that there is adequate protection of states' interests in Congress. Moreover, Blackmun goes out of his way to make clear that his decision does not depend on the 51 million carrots of gold connecting San Antonio's buses to the federal trough — and the federal stick. Accordingly, the *Garcia* holding explicitly is not limited to the spending power loophole left open in *National League of Cities*.³⁸

Three further points are noteworthy about Justice Blackmun's *Garcia* opinion. First, reports that the *Garcia* majority entirely rejects the idea of judicial review of actions by the national government, even when those actions threaten the essence of state functions, are exaggerated. On close reading, Justice Blackmun's opinion hedges about the issue in several places, and even seems to concede that congressional process could prove inadequate.³⁹ If there is still any constitutional essence of state sovereignty to serve as a constitutional limit, however, Justice O'Connor is accurate in pointing out, in her separate dissent, that it is indeed a very "weak 'essence'."⁴⁰

38. 105 S. Ct. 1005, 1020 n.21 (1985). Earlier decisions indicated that the distinction between the commerce clause and the power of Congress to spend for the general welfare might be important. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 90 (1976) (general welfare clause as "grant of power . . . which is quite expansive"); *North Carolina v. Califano*, 435 U.S. 962 (1978), *aff'g* 445 F. Supp. 532 (E.D.N.C. 1977) (unanimous summary affirmance of a three judge District Court holding that Congress could constitutionally condition health care aid on certificate of need requirement, despite violation of state constitution); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (plurality opinion). A good indication of the malleability of federalism concepts may be found in the contrasting critiques of *Garcia* by Professors Van Alstyne and Stewart. Van Alstyne defends *National League of Cities* because it invalidated an "[a]ct of Congress which was all stick and no carrot," *see supra* note 6, at 1714, while Stewart finds federal carrots to be a pernicious mode of congressional invasion of state prerogatives meriting particularly skeptical judicial scrutiny. *See supra* note 6, at 971.

39. 105 S. Ct. at 1017-18, 1020.

40. *Id.* at 1033 (O'Connor, J., dissenting with Powell, Rehnquist, J.J.). O'Connor's opinion offers

Next, Justice Blackmun seems to rest his new view of federalism not on pragmatic grounds alone, but also on unspecified "postulates" he discovers "behind the words of the constitution," postulates which "limit and control."⁴¹ This kind of mysticism is the mirror image of the dissenters' faith in an undifferentiated concept of what they sense to be the requirements of Our Federalism. To paraphrase John Ely and Bertrand Russell: "These are my fundamental postulates; those are your abstract, unanchored, wooly generalities; I have the votes and I win." This approach to federalism does not foster confidence.

Finally, as I will show, Justice Blackmun seems altogether too quick to concede the historical argument to the dissenters. In addressing the traditional state function approach suggested by *National League of Cities*, Justice Blackmun argues, "Reliance on history as an organizing principle results in line-drawing of the most arbitrary sort."⁴² But Justice Blackmun's willingness to abandon the historical debate to the dissenters goes further. The majority's historical argument consists only of a curious pastiche of quotations from James Madison and James Wilson, a few passes at *The Federalist*, and a reference to Justice Field's dissenting opinion in *Baltimore & Ohio R.R. Co. v. Baugh*.⁴³ The *Garcia* majority advances these historical snippets merely to support the claim that "we have no license to employ free standing conceptions of state sovereignty when measuring congressional authority under the Commerce Clause."⁴⁴

Justice Blackmun also quotes an important, directly relevant statement by James Madison in 1791, but he uses it as a makeweight. This speech by Madison came early in his long journey from a passionate belief in the need for a strong national government, advanced in 1787, to a view that the states retained the power to interpose their

a good illustration of the difficulty inherent in invoking mystical concepts in judicial decisions about federalism, such as "the *spirit* of the tenth amendment," at 1036 (emphasis in original).

41. *Id.* at 1016, quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934). This is a rather curious source, since Chief Justice Hughes's opinion for a unanimous Court marked the grand finale in the long effort by bondholders to force southern states to live up to commitments they had expressed through the issuance of bonds. As it had done for half a century, the Court again found a dubious eleventh amendment bar against such suits and thereby relieved the southern states (with the occasional exception of Virginia) of their obligations. See generally J. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE HISTORY OF THE ELEVENTH AMENDMENT* (forthcoming, 1986) (copy on file at U. Colo. L. Rev.); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

42. 105 S. Ct. at 1014.

43. 149 U.S. 368, 401 (1893), quoted *id.* at 1017. The *Baugh* citation and the accompanying statement that Field's *Baugh* dissent was "quoted with approval in *Erie R.R. Co. v. Tompkins*" is quite peculiar. Justice Brandeis's *Erie* opinion would seem to give comfort to those such as Justice Powell and the other dissenters, who favor an unspecified but potent metaconstitutional enclave of state sovereignty. See generally Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 701-04 (1974).

44. 105 S. Ct. at 1017.

constitutional interpretations against the national government, adopted in 1798.⁴⁵ In Congress, in the course of debate over the Bank of the United States, Madison said:

[I]nterference with the power of the States was no constitutional criterion of the powers of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.⁴⁶

This view, which came after Madison's fervor for a strong national government had dampened, and after Jefferson returned to the United States and began to articulate a states' rights view, indicates that Madison still did not believe that the tenth amendment created a constitutional wall to protect state sovereignty. As I will discuss in a moment, Madison's statements surrounding the passage of the tenth amendment a few years earlier underscore this point.

B. The Dissent: Politics and Passion

Justice Powell is the author of the lead dissent in *Garcia*, while Justice Rehnquist adds a prophecy that Justice Blackmun's approach will be short-lived and Justice O'Connor writes to contain the damage she perceives in the majority opinion. Justice Powell's primary target is the growth of the federal bureaucracy, a consequence of political and structural changes since 1954 which, in his view, combine to make Congress insensitive to state and local values. It was in 1954 that Herbert Wechsler wrote his famous article⁴⁷ asserting that federal law is interstitial and, because state interests are represented in various ways

45. Forrest McDonald terms Madison "an ideologue in search of an ideology" and explains that Madison abandoned his theories of vigorous nationalism a few years after the constitutional convention. By then, Madison began to fear the triumph of Hamiltonianism; moreover, Madison's hated political rival, Patrick Henry, no longer blocked Madison's way in Virginia politics. F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 203 (1985). Despite two important caveats — and a reminder that it is something of a myth to consider Madison the Father of the Constitution — McDonald describes Madison as "an ardent advocat[e] of a purely national system" whose constitutional plan called for a government "purely national, the states having no agency in it whatsoever." *Id.* at 236, 206. See also *supra* note 15. Cf. Banning, *The Hamiltonian Madison: A Reconsideration*, 40 WM. & MARY Q. 227 (3d Ser. 1983).

46. 2 ANNALS OF CONG. 1897 (1791). For discussion of this important speech, see, for example, A.T. MASON, *THE STATES RIGHTS DEBATE 186-97* (1966); Berns, *The Meaning of the Tenth Amendment*, A NATION OF STATES 126 (R. Goldwin ed. 1963).

47. 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). See also J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980). See generally Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980's*, 21 B.C.L. REV. 763 (1980); Henderson & Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429 (1978); Stewart, *Pyramids of*

within the federal branches of government, the structure adequately serves and protects state interests. Justice Powell argues that politics and government have changed greatly since 1954.⁴⁸ To paraphrase, one might say, "In the interstices, there lurks a far worse disease."

Justice Powell is particularly appalled by the majority's notion that Congress is an adequate clearinghouse for state interests. He goes so far as to assert that "[t]his Court never before abdicated its responsibility on the ground that affected parties theoretically are able to look out for their own interests through the electoral process."⁴⁹ He apparently forgets his own votes in the recent series of standing decisions, such as *Allen v. Wright*⁵⁰ and *Valley Forge Christian College v. Americans United*,⁵¹ as well as his forceful concurring opinion in *United States v. Richardson*,⁵² which went further than Chief Justice Burger's opinion to deny standing and relegate those with constitutional complaints to their remedy at the polls. Justice Powell also ignores several major lines of constitutional doctrine stretching back more than a century to *Munn v. Illinois*,⁵³ for example, and the

Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 YALE L.J. 1196 (1977).

48. 105 S. Ct. at 1025-26 n.9. Powell emphasizes the increased role of congressional staff members and federal bureaucracy; he also imports whole cloth to the setting of federalism the notion that there is an inherent "hydraulic pressure" in each branch of the federal government to "exceed the outer limits of its power." *Id.* at 1025, quoting *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). Justice Powell also relies on the recent Advisory Committee on Intergovernmental Relations report, *Regulatory Federalism: Policy, Process, Impact and Reform* (1984), itself not obviously the product of participatory democracy.

49. 105 S. Ct. at 1026 n.12.

50. 104 S. Ct. 3315 (1984).

51. 454 U.S. 464 (1984).

52. "Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. I also believe that repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negate the actions of the other branches. We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated judicial branch. Moreover, the argument that the Court should allow unrestricted taxpayer or citizen standing underestimates the ability of the representative branches of the Federal Government to respond to the citizen pressure that has been responsible in large measure for the current drift toward expanded standing. Indeed, taxpayer or citizen advocacy, given its potentially broad base, is precisely the type of leverage that in a democracy ought to be employed against the branches that were intended to be responsive to public attitudes about the appropriate operation of government." (Citations omitted.) 418 U.S. 166, 188-89 (1974).

53. 94 U.S. 113, 134 (1877). In upholding state police power to regulate matters "affected with a public interest," Chief Justice Waite wrote: "We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls." In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824), Chief Justice Marshall

Court's history of decisions construing the guarantee clause of article IV,⁵⁴ to say nothing of other so-called political questions.⁵⁵

Justice Powell seems at least as upset by *Garcia* as Justice Brennan was by *National League of Cities*. To Justice Powell, the majority opinion "substantially alters the federal system embodied in the constitution" and "rejects almost 200 years of the understanding of the constitutional status of federalism."⁵⁶ Moreover, he asserts that whether or not federal funding is involved, "the constitutional question remains the same: whether the federal statute violates the sovereign powers reserved to the States by the tenth amendment."⁵⁷ The tenth amendment, according to Justice Powell, plays an "integral role . . . in our constitutional theory."⁵⁸ Further, "judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution."⁵⁹

Justice Powell's final flourish is his statement that "[t]he Court's action reflects a serious misunderstanding, if not an outright rejection, of the history of our country and the intention of the Framers of our Constitution."⁶⁰ Unfortunately, his own understanding of that history and what it says about the tenth amendment relies almost exclusively on his own conclusory assertions supplemented by references to several of the *Federalist* papers, specifically Nos. 17, 39, and 45.

There are two central difficulties with using *The Federalist* as one's primary historical source. First, that magnificent campaign document was written more than a year before Madison reluctantly proposed the tenth amendment to the First Congress, an amendment Madison considered "perhaps . . . superfluous" and "unnecessary,"

made a similar argument about Congress' discretion and the people's resort to the polls as "sole restraints" on which the people would generally rely to restrain Congress, thereby presenting a view of federalism and the judicial role quite opposed to the state sovereignty-enforcing view advanced by Justice Powell in *Garcia*.

54. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). See generally W. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* (1972); Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561 (1984). Ironically, Butler and his allies raised a guarantee clause claim in the district court in the case which became *United States v. Butler*; it was rather summarily rejected by Judge Elisha Brewster. Judge Brewster also rejected other constitutional arguments made against the AAA, though he took them more seriously. See *Franklin Process Co. v. Hoosac Mills Corp.*, 8 F. Supp. 552, 562 (D. Mass. 1934).

55. See generally Henkin, *Is There a 'Political Question' Doctrine?*, 85 YALE L.J. 597 (1976); *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring).

56. 105 S. Ct. at 1021, 1023.

57. *Id.* at 1026 n.10. To Justice Powell, the success of states in obtaining federal funds is simply not relevant to tenth amendment questions, which are "a matter of constitutional law, not of legislative grace." *Id.* at 1026.

58. *Id.* at 1028.

59. *Id.*

60. *Id.* at 1032.

but probably harmless.⁶¹ Second, even greater difficulty arises because *The Federalist* was obviously and purposefully ambiguous on basic issues of federalism.

There are many eloquent statements in favor of a national government with conclusive power in *The Federalist*, just as there are many in support of states' rights. This leads to the kind of selective quotation Justice Powell employs when, for example, he quotes *Federalist No. 39* as illustrative of commitment to a states' rights limit on national power. He thereby misses Madison's thrust in that very essay, which is that the constitutional scheme provides for a mixed government — national when necessary, federal for other purposes.⁶²

As one scholar recently put it: "It is apparent that *The Federalist's* ambiguous language can be invoked by both sides to support desired conclusions."⁶³ All too often, resort to *The Federalist* to resolve a dichotomous historical issue about federalism is reminiscent of the Marx Brothers in a scene from "Coconuts." Chico is the shill and Groucho the auctioneer of Florida real estate. The scene goes something like this: Whenever someone bids, Chico raises the bid; finally, somewhat frustrated by the process, Chico answers Groucho's "Do I hear \$600?" with, "\$600, \$700, I got lots more numbers!"

Many, and often a majority, of the current Justices indulge in wistful remembrances such as Justice Powell's ahistorical history; they like to recall an imaginary clear and convincing past. The recent spate of eleventh amendment decisions provides a good illustration. Sovereign immunity is a realm in which states' rights faith is still ascendant. In a footnote in the majority opinion in *Atascadero State Hospital v. Scanlon*,⁶⁴ for example, Justice Powell states:

61. James Madison, Speech Placing the Proposed Bill-of-Rights Amendment Before the House of Representatives, June 8, 1789, 1 ANNALS OF CONG. 440-60 (1789-91, 1st Cong.), excerpts quoted in A. MASON, *THE STATES RIGHTS DEBATE* 185 (1966) and discussed at 94-96. See also W. CROSSKEY, *1 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 675-90 (1953); Berns, *supra* note 46, at 138.

62. See, e.g., D. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 51-54 (1984) which discusses FEDERALIST NO. 39 in terms of Madison's insistence on a republican form of government, and analyzes Madison's denigration of attempts to distinguish between confederacy and consolidation. Hamilton in FEDERALIST NO. 9 was even more skeptical than Madison of such line drawing efforts ("[this principle] has been the cause of incurable disorder and imbecility in the government"). See also Diamond, *What the Framers Meant By Federalism*, A NATION OF STATES 24 (R. Goldwin ed. 1963); Scheiber, *supra* note 1.

63. Wilson, *The Most Sacred Text: The Supreme Court's Use of THE FEDERALIST* Papers, 1985 B.Y.U. L. REV. 65, 87. See also, e.g., Adair, *The Authorship of the Disputed Federalist Papers*, 1 WILLIAM & MARY Q. 97 (3rd ser. 1944), reprinted in *FAME AND THE FOUNDING FATHERS: ESSAYS BY DOUGLASS ADAIR* (T. Colbourn ed. 1984), *supra* note 15; Mason, *THE FEDERALIST: A Split Personality*, 57 AM. HIST. REV. 625 (1962); G. Wills, *supra* note 15.

64. 105 S. Ct. 3142, 3146 n.2 (1985).

[N]one of the Framers questioned that the Constitution created a federal system with some authority expressly granted the federal government and the remainder retained by the several states.

This statement is misguided in at least three important ways. First, some of the framers most certainly did question the efficacy of a federal system. Neither all nor even most of them shared Justice Powell's view of what the Constitution created, unless Alexander Hamilton, George Washington, and even James Madison rather consistently in 1787, do not count as framers.⁶⁵

Second, the statement neglects the final phrase of the tenth amendment, which reserves power to the people. It is a serious blunder to view federalism as a binary or zero-sum phenomenon. This is particularly so when the text invoked as the source for this view explicitly mentions three sides. The role of the people as the source of constitutional authority became a hotly debated issue in the ratification process. At the Virginia convention, for example, Patrick Henry emphasized that the concept of state sovereignty "turned, sir, on that poor thing — the expression, 'we, the people,' instead of the states of America."⁶⁶ Henry therefore opposed ratification of the Constitution, as did his fellow Virginians George Mason and James Monroe, as well as many other eloquent states' rights advocates. At the very least, their opposition is difficult to explain on Justice Powell's theory. So is Chief Justice John Marshall's insistence on the people as the source of constitutional power in the most crucial passages in *McCulloch v. Maryland*.⁶⁷

Third, Justice Powell comes close to repeating a common error committed, for example, in three cases often invoked by states' rights

65. Of course, it is difficult to encapsulate the thought of any one of these Framers, to say nothing of trying to capture them all confidently to find them unified, as Powell suggests. Hamilton, for example, is notorious for his belief in a strong national government and he had to fend off charges that he hoped to eliminate the states altogether. Yet Hamilton wrote *FEDERALIST* Nos. 9, 28, 31, 32, and 33, for instance, which concede state sovereignty in terms such as a comparison to "independent nations," No. 28, and "complete sovereignty" in the states, No. 31. Elsewhere, of course, Hamilton lived up to his image as a firm advocate of power in the national government, to the point that he appeared ready to abandon the states altogether, see 3 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 282-93, 322-34 (1911). For the strong nationalist views of James Wilson, see *id.* at 138-143. Similarly, Madison not always, but generally, favored the plan he proposed on the eve of the Convention, which would provide "a due supremacy of the national authority, and leave in force the local authorities so far as they can be subordinately useful." Madison's letter to Edmund Randolph (April 8, 1787) in 9 *PAPERS OF JAMES MADISON*, *supra* note 15 at 368. Edmund Randolph, at least in private, also appeared ready to abandon the states, and George Washington was close to that. See generally W. HAMILTON & D. ADAIR, *THE POWER TO GOVERN: THE CONSTITUTION - THEN AND NOW* (1937).

66. 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 72 (J. Elliot ed. 1836), *quoted and discussed* in A. MASON, *supra* note 61, at 67.

67. 17 U.S. (4 Wheat.) 316, 404-405 (1819). Marshall borrowed liberally from Madison's essays in *FEDERALIST* Nos. 43-44 for this point and for his rhetoric.

advocates to establish a reputable pedigree for their constitutional argument: *Lane County v. Oregon*,⁶⁸ *Collector v. Day*,⁶⁹ and *Hammer v. Dagenhart*.⁷⁰ The tenth amendment text, states' rights proponents assume, contains the word "expressly" as a limit on the grant of powers to the national government.⁷¹ Not only is that limitation not to be found in the amendment, but it cannot even be claimed that its omission was inadvertent. Like the Romans thrice offering a crown to Julius Caesar, those who advocated states' rights three times proposed that the word "expressly" be added to the text of the tenth amendment. Three times, James Madison successfully led the battle against their proposed addition.⁷²

In *McCulloch v. Maryland*, surely the keystone for subsequent analysis of federalism in constitutional law, Chief Justice Marshall stressed that the word "expressly" was omitted from the tenth amendment precisely because "[t]he men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it, to avoid these embarrassments."⁷³ In terms of original intent, no one has ever made a credible argument that the tenth amendment's reservation of powers to the states or to the people was anything other than a declaration and reaffirmation of the distribution of powers made in the original constitutional text.

I am pleased to find myself in illustrious company on this point, not only with Professor Crosskey, as one might expect, but also with

68. 74 U.S. (7 Wall.) 71, 76 (1869).

69. 78 U.S. (11 Wall.) 113, 125 (1871) (quoting *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)).

70. 247 U.S. 251, 275 (1918).

71. A striking, relatively recent example of how one's basic assumptions can produce fallacious "quotations" is to be found in Justice Harlan's dissent in *Oregon v. Mitchell*, 400 U.S. 112, 201 (1970): "When the Constitution with its original Amendments came into being, the States delegated some of their sovereign powers to the Federal Government, surrendered other powers, and expressly retained all powers not delegated or surrendered. Amtd. X." For a good discussion of the history of the "expressly" fallacy, see Berns, *supra* note 46, at 133-37. Justice Joseph Story firmly decried efforts "to foist into the text the word 'expressly'; to qualify what is general, and obscure what is clear and defined." J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1901 (1833). See also, e.g., Powell, *Joseph Story's COMMENTARIES ON THE CONSTITUTION: A Belated Review*, 94 YALE L. J. 1285 (1985); W. CROSSKEY, *supra* note 61, at 679-84. Crosskey discusses at some length the idea that the word "expressly" actually meant something different in the late 18th century. For further discussion of the changing meaning of the same constitutional terminology, see F. McDONALD, *supra* note 45, at xi-xii.

72. The articles of confederation had included the "expressly" limitation. According to the fragmentary record of the debates in the House of Representatives in August-September, 1789, Madison answered the arguments made on behalf of the motion to add the term made by Tucker of South Carolina by explaining "there must necessarily be admitted powers by implication, unless the Constitution descended to recount every minutiae," quoted in W. CROSSKEY, *supra* note 61, at 682.

73. 17 U.S. (4 Wheat.) 316, 406-07 (1819).

Professors Corwin, Powell, Mason, Brant, Koch, Scheiber, Ely, Wood and even Walter Berns.⁷⁴ What is startling about the dissents in *Garcia* is that their authors, self-proclaimed strict constructionists, seem unconcerned with anything that may be discerned about the original understanding of the tenth amendment. Perhaps some subliminal fear about reawakening its companion, the ninth amendment, helps to explain this curious phenomenon. Perhaps the prevalent fashion for nostalgia today would be tattered, if not torn asunder, by actual knowledge of our past. Most probably, however, neither the Justices in the majority nor the dissenters in *Garcia* want to use history to determine how to vote; rather, a pale version of law-office history provides each side with a few rhetorical steps along a road already taken.⁷⁵

II. THE BAD NEWS IS: NO PRINCIPLES NEED APPLY

There is not now, nor has there ever been, a principled rule of law to limit the power of Congress to spend for "the general Welfare."⁷⁶ Assumptions that a clear line must or should be back in time somewhere cannot substitute for actual history. Moreover, there exists no

74. The amendment proclaimed what was widely believed to be a postulate of the science of government and the theory of republican ideals: Congress could not exceed its powers. Instead of an enclave of state sovereignty to be invoked by judges to invalidate federal actions, however, the tenth amendment established a precatory line of demarcation and the audience was to include legislators and voters. In addition to attempting to calm the "excessive jealousies" to which Marshall referred in *McCulloch v. Maryland*, *id.* at 425, the tenth amendment reflected a late eighteenth century presumption that the people remained free to speak through and to their representatives in Congress about constitutional powers and rights. The "wholly popular" government was free to alter the balance, if the people so wished, even if at the expense of state sovereignty. See generally D. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 43-54 (1984); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, 519-564 (1969); R. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* (1971); B. HAMMOND, *BANK AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* (1958).

75. See generally C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969); tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CALIF. L. REV. 664 (1938). As Alexander Bickel put it, "[i]n almost regular cyclical fashion, we witness atavistic regressions to the simplicities of *Marbury v. Madison*, to its concept of the self-applying Constitution and the self-evident function of judicial review." A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 74 (1962).

76. The full sentence in article I, § 8, cl. 1 is: "The Congress shall have 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; but all Duties, Imposts and Excises shall be uniform throughout the United States." For an intriguing tale of a clever, but unsuccessful, effort by Gouverneur Morris to insert a semicolon between "to lay and collect taxes, duties, impost and excises" and "to pay the debts and provide for the common defense and general welfare" in order to change the meaning of the sentence, see F. McDONALD, *supra* note 45, at 264-65. The kind of true-believing, originalist textualism which relied exclusively upon such matters was characterized as "government by semicolon" in McBain, *The Supreme Court and the States*, 16 PROC. ACAD. OF POL. SCI. 464 (1936), quoted in J. CLARK, *THE RISE OF A NEW FEDERALISM* 283-84 (1938).

interpretation based upon constitutional structure to establish workable limitations on Congress' authority to act for what Congress believes to be the public good, except for limitations premised on the rights of individuals protected elsewhere in the Constitution.

This is disheartening. A nice, orderly rule of law to which insistent and genuine problems of federalism might be referred is something devoutly to be wished. Legal symmetry, at least in our chaotic world, would make most of us feel more secure. But as Henry Adams said of the purported revelations of modern science: "Chaos was the law of nature; Order the dream of man."⁷⁷ Both the origin and the evolution of our peculiar species of constitutional federalism suggest that Congress but not the courts, politics but not principle, will have the final say about what the general welfare is, and if and how government should spend for it.

Chief Justice John Marshall echoed James Madison's words at the Constitutional Convention when he proclaimed in *McCulloch* that the Federal government proceeded not from the states, but "directly from the people."⁷⁸ Federal power "required not the affirmance, and could not be negated, by the State governments."⁷⁹

Instead of following Madison and Marshall, our newest New Federalism uncannily echoes the view of federalism espoused by President Franklin Pierce in 1854. It was Pierce's position which Justice

77. H. ADAMS, *THE EDUCATION OF HENRY ADAMS* 451 (1918), *quoted and discussed in* D. HOLLINGER, MORRIS R. COHEN AND *THE SCIENTIFIC IDEAL* 100 (1975). Madison actually wrote a remarkable, exceptionally modern-sounding digression on issues of indeterminacy in science, human perception, and language in *FEDERALIST* No. 37. *Cf. A Most Ingenious Paradox* in S. GOULD, *THE FLAMINGO'S SMILE: REFLECTIONS IN NATURAL HISTORY* 78 (1985).

78. 17 U.S. (4 Wheat.) 316, 403 (1819). Marshall also emphasized that it was the national legislature which was intended as a focus for the confidence of the people, *id.* at 431. Indeed, Marshall articulated his fear of "prostrating (the federal government) at the foot of the states" and declared that "the American people . . . did not design to make their government dependent on the States," *id.* at 432. Even during this, the height of what Leonard Levy aptly termed the "Screaming Eagle Phase" of our constitutional history, *AMERICAN CONSTITUTIONAL LAW — HISTORICAL ESSAYS* 6 (L. Levy ed. 1966), Marshall borrowed heavily from Madison's views in the late 1780s and went no further than Madison earlier had gone in asserting the necessity for a powerful federal government whose powers were not diminished by state sovereignty. Marshall's reliance on *The Federalist* papers in *McCulloch* is hardly surprising, since, as David Epstein convincingly summarizes them, "[t]he Federalist's own position is on the whole unsympathetic to the importance of the states." D. EPSTEIN, *supra* note 62, at 54. As Charles Black points out, "In [*McCulloch*], perhaps the greatest of our constitutional cases, judgment is reached not fundamentally on the basis of that kind of textual exegesis which we tend to regard as normal, but on the basis of reasoning from the total structure which the text has created." C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 15 (1969).

79. 17 U.S. (6 Wheat.) 316, 404 (1819). Probably it was no accident that in his Gettysburg address, Abraham Lincoln echoed and improved upon Marshall's cadence in *McCulloch*, in which Marshall declared the United States to be a government "of the people . . . from the people . . . and for their benefit," *id.* at 403. Lincoln also believed — and fought a war to confirm — that the Federal government "could not be negated, by the State governments." *Id.* at 405.

McReynolds quoted at length in his *Steward Machine Co. v. Davis* dissent.⁸⁰ McReynolds bitterly asserted there that Congress had no spending power authority to establish the Social Security system. Ironically, the centerpiece of President Reagan's First Inaugural Address was an almost verbatim, albeit inadvertent, quotation of Pierce.⁸¹

The current states' rights theory undoubtedly follows a long and familiar tradition, at least as old as Anti-Federalist opposition to ratification of the Constitution. In 1798, Thomas Jefferson and James Madison adopted a rather extreme states' rights doctrine when they attacked the Alien and Sedition Acts and even hinted at nullification by the states.⁸² John C. Calhoun continued and expanded this tradition with his state nullification theory in the 1830s.⁸³ States' rights also figured prominently in antislavery rhetoric as well as in southern secessionist action.⁸⁴

What is probably less familiar, however, is the idea that constitutional ideas about federalism have changed over time, a phenomenon Madison specifically anticipated and celebrated in *Federalist* No. 46.⁸⁵

80. In a veto message sent to the Senate on May 3, 1854, Pierce — whom McReynolds described in his dissenting opinion in *Steward Machine Co. v. Davis*, 301 U.S. 548, 598-609 (1937) as "a scholarly lawyer of distinction [who] enjoyed the advice and counsel of a rarely able Attorney General — Caleb Cushing of Massachusetts," *id.* at 600 — argued that Congress lacked power to grant public lands to the states for the benefit of the indigent insane. Pierce asked: "Are we not too prone to forget that the Federal Union is the creature of the States, not they of the Federal Union?" MESSAGES AND PAPERS OF THE PRESIDENTS 249 (J. Richardson ed. 1903).

81. President Reagan emphasized in his first Inaugural Address, "[a]ll of us — all of us need to be reminded that the Federal Government did not create the states; the states created the Federal Government." N. Y. Times, Jan. 21, 1981, at B1, col. 1. *But see Administration Submits Plan to Reduce Damage Awards*, N.Y. Times, May 1, 1986, at B9, col. 1; *Reagan Aides Draft Bill to Pre-Empt States Product-Liability Laws*, N.Y. Times, April 21, 1986, at B9, col. 1.

82. The intricate history of the secret authorship and circulation by Thomas Jefferson of the Kentucky Resolutions and by James Madison of the more moderate Virginia Resolutions is explored in Koch & Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, 5 WM. & MARY Q. 145 (3rd Ser., 1948) (including an Editor's Note taking "special pleasure in publishing this article" at a time of "fierce political controversy now raging within the Democratic Party," *id.* at 145, because Virginia's Senator Byrd and Governor Tuck sought to leave the names of Harry Truman and Henry Wallace off the 1948 presidential ballot because of the President's commitment to eliminating Jim Crow). *See also* A. KOCH, JEFFERSON & MADISON: THE GREAT COLLABORATION 174-211 (1964). Adrienne Koch demonstrated that Madison adopted a much milder tone than that in Jefferson's initial draft, which argued for state nullification, and she claimed that Madison's "last years were wholly absorbed in defending the Union." A. KOCH, MADISON'S "ADVICE TO MY COUNTRY" 132 (1966).

83. A snappy review of the nullification controversy may be found in R. REMINI, 3 ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY, 1833-1845, 8-44 (1984), in which Jackson sounds remarkably like Joseph Story. *See supra* note 71 and *infra* note 116.

84. For example, the Personal Liberty Law passed by Massachusetts in 1855 declared the Federal Fugitive Slave Law to be "a direct violation of the Xth Amendment," S. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860 (1968). *See also* the antislavery cases which culminated in *Ableman v. Booth*, 62 U.S. (21 How.) 506, 517-22 (1859).

85. Madison wrote, "[b]eyond doubt . . . the first and most natural attachment of the people will

Many wise lawyers have failed, like Justice Powell, to recognize that the Civil War and the amendments passed in its wake had something to say about state sovereignty. I am thinking, for example, of Justice Black's reliance on "the dreams of the Founders" as a grounding for the metaconstitutional doctrine of Our Federalism in *Younger v. Harris*.⁸⁶ Many forget, as Justice Rehnquist tried to remind his audience at the University of Missouri several years ago, that:

The original Constitution was adopted not to enshrine states' rights or to guarantee *individual* freedom, but to create a limited *national* government which was empowered to *curtail* both states' rights and individual freedom.⁸⁷

Justice Rehnquist insisted that "the final answer to the question of states' rights as opposed to the authority of the national government was solved, not by philosophers or debaters, but by the brave soldiers on both sides who fought the Civil War."⁸⁸

A. *The Process of Constitutional Amendment*

Even if we were to assume that the tenth amendment authorizes judicial intervention, the pattern of later constitutional amendments by the people is overwhelmingly against state sovereignty and tends toward increased federal control. With the exception of the eleventh amendment, an altogether muddy response to a lawyers' problem about federal court jurisdiction,⁸⁹ and the twenty-first, which restored regulation of intoxicating beverages to the states, the amendments establish a clear pattern.

In three clusters of amendments, each over the course of approximately one decade, the people formally changed the Constitution to grant additional powers to Congress. Each time, after a lull of several years, federal judges responded to the new amendments with interpretations of the Constitution as a repository of states' rights. They could easily find resonance in the oratory of George Wharton Pepper who, in his argument in *United States v. Butler*, warned of a time when "the general welfare clause gone mad" would compel "replacement of the

be to the governments of the respective states," but Madison emphasized that if the situation changed, "the people ought not surely to be precluded from giving most of their confidence where they may discern it to be most due."

86. 401 U.S. 37 (1971).

87. Rehnquist, *Government By Cliché*, 45 MO. L. REV. 379, 387 (1980) (emphasis in original).

88. *Id.* at 388. *But see, e.g.*, Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981); *Rizzo v. Goode*, 423 U.S. 362 (1976).

89. *See supra* note 41 for sources on the history of the eleventh amendment and *infra* notes 128-130 for a discussion of the current Court's ahistorical attitudes about it.

land of the free" with "the land of the regimented."⁹⁰

There is a dialectic in judicial perceptions of federal-state relations which mirrors the dialectic in questions of federal and state court jurisdiction. But the direction of the amendment process is more like a straight line, pointing toward an ever-increasing sense of national interdependence and enhancement of federal governmental power. This movement can be better understood by looking at the three clusters of amendments themselves, rather than at judicial pronouncements about them.

1. The First Cluster: Civil War Amendments

The first cluster of amendments was ratified in the wake of the Civil War. The thirteenth, fourteenth, and fifteenth amendments dramatically rejected states' rights claims, relied upon before the war by what the victors called the Slave Power. With enthusiasm, the men of the 39th Congress and their immediate successors invoked in support of the amendments decisions such as *Prigg v. Pennsylvania*,⁹¹ which had found a constitutional compulsion for federal power to return fugitive slaves from free states to the south. Noting the irony, such Moderate Republican leaders as Representative James R. Wilson (R.-Iowa) and Senator Lyman Trumbull (R.-Ill.) joined Radical Republicans such as Representative Thaddeus Stevens (R.-Pa.) and Senator Charles Sumner (R.-Mass.) in celebrating a radical transformation of the constitutional scheme. They sought to guarantee the fruits of the Civil War victory, won at such a gruesome cost, and to bury forever the constitutionalism that had produced the *Dred Scott v. Sanford*⁹² decision and, in their view, had led directly to the outbreak of the war.

Just as federal power in support of slavery had triumphed over state laws protecting personal freedom in antislavery strongholds such as Pennsylvania, Massachusetts, and Wisconsin, the new amendments would override states' rights claims when federal protection was neces-

90. 297 U.S. 1, 44 (1936). A summary of George Wharton Pepper's outstanding example of old-style appellate advocacy may be found beginning at 297 U.S. 1, 23 (1936). For a powerful radio speech in response to *Butler*, see Corwin, *Curbing the Court*, in 2 VITAL SPEECHES OF THE DAY 373 (1936). A survey of the reportage and editorial comment about the *Butler* decision reveals a surprising propensity for the rhetoric of class-war and a generally vigorous debate. See, e.g., Lerner, *The Divine Right of Judges*, THE NATION 121-23 (January 29, 1936); *The Supreme Court Rules*, THE NEW REPUBLIC 269-70 (January 15, 1936); N.Y. Times, Jan. 7, 1936, at 112-113 (summary of nation's press reactions). This helps to explain why *Butler* provoked the first steps toward Roosevelt's Court-packing scheme. See R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 139 (1941); H. ICKES, THE SECRET DIARY OF HAROLD L. ICKES: THE FIRST THOUSAND DAYS, 1933-36, 515 (1953).

91. 41 U.S. (16 Pet.) 539 (1842).

92. 60 U.S. (19 How.) 393 (1857). See generally D. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978).

sary to guarantee rights to the newly freed slaves and to all male citizens. Through the enforcement clauses of each of the Civil War Amendments, and repeatedly in debate and in statutes, the post-Civil War Congresses sought to nationalize constitutional protection by compelling the states to provide full and equal protection for basic civil and political rights.⁹³ Federal intervention would be forthcoming should the states fail in their constitutional obligations to guarantee equal protection.

The Supreme Court quickly began to eviscerate this Second Constitution through bizarrely formalistic and internally inconsistent decisions such as *United States v. Cruikshank*,⁹⁴ *United States v. Harris*,⁹⁵ and the *Civil Rights Cases*.⁹⁶ Yet even in these decisions and those like them, the Court repeatedly proclaimed that the thirteenth, fourteenth and fifteenth amendments were intended to guarantee "additional powers to the federal government; additional restraints upon those of the states."⁹⁷

In the context of such a gap between an acknowledged broad purpose and a remarkably crabbed application, the seesaw fallacy of the "conservation of historical energy" lies in the assumption that an increase in federal power automatically implies a decrease in state power. The basic presumption in these Civil War amendments was that the states were newly obliged to exercise their power to protect civil rights and that now the power of the federal government was increased sufficiently to intervene if the states failed in their duty. Unfortunately, instead of recognizing this relatively clear example of an original understanding, the seesaw fallacy is commonly employed instead. This approach is both illogical and fundamental to the typical debate about American federalism. That the immediate post-Civil War Amendments altered the constitutional scheme — and were intended to allow increased power to Congress to reach areas not previously within its grasp when necessary — is as certain as anything can be in constitutional history. For a variety of tangled reasons, however, the Court and most of the nation were anxious to forget the suffering of the Civil War and to return to a new normalcy; they tended to reach back to antebellum notions and to recast them as bulwarks to use against congressional efforts to protect the civil rights of all

93. For a review of the historical literature and a detailed discussion, see, for example, H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875* (1982); Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979).

94. 92 U.S. 542 (1876).

95. 106 U.S. 629 (1883).

96. 109 U.S. 3 (1883).

97. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 67-68 (1873).

citizens.⁹⁸

The constitutional revolution that accompanied the bloody resolution of the federalism debate between 1861-1865 was almost entirely abrogated by the attack launched by the Supreme Court against congressional power. Before the Civil War, only two federal statutes and a handful of state statutes had been declared unconstitutional, but during the Gilded Age the Court began to play an aggressive interventionist role. Statute after statute — state and federal — fell before the judges' new theories about the appropriate limits of dual sovereignty.⁹⁹

Reliance on a formal theory about governmental power and federalism dominated constitutional law from approximately 1870 until 1937. It was not until Franklin Delano Roosevelt lost the battle to pack the Court but won the war to reconstruct it that dual sovereignty died the death ordained by the Civil War. A plausible explanation for the staying power of the dual sovereignty concept was its utility as a whipsaw against any legislation judges disliked at any level of government. Neither federal nor state attempts to regulate corporations, for example, could survive the judges' fixed-pie approach to federalism. Legislative control over child labor and anti-union practices fell frequently. These popular innovations were held to be beyond the proper scope of federal legislation. Yet they were also held not to be within the constitutional power of state legislatures. Substantive due process doctrines, and other federal and state constitutional weapons such as the contract clause, established a twilight zone entirely free from legal regulation.

Three well-known 1895 decisions underscore the difficulties in the dual sovereignty approach by exemplifying the lack of principle in attempts to apply a simple "either/or" approach to the complex rela-

98. Those who invoked the Civil War amendments confronted several basic conflicts that dated from the time of the initial constitutional compromises and were exacerbated by westward expansion, nationalism, and political changes. The thirteenth amendment, for example, simply declared away the constitutional argument that slaves were property, protected from any federal taking unless due process and just compensation were forthcoming.

Considered as a unit, the Civil War amendments chopped through the tangle of states' rights arguments and limitations upon the power of Congress exemplified by the *Dred Scott* decision. Yet most judges interpreted constitutional and statutory changes as if bound by antebellum precedents and attitudes. This legal response is, in fact, a major aspect of the Reconstruction tragedy. The obvious sea change in federalism produced by the Civil War failed to alter basic judicial perceptions, despite the intentions of most framers and ratifiers of the new constitutional order. I explored these themes in a paper, *Forty Acres, Forty Years: Constitution and Contract Law after Slavery*, presented at the 1981 Annual Meeting of the Organization of American Historians (on file with the University of Colorado Law Review).

99. See generally L. BETH, *THE DEVELOPMENT OF THE AMERICAN CONSTITUTION, 1877-1917* (1971); B. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* (1942); E. Corwin, *supra* note 1; Hamilton, *Freedom of Contract*, 5 *ENCY. OF THE SOCIAL SCIENCES* 450 (1931).

tionships of the modern world: *United States v. E. C. Knight Co.*,¹⁰⁰ *In re Debs*,¹⁰¹ and Chief Justice Fuller's decision on rehearing in *Pollock v. Farmers' Loan & Trust Co.*,¹⁰² which invalidated the income tax. Chief Justice Hughes later identified this last decision, replete with its explicit statements against allowing redistribution of wealth, as one of the Supreme Court's three "self-inflicted wounds."¹⁰³

2. The Second Cluster: World War I

The heated popular response to *Pollock* culminated in a rare overturning of a pronouncement by the Court about constitutional law in the enactment and ratification of the sixteenth amendment in 1913. This amendment transferred a tremendous amount of power to the federal government; indeed, most Americans would claim that it provided Congress with virtually limitless authority to tax.¹⁰⁴

The sixteenth amendment was only the opening salvo in the second cluster of amendments surrounding World War I that further lim-

100. 156 U.S. 1 (1895). Chief Justice Fuller determined that, although the Sugar Trust monopolized ninety-eight percent of the country's sugar refining, Congress could not reach it under the Sherman Act. Because the Trust was engaged in manufacturing but not in commerce, it could be regulated only by the states; federal authority simply did not extend to manufacturing.

101. 158 U.S. 564 (1895). *In re Debs* was a most paradoxical decision by the strong believers in states' rights who dominated the Court. Justice David Brewer, writing for a unanimous Court, upheld the inherent power of President Grover Cleveland and Attorney General Richard B. Olney to use the equitable powers of the federal courts to halt the actions of the leaders of the huge Pullman railroad strike. Despite the absence of statutory authority, Brewer held, the federal government's inherent power to act for the general welfare was sufficient to sustain intervention by federal courts and federal troops, even over the objections of Illinois Governor John Peter Altgeld and other state officials. See generally R. GINGER, *ALTGELD'S AMERICA: THE LINCOLN IDEAL VERSUS CHANGING REALITIES* (1958).

102. 158 U.S. 601 (1895). For a discussion of Chief Justice Fuller's decision, see W. KING, *MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES, 1888-1910*, 193-221 (1950). In the 1894 Term, there were no facts more dramatic than those surrounding the *Debs* case, but the most dramatic legal argument was made by Joseph Choate as part of the constitutional assault on the federal income tax in *Pollock*. A summary of Choate's famous argument is available at 157 U.S. 532 (1895). Choate proclaimed: "The Act . . . is communistic in its purposes and tendencies, and is defended here upon principles as communistic, socialistic — what shall I call them — populistic as ever have been addressed to any political assembly in the world." *Id.* at 532. Choate warned the Justices: "There is protection now or never. . . . You cannot hereafter exercise any check if you now say that Congress is untrammelled and uncontrollable." *Id.* at 533.

For a discussion of the *Debs* case, and of the 1895 Term in its legal and political context, see A. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW* (1960).

103. The other decisions Hughes listed in the book he wrote between his two stints on the Supreme Court, C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* (1928), were the *Dred Scott* decision and the Court's quick switch in the legal tender cases after the Civil War.

104. Apparently, there was little recognition and hardly any discussion of the implications for federal-state relations in the debates over the sixteenth amendment and the ratification process, which were analyzed by a student of mine, Steve Lincoln, and discussed in his paper, *Ratification of the Sixteenth Amendment: Theories of State Approval* (on file with the University of Colorado Law Review).

ited the power of the states. In 1913, the seventeenth amendment changed the process of electing United States Senators by taking that franchise away from state legislatures and assigning it directly to the voters themselves. (This accomplished what Madison had urged at the Constitutional Convention.) In 1919, state and local options were overridden again in the nationalization of the Prohibition experiment by the eighteenth amendment. Finally, the right of women to vote was nationalized by the nineteenth amendment in 1920. This amendment contained a clause taken from the Civil War Amendments, which gave Congress additional, undefined power to enforce suffrage guarantees.¹⁰⁵

3. The Third Cluster: The 1960s

After the repeal of Prohibition and several housekeeping changes concerning the Presidency, the final flurry of constitutional amendments occurred in the decade from 1961-1971. With the exception of the twenty-fifth amendment, which was ratified in 1967 and altered the line of presidential succession, the amendments in this third group continued the pattern of increased deference to and reliance upon congressional power. The twenty-third amendment gave presidential electors to the District of Columbia, thereby diminishing slightly the power of existing state electors. More substantial limitations occurred when the twenty-fourth amendment eliminated the poll tax in federal elections in 1964 and the twenty-sixth amendment guaranteed eighteen-year-olds the right to vote in 1971. Not only did all these amendments constrict state sovereignty, but they all contained the now standard clause assigning enforcement power to Congress. In fact, they dealt with and limited the ability of states to control the franchise — surely a fundamental attribute of sovereignty — and to preserve the political impact of the states in national elections.¹⁰⁶

105. There was limited official judicial resistance to the first of these two amendments, but the nineteenth amendment frequently met with substantial narrowing constructions, and yet also was invoked with almost gleeful irony. For example, a number of courts quickly determined that affording suffrage to women did not extend to them general civic rights and duties such as jury service or equality in qualifying for licenses. At the same time, the Supreme Court invoked the new suffrage amendment to argue in *Adkins v. Children's Hospital*, 261 U.S. 525, 553 (1923) that legislation setting minimum wages for women in the District of Columbia was unconstitutional since, with suffrage, the civil inferiority of women had reached the "vanishing point." See, e.g., *In re Opinion of the Justices*, 237 Mass. 591, 130 N.E. 685 (1921); *Commonwealth v. Welosky*, 275 Mass. 398, 177 N.E. 656 (1931), cert. denied, 284 U.S. 684 (1932); Palfrey, *The Eligibility of Women for Public Office under the Constitution of Massachusetts*, 7 MASS. L.Q. 147 (1922); Note, *The Current Controversy About Juries*, 8 MASS. L.Q. 31 (1923). But see *State v. Chase*, 106 Or. 263, 211 P. 920 (1922). See generally Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L. J. 50 (1986).

106. We lack a coherent, consistent theory of representation. There is no generally acknowledged standard — constitutional or otherwise — that determines whether state government, a national

The point of this brief review of the movement in constitutional amendments toward centralization is certainly not that all or even most Americans have abandoned their traditional reliance upon state government, or their belief in state autonomy. On the contrary, states' rights arguments remain sufficiently powerful that we resort to the constitutional amendment process when we want formal alteration of the *status quo* of federalism. Nevertheless, the unmistakable thrust of changes in the constitutional text has been toward increased power in the Congress and toward expansion of a direct, national role for the electorate.

III. THE SPENDING POWER UNCHAINED: THE TENTH AMENDMENT UNBOUNDED

*United States v. Butler*¹⁰⁷ is probably the best illustration we have of the inherent difficulties in establishing constitutional limitations within the spending power. This decision represents the last and best-known application of a constitutional theory of structural restraint on congressional power to spend for the general welfare. It also demonstrates the range of political issues and emotions that surround Congress' use of the federal purse to induce or coerce conduct.

Butler, which invalidated President Roosevelt's Agricultural Adjustment Act ("AAA"), involved a challenge to congressional power to tax those who processed farm products, to provide revenue to subsidize those farmers who agreed to reduce their crop production.¹⁰⁸ The party actually before the Court was William M. Butler, who appeared as the president and receiver for the Hoosac Mills Corporation.

clearinghouse, or some local or alternative governmental form best serves liberty and equality, guarantees majoritarian control and protection of minorities, and reflects the people's will but is not captured by special interests. For an admirable attempt at application of representation ideals in constitutional law, see J. ELY, *DEMOCRACY AND DISTRUST* (1980). In contrast to its consideration of cases perceived to be within the tenth amendment category, the Court generally has been willing to uphold quite expansive congressional power over state regulation of the franchise. See, e.g., *City of Rome v. United States*, 446 U.S. 156 (1980); *Katzenbach v. Morgan*, 384 U.S. 641 (1966). But see *Oregon v. Mitchell*, 400 U.S. 112 (1970).

107. 297 U.S. 1 (1936).

108. The Agricultural Adjustment Act, 48 Stat. 31 (1933) (hereinafter AAA), was premised on the idea that the prices paid to farmers for their agricultural products should provide them with parity in purchasing power to what they had had in a base period designated as 1909-1914 for farm products other than potatoes and tobacco. To reach parity, the Act gave Secretary of Agriculture Henry A. Wallace tremendous discretion to provide for reduction in average yield or in the supply of particular farm commodities. The processing tax created in § 9 also was premised on the 1909-1914 base period, and sought to make up the difference between that rate, which was termed the "fair exchange value of the commodity," and the then-current average market price. Like the National Industrial Recovery Act invalidated in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the AAA relied on marketing agreements and is an example of the corporatist strand in New Deal policy. See generally P. IRONS, *THE NEW DEAL LAWYERS* (1982).

Cloaked in the rough garb of a Jeffersonian yeoman, Butler actually was a leading Republican businessman.¹⁰⁹ Not only had Butler briefly been a United States Senator from Massachusetts, but he also had served as Calvin Coolidge's national presidential campaign manager in 1924. Butler was represented vehemently before the Court by George Wharton Pepper, of the Philadelphia Wharton and Pepper families, who had been a United States Senator with Butler during Coolidge's presidency and who was the quintessential Philadelphia lawyer.¹¹⁰

Butler was neatly positioned to force the federal government lawyers into court to defend a statute they were loath to litigate. He challenged the government's claim that the Hoosac cotton mill receivers owed some \$80,000 in processing and floor taxes.¹¹¹ Peter Irons, in impressive fashion, recently told the story of how the AAA was drafted, applied, and defended against challenges launched by supporters as well as diehard opponents of the New Deal and by lawyers inside as well as outside Roosevelt's administration.¹¹² Although there were a number of relatively limited grounds the Court might have chosen to invalidate the AAA,¹¹³ Justice Roberts and the major-

109. For biographical data on William M. Butler, see obituary, N.Y. Times, March 30, 1937 at A-23, col. 1. A graduate of Boston University School of Law and an influential businessman, Butler was appointed to the United States Senate in November, 1924 to fill out the term of Henry Cabot Lodge. Butler twice lost attempts to be elected to the Senate himself. See also IRONS, *supra* note 108, at 320 n.2.

110. For biographical data on George Wharton Pepper, "a very proper Philadelphian . . . [and] the unofficial dean of the Philadelphia bar," E. BALTZELL, PURITAN BOSTON AND QUAKER PHILADELPHIA 414 (1979), see obituary, N.Y. Times, May 25, 1961 at A. 37, col. 2. Pepper was appointed to the United States Senate to fill Boise Penrose's unexpired term but was defeated for re-election. The Wharton family and its connection to business and the Wharton School is well-known; that there were real Dr. Peppers and that "they virtually ran the Penn Medical School between the Civil War and World War II," BALTZELL at 359, is perhaps less well known. George Wharton Pepper wrote a revealing autobiography: G. PEPPER, PHILADELPHIA LAWYER, AN AUTOBIOGRAPHY (1944).

111. In early 1934 the Agricultural Adjustment Administration was attempting to avoid litigation as much as possible. Because the federal government claimed that the bankrupt Hoosac Cotton Mills in North Adams and New Bedford owed \$81,694.28 in overdue processing and floor taxes, however, Butler and his fellow receivers were ideally placed "to make it a test case," as their lawyer John W. Lowrance put it. See P. IRONS, *supra* note 108, at 182-83. In fact, Irons has developed evidence suggesting that the Boston financier, Frederick Prince, was behind the attempt to use the bankrupt firm as "a legal Trojan horse," in order to gain revenge or at least bargaining power in his dispute with AAA officials over their access to the records of Armour & Co., which Prince controlled. *Id.* at 183.

112. P. IRONS, *supra* note 108, at 111-199. Irons includes material on Jerome Frank and Frank's own reverse anti-semitism, as well as illuminating information about young lawyers such as Alger Hiss, Paul Freund, and Adlai Stevenson. The book is a fine treatment of the turf battles within the New Deal generally and is quite illuminating about the impact of New Deal farm policy on tenant farmers and others not party to marketing agreements or lacking in political clout.

113. The decision in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) made the delegation argument appear particularly dangerous to the lawyers working in the office of Solicitor General Reed to defend the AAA. Among them was Alger Hiss, who earlier had resigned in sympathy for Jerome Frank when Frank was purged from his post as AAA General Counsel in February, 1935.

ity seized the opportunity to determine the scope of the spending power and to establish what they hoped would be an impregnable tenth amendment barrier against that power.

A frequently overlooked facet of the *Butler* decision is that the majority did not rely on a limited reading of the spending power, nor on a limited definition of the general welfare. In its enthusiasm to resurrect a tenth amendment threatened by several earlier decisions upholding various governmental interventions in the labor market, the Court relegated more obvious constitutional claims such as improper delegation, due process, equal protection, and indirect taxation to a footnote.¹¹⁴ Justice Roberts instead plunged directly into the maelstrom of the perceived clash between competing forces of the spending power and the tenth amendment. He first determined that the limited view of the spending power he attributed to Madison would make article I's grant of the taxing and spending power a "mere tautology."¹¹⁵ To avoid that, Roberts asserted, it was necessary to embrace Hamilton and to recognize that Congress possesses powers beyond those made explicit elsewhere in the Constitution. Therefore, the *Butler* majority summarized: "The power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."¹¹⁶

It would be hard to find a more explicit judicial proclamation of the open-ended reach of the spending power. How, then, did the *But-*

Hiss, who assumed primary responsibility for drafting the government's brief along with Paul Freund, told Peter Irons in 1978 that he and his colleagues never liked the processing tax, but tried to stretch the general welfare clause as far as they could. P. IRONS, *supra* note 108, at 188-89. With the advice of Professor Thomas Reed Powell, Hiss and Freund adopted what came to be called the Hamiltonian position on congressional spending power, traceable to Alexander Hamilton's *Report on Manufactures to the House of Representatives* (1791), and his *Opinion as to the Constitutionality of the Bank of the United States*. 3 WORKS OF ALEXANDER HAMILTON 180 (H. Lodge ed. 1885). This position was summarized and enthusiastically endorsed in J. STORY, COMMENTARIES ON THE CONSTITUTION §§ 1900-01, 1907-12 (1833), *quoted and discussed in* *United States v. Butler*, 297 U.S. 1, 64 n.11 (1936); Berns, *supra* note 46, at 130-45.

114. 297 U.S. 1, 62 n.8 (1936). *Id.* at 65.

115. The basis for terming this the Madisonian position is not specified. This certainly was not what Madison said or did in 1787, though there is some support for it in Madison's FEDERALIST NO. 41, in contrast to Madison's FEDERALIST NO. 14. The best known source for this restrictive view of the general welfare clause is President Madison's *Veto Message of March 3, 1817*, in J. RICHARDSON, 1 MESSAGES AND PAPERS OF THE PRESIDENTS 584-85 (1899). In this famous message, which Madison delivered on his final day as President, Madison vetoed an internal improvements bill sponsored, ironically, by Representative John C. Calhoun, who was "at this stage one of the most thoroughgoing nationalists in the country." Corwin, *The Spending Power of Congress — Apropos the Maternity Act*, 36 HARV. L. REV. 548, 557 (1923). On other issues during Madison's presidency, such as chartering the Second Bank of the United States in 1816, Madison was allied with Calhoun in actual practice and supported implicit national power.

116. 297 U.S. at 65. Roberts, relying heavily on Justice Story's interpretation for his decision, specifically endorsed what Roberts called "the Hamiltonian position," *id.* at 64-67.

ler majority — composed of Chief Justice Hughes and the “Four Horsemen of Reaction” in addition to Justice Roberts — manage to find constitutional grounds to invalidate the New Deal farm program? They said there was no limit, either explicit or implicit, within Article I’s broad grant of powers to Congress; rather, Justice Roberts attempted to draw a constitutional line between “matters of national, as distinguished from local welfare.”¹¹⁷ He asserted that Congress sought a constitutionally impermissible end in its farm scheme, because the statute “invades the reserved rights of the states.”¹¹⁸ The ground for this claim remained a bit vague, but its source was the Court’s reading of the tenth amendment to provide that “powers not granted are prohibited.”¹¹⁹ In addition to *Butler* being wrong-headed about the text and intention of the tenth amendment, there are other significant problems with the use of the tenth amendment as a restraint upon federal agricultural programs.

The first difficulty is that, even if one assumes that the tenth amendment grants or guarantees state sovereignty, the inconsistency between state sovereignty and a federal agricultural policy is not obvious. Apparently, the inconsistency was thought to rest on a vague Aristotelian notion that farming is somehow naturally a matter left exclusively to the states. Earlier cases that involved both vicious competition among the states to protect their own dairy farmers and the failure of state programs to deal with issues such as child labor and plummeting prices had demonstrated rather powerfully that this approach to federalism was inconsistent with the reality of economic interdependence put into stark relief by the Depression.¹²⁰ But the *Butler* majority retreated to the familiar terrain of judicial fiat. Without citation, but with much vivid embroidery supplied by slippery slope arguments, Justice Roberts declared, “contracts for the reduction of acreage and the control of production are outside the range of that [federal] power.”¹²¹

The second major difficulty in *Butler* is that the federal program

117. *Id.* at 67.

118. *Id.* at 68.

119. *Id.* Justice Roberts was willing to acknowledge national government powers “reasonably to be implied from such as are conferred,” *id.*, and purported to indulge every presumption in favor of the constitutionality of congressional action. *Id.* at 67.

120. Compare, e.g., *Nebbia v. New York*, 291 U.S. 502 (1934); *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934); *Chicago Board of Trade v. Olsen*, 262 U.S. 1 (1923) with, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *The Child Labor Tax Case* [*Bailey v. Drexel Furniture Co.*], 259 U.S. 20 (1922); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

121. 297 U.S. at 73. Almost surely the pun was unintended when Roberts asked the rhetorical question: “Is a statute less objectionable which authorizes expenditure of federal moneys to induce action in a field in which the United States has no power to intermeddle?” *Id.*

involved only voluntary participation by farmers. Nevertheless, the majority believed that sufficient "coercion by economic pressure" was involved to render the "asserted power of choice . . . illusory."¹²² The implications of this argument — if the idea that consent is illusory when based upon financial necessity were applied, for example, to labor relations — seemed not to occur to the *Butler* majority. It would have turned upside down the liberty of contract-substantive due process ideals fundamental to Justices McReynolds, Van Devanter, Butler, and Sutherland to encourage judicial scrutiny of voluntary agreements that only appeared to rest on consent. Judicial review of virtually all state as well as federal government programs might follow.

Yet the coercion theme in *Butler* remains appealing. It is clearly relevant to contemporary attacks on governmental carrots and sticks and is useful in challenging a variety of conditions attached to government benefits. That approach makes sense when applied to cases of unconstitutional conditions for individuals.¹²³ Hamilton himself asserted in *Federalist No. 79*: "In the general course of human nature, a power over a man's subsistence amounts to a power over his will."¹²⁴ There is no textual basis in the Constitution for this economic approach to coercion, however, except possibly the thirteenth amendment. That amendment, which abolished involuntary servitude as well as slavery, is generally construed quite narrowly on matters of financial coercion.¹²⁵ Yet we lack any clear means to distinguish con-

122. *Id.* at 71. George Wharton Pepper attacked the image of "the farmer . . . placed on the auction block . . . [who] sells his freedom for this mess of pottage," *id.* at 34.

123. This is not to say that the doctrine of unconstitutional conditions as we know it today is satisfactory or even coherent. See, e.g., *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 106 S. Ct. 2968 (1986). Rather it is to deny that one of Holmes's favorite postulates — that the greater power necessarily includes the lesser — should be as prevalent in legal discourse as it still seems to be. Such reasoning, after all, served nicely as a primary justification for slavery, defended as an exercise of the lesser power than the power to kill one's captives. See generally D. DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* (1966); Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529, 536-38 (1951); Touster, Book Review, 76 HARV. L. REV. 430 (1962) (reviewing E. WILSON, *PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR* (1962)). The locus classicus for modern judicial rejection of the doctrine of unconstitutional conditions is Holmes's opinion in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892).

124. (Emphasis in original.) This was quoted by Chief Justice Burger in his unanimous opinion in *United States v. Will*, 449 U.S. 200, 218 (1980). For a more detailed examination of the concept, and its use and abuse by judges around the end of the nineteenth century, see Soifer, *The Paradox of Paternalism: The United States Supreme Court and Laissez-Faire Constitutionalism, 1888-1921*, forthcoming in *CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY* (W. Samuels & A. Miller eds. 1986). Alexander Hamilton seemed to state the obvious in *Federalist No. 22*, in which he ridiculed the "enormous doctrine of a right of (State) legislative repeal" and emphasized the absurdity of the idea that "a party to a compact has a right to revoke that compact."

125. See, e.g., *Flood v. Kuhn*, 407 U.S. 258 (1972); *Clyatt v. United States*, 197 U.S. 207 (1905); *United States v. Choctaw Nation*, 193 U.S. 115 (1904); *Robertson v. Baldwin*, 165 U.S. 275 (1897). *But*

sent obtained out of necessity from consent obtained out of ambition or greed. The volunteer army is a good example of the problem. What, if any, judicial scrutiny of enlistments by unemployed black teenagers, for example, is desirable or constitutionally compelled?

In any event, the third problem in *Butler* is that the coercion doctrine simply has no place in matters involving the states *qua* states. This is not to deny the pervasive use of federal dollars, taxes, or tax exemptions to channel or cabin individual actions today. Nor is it to reject efforts to control manipulation of individuals by the almighty federal dollar, or at least to guarantee better feedback about and control of the federal bureaucracy. But there is no constitutional basis for the broadening Supreme Court attacks on federal funding schemes which purportedly coerce or purchase the consent of states. Couched in the language of statutory construction, with a patina of protective constitutional coloration, this trend departs entirely from modern precedent and longstanding practice.¹²⁶ It is nevertheless now clear that a majority of the Court believes that “[t]he legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’ ”¹²⁷

see *Bailey v. Alabama*, 219 U.S. 219 (1911), over a harsh Holmes dissent in which he proclaimed, “[t]he Thirteenth Amendment does not outlaw contracts for labor.” *Id.* at 246.

126. *See, e.g.*, *Green v. Mansour*, 106 S. Ct. 423 (1985); *Atascadero State Hospital v. Scanlon*, 105 S. Ct. 3142 (1985); *Pennhurst State School & Hospital v. Halderman*, 104 S. Ct. 900 (1984); *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981).

127. *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981). This decision, based ultimately on the Court’s narrow statutory reading of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000-6081, is a remarkable example of the application of the ideology of freely-willed contract law to intergovernmental relations, reminiscent of John C. Calhoun’s theories during his secessionist phase. For example, Justice Rehnquist’s majority opinion seeks to determine “whether Congress spoke so clearly that we can fairly say that the State could make an informed choice.” 451 U.S. at 25. (Rehnquist does not specify which or how many state officials this test requires nor does he suggest what would actually constitute informed consent by a state). The state’s consent, he argues, should be considered to be “much in the nature of a contract.” *Id.* at 17. Unfortunately, putting weight on the concept of the state of mind of a state is a vivid example of the power of a metaphor to conceal rather than reveal what is being discussed.

Scrupulous concern for consent by a state contrasts starkly with decisions by the Court enforcing contracts against individuals, despite severely restricted or non-existent alternatives. The tone of Justice Rehnquist’s entire opinion is that the Commonwealth of Pennsylvania could or should not have made such a bad bargain with the federal government as actually to obligate itself to guarantee the Bill of Rights for the Disabled that Congress promulgated. Compare this solicitude for the state — this insistence that the entities of states “exercise their choice knowingly, cognizant of the consequences of their participation,” *id.* — with, for example, the Court’s demonstration of little concern for the knowing and voluntary quality of the bargain when it determined that a welfare recipient could be required to accept the intrusion of a home visit as a condition of her acceptance of welfare benefits. In the words of Justice Blackmun, writing for the majority in *Wyman v. James*, 400 U.S. 309, 324 (1971): “Mrs. James has the ‘right’ to refuse the home visit, but a consequence in the form of cessation of aid . . . flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved.” *See also*

This statement may be dictum, but its potential impact is vast and it articulates a standard which contrasts sharply with the view of earlier courts, including some of those most dedicated to dual sovereignty. As Edward Corwin put it in his detailed, yet marvelously crisp article published in anticipation of the challenge by Massachusetts to the Maternity Act of 1921:

The scruples raised against such cooperation in the name of state autonomy tend rather to withdraw from the states what must often prove a most advantageous mode of exercising that autonomy. Reversing the scriptural text, they would save the ghost of state sovereignty by suspending its ineffectual body at the end of a chain of fine-spun legalism.¹²⁸

Corwin was able to demonstrate persuasively, even at the time of the Harding administration, that "any attempt to apply the Madisonian test to national expenditures today would call for a radical revision in the customary annual budget of the government and for a revolution in national administration."¹²⁹ Needless to say, Congress had not then even begun to imagine that it had to rely on section five of the fourteenth amendment as its constitutional basis for such established practice. Today Congress apparently would be required to declare its civil rights enforcement purpose to pass the Court's new constitutional test. Otherwise, if a statute involves state consent to conditions imposed in exchange for federal funding, Congress must seek state consent unequivocally, within the four corners of the statute.¹³⁰

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (unconstitutional for Minnesota to alter pension obligations of employers: workers could have bargained to have pensions vest at the end of 10 years; since they did not, it was an impairment of the obligation of contract to do the equivalent for them by statute); *Fare v. Michael C.*, 442 U.S. 707 (1980) (16 1/2-year-old who asked for probation officer instead of lawyer knowingly and voluntarily waived *Miranda* rights when he later tearfully confessed to murder while in custody of several police officers).

128. Corwin, *supra* note 1, at 582.

129. *Id.* at 579. Corwin's survey of both practice and official proclamations over nearly 150 years, conducted even before the heyday of what we have come to think of as the Big Bad Brother of national government, demonstrated that only between 1845 and 1860 was the Madisonian doctrine of limiting Congress' power to spend to those powers explicit elsewhere in the Constitution "at all generally accepted." *Id.* Corwin concluded that, so far as the power to spend is concerned, "the 'general welfare' is what Congress finds it to be." *Id.* at 580.

130. *Atascadero State Hospital v. Scanlon*, 105 S. Ct. 3142 (1985) is particularly instructive. At first glance, the case seems a curious one for the Court to have decided to grant certiorari and its result seems largely explainable in terms of attorneys' errors: why would anyone ask for trouble by suing only the State of California after *Quern v. Jordan*, 440 U.S. 332 (1979) and the eleventh amendment decisions discussed *supra*, note 29? On closer scrutiny, however, Justice Powell's majority opinion is quite significant beyond its reiteration of recent eleventh amendment doctrine. First, that opinion vividly demonstrates the Court's new and selective approach to sources of congressional power by rejecting the Ninth Circuit's view that the Rehabilitation Act of 1973 was based on Congress' power under section five of the fourteenth amendment. Since the lower court focused on whether or not the state consented,

That this rigid contractual approach to the spending power marks a significant departure from past judicial precedents is illustrated by the Court's response to the attack on the Maternity Act. In the course of denying standing to Massachusetts and to Mrs. Frothingham, Justice Sutherland wrote for a unanimous Court: "Probably, it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject."¹³¹ The entire Supreme Court in 1923 could not be considered insensitive to claims of liberty of contract or states' rights.¹³² Still, when Massachusetts made the "naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent," it was "plain that that question . . . is political and not judicial in character."¹³³

Despite *Massachusetts v. Mellon*, and in terms perhaps meant to echo *McCulloch v. Maryland* ironically, the *Butler* majority warned that "power to confer or withhold unlimited benefits is the power to coerce or destroy."¹³⁴ Discerning a "coercive purpose," the *Butler* Court decided that "coercion by economic pressure" could not be squared with the Constitution.¹³⁵

The following year, however, in response to state attacks on alleged coercion or purchase of their consent to take part in the Social Security system, Justice Cardozo returned to the *Massachusetts v. Mellon* approach. Writing for the majority in *Steward Machine Co. v. Davis*, he rejected the states' rights claims with language at least as stark as that Justice Sutherland had used:

[To] hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a

according to Justice Powell, the case should be analyzed in terms of the spending power, 105 S. Ct. at 3149-50 n.5. That categorization exercise completed, Justice Powell proceeds to hold that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." *Id.* at 3148. The fact that California's Constitution appeared to waive sovereign immunity was held to be not stated with sufficient clarity to satisfy the majority's eleventh amendment concerns, *id.* at 3147, nor did the majority accept California's concession below that Congress had passed the Rehabilitation Act pursuant to section five of the fourteenth amendment. *Id.* at 3149 n.4.

131. *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923).

132. See generally F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT (1938); E. CORWIN, *supra* note 1.

133. 262 U.S. at 483.

134. 297 U.S. at 71.

135. *Id.*

working hypothesis in the solution of its problems.¹³⁶

With the current Court, however, the same challenge raised by a state would get a more sympathetic response. Recently, the Court reiterated its view that the eleventh amendment cuts a large chunk out of Article III.¹³⁷ Yet Congress somehow retains the constitutional authority to restore power to the federal courts when Congress presses precisely the right button. The Court never has made entirely clear why a constitutional decision should turn on what particular source for its authority Congress expressly invokes. Moreover, the Court's curious flip of the search for motive, otherwise much in vogue when fundamental individual rights are at stake, threatens innumerable statutes passed before the Court began to instruct Congress about how the right shibboleth, used to identify the source of its power, would make all the constitutional difference.¹³⁸

136. 301 U.S. 548, 589-90 (1937). During the 1930s, Justice Cardozo probably was the leading judicial exponent of the view that economic and social problems were national in scope and should be approached as questions of degree — which he considered to be in the manner of the laws of physics — rather than with neatly compartmentalized rules. See, e.g., *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (dormant commerce clause invalidation of state parochialism in dairy industry); *Carter v. Carter Coal Co.*, 298 U.S. 238, 327 (1936) (dissenting from Justice Sutherland's majority opinion invalidating federal regulation of maximum hours and minimum wages in coal mines). In *Steward Machine Co.* itself, Justice Cardozo derided the idea of the surrender of state sovereignty, claiming that since a state could withdraw its consent, "[t]o find state destruction there is to find it almost anywhere." 301 U.S. at 596. Concern over the loss of essential powers of statehood, according to Justice Cardozo, "dissolves in thinnest air when . . . conceived of as dependent upon a statutory consent." *Id.* at 597. See also *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding the Social Security old age benefits system on the basis of spending power). There Justice Cardozo wrote: "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield." *Id.* at 645.

The extent of the transformation within the Court and of acceptance of Cardozo's organic theory of interconnectedness is probably best demonstrated by *Wickard v. Filburn*, 317 U.S. 111 (1942) (Agricultural Adjustment Act of 1938 could reach and penalize a surplus of 239 bushels of wheat grown for home consumption by owner of a small Ohio farm). The tenth amendment approach used in *Butler* was abrogated in *U.S. v. Darby*, 312 U.S. 100 (1941) (upholding Fair Labor Standards Act of 1938), though *Butler* itself has never been formally overruled.

137. *Green v. Mansour*, 106 S. Ct. 423, 425 (1985).

138. For a discussion of the rise of the idea of requiring proof of bad motive in the context of civil rights, see Soifer, *Complacency and Constitutional Law*, 42 OHIO ST. L. J. 383, 393-410 (1981). *Rogers v. Lodge*, 458 U.S. 613 (1982) indicated that not all my dire predictions have come true, but the Court continues generally to require rather complete proof of bad motive even in cases of racial discrimination. See, e.g., *Memphis v. Greene*, 451 U.S. 100 (1981); *Crawford v. Los Angeles Bd. of Education*, 458 U.S. 527 (1982); *Wygant v. Jackson Bd. of Education*, 106 S. Ct. 1842 (1986). Additionally, the Court has not indicated how the Civil Rights Act of 1964, for example, will fare under the Court's new divide-and-conquer approach to the intent behind congressional power, see excerpts from Senate Committee Hearings and comments in G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 159-64 (11th ed. 1985), nor what will follow when judges review either mixed signals from Congress about the particular source of its constitutional power or boilerplate language adopted to try to establish the strongest possible constitutional basis for statutes, such as a virtually pretextual citation by the relevant congressional committees of section five of the fourteenth amendment.

As a final matter, it is obvious that the *Butler* majority evaded the problem of drawing coherent lines to limit federal power. Ironically, despite its states' rights holding, the *Butler* decision actually painted the Court into a corner by adopting the Hamiltonian interpretation of the spending power. The Court responded to this dilemma which it created for itself by invoking an extreme version of a slippery-slope argument: if upheld in *Butler*, Justice Roberts claimed, the spending power would become "[t]he instrument of the total subversion of the governmental powers reserved to the individual states."¹³⁹ Unless the tenth amendment were a constitutional barrier, the Court proclaimed in language quite similar to Justice Powell's lament in his *Garcia* dissent, the Constitution would be "subverted."¹⁴⁰ Indeed, Justice Roberts declared, "the independence of the individual states [would be] obliterated, and the United States converted into a central government exercising uncontrolled police power in every state of the Union, superseding all local control or regulation of the affairs or concerns of the states."¹⁴¹

In his well-known dissent in *Butler*, Justice Stone warned against judicial intervention that confuses the wisdom of congressional legislation with the power of Congress to enact such legislative policy. He also emphasized the long history of federal interventions, premised on the spending power, that were accompanied by specific conditions such as the Morrill Act, which required that agricultural science be taught in land grant universities.¹⁴² He argued that Congress legitimately could consider depressed conditions for farmers to be a national concern and could reasonably enact national legislation.

Justice Stone went on to claim that while the federal government's power of the purse is great, it is not unrestrained. By stating that Congress has "power to impose conditions reasonably adapted to the attainment of the end"¹⁴³ invoked to justify the expenditure, Justice Stone suggested that potential judicial scrutiny should remain. Apparently, however, he would only invoke the traditional, extremely deferential mode of judicial consideration limited to whether legisla-

139. 297 U.S. at 75.

140. See *supra* note 56 and accompanying text. Justice Roberts, like Justice Powell, couched his argument in the vague terms of the absence of evidence of a suggestion by the framers of a willingness to see the Constitution subverted, the states destroyed, and the national government exercising uncontrolled power. The failure to find such suggestions seems neither a great surprise nor probative of much of anything.

141. 297 U.S. at 77. To decide otherwise, Roberts wrote, would "inevitably lead" to the destruction of local self-government in the states. *Id.* at 77-78.

142. *Id.* at 83.

143. *Id.* at 85.

tive means were rationally related to legitimate ends.¹⁴⁴

In his *Butler* dissent, Justice Stone tried to articulate constitutional restraints on the spending power:

One restriction is that the purpose must be truly national. Another is that it may not be used to coerce action left to state control. Another is the conscience and patriotism of Congress and the Executive.¹⁴⁵

But of these restraints, the first — “truly national” — and second — “left to state control” — seem hardly more clear or better-fitted to judicial interpretation than the “conscience and patriotism” of the third.

Still, it was Justice Stone and his fellow dissenters, and not the *Butler* majority, who struggled to articulate constitutional limits within the Hamiltonian view of the spending power. Justice Stone's dissent in *Butler* is renowned most of all for its articulation of a “guiding principle” of judicial review:

[W]hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our sense of self-restraint.¹⁴⁶

Beginning with the Court's refusal to invalidate Social Security in 1937, in spite of constitutional claims quite similar to those raised in *Butler*, the Court quickly reduced the tenth amendment to “but a truism.”¹⁴⁷ So it remained over the next forty years. After the flurry of controversy about Court-packing, a plan specifically inspired by presidential outrage over the *Butler* decision, Roosevelt's appointees to the Court shared a perception that both life and federalism were messy, without neat, logically ordered choices. The new majority and their

144. For valiant efforts to put teeth into the bite of rational relationship review, see Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Bennett, “*Mere*” Rationality in Constitutional Law: *Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049 (1979). For a similar approach to federalism concerns, see Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979). Kaden limits his proposal to cases in which the spending power “would exceed the congressional power under the commerce clause because of its interference with state autonomy,” *id.* at 896, but in such a case, Kaden argues, the burden should shift to Congress “to demonstrate that the [spending power] requirement is related to the achievement of an important governmental objective.” *Id.* It is difficult to imagine this proposed standard of judicial review in actual operation, just as it is hard to tell why what may be a good idea as policy should be imposed as a judicial test allegedly premised on the Constitution. As Justice Stone warned, quoting Holmes in his *Butler* dissent, “It must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.” 297 U.S. at 87 (quoting *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U.S. 267, 270 (1904)).

145. 297 U.S. at 87.

146. *Id.* at 78-79.

147. See *supra* note 4.

immediate successors stressed the complexity of social and economic relationships and therefore believed such matters were best left to legislative processes.

This is not to say that all constitutional restraints on the spending power are inconceivable. It is to suggest, however, that the constitutional promised land for such limits is to be found somewhere other than in mystical rings of federalism circling on or about the tenth amendment. In a hypothetical example mentioned by the *Butler* majority, for example, Congress might mandate instruction in subversive activities.¹⁴⁸ This illustration is exactly the kind of *reductio ad absurdum* favored in the old, dual federalism style of legal argument.¹⁴⁹ Even if the political system were to misfire so improbably as to require that students be instructed in subversion, a Court should not strike down such an absurdity on the basis of the spending power. It would be far more persuasive to review such a law as a possible invasion of academic freedom, for example, or as an infringement of other individual rights.¹⁵⁰

We can all imagine blatantly unconstitutional conditions impinging upon the civil rights of individuals that could conceivably be tied to federally-funded programs. Constitutional constraints on such contingencies can be derived from specific constitutional protections outside the spending power and the tenth amendment. It is quite important, in fact, to keep such constitutional review separate and distinct from efforts to squeeze states' rights limits from the Constitution. Such limits ultimately must rely on what Justice Holmes once mocked as an "invisible radiation from the tenth amendment."¹⁵¹

It is possible, of course, to posit elegant theories of what such radiations might usefully contain or what federalism would look like

148. 297 U.S. at 74. Justice Roberts also listed redistribution of the entire industrial population, *id.* at 76, as well as such other in terrorem prospects as redistribution of income and the like.

149. In addition to the fine example provided by *Butler* itself, see, for example, Justice Sutherland's majority opinion in *Carter v. Carter Coal Co.*, 298 U.S. 278, 295-308 (1936). For recent discussion of the lawyerly habit of using extreme hypotheticals, see Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

150. See O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CAL. L. REV. 443 (1966). See also, e.g., Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 YALE L.J. 1694 (1981); Stolz, *Revenue Sharing — New American Revolution or Trojan Horse?*, 58 MINN. L. REV. 1 (1973); Linde, *Justice Douglas on Freedom in the Welfare State*, 39 WASH. L. REV. 4, 28-31 (1964). See generally Kriemer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PENN. L. REV. 1293 (1984).

151. *Missouri v. Holland*, 252 U.S. 416, 434 (1920). This explicit indication of Justice Holmes's corrosive view of the tenth amendment, in the context of an alleged conflict between the tenth amendment and national power in the Migratory Bird Treaty Act of 1918, seems a better source for his interpretation of the tenth amendment than Professor Van Alstyne's attempt to reason by inference from Justice Holmes's "dissenting dictum" in *Northern Securities Co. v. United States*, 193 U.S. 197, 202 (1904). See Van Alstyne, *supra* note 6, at 1711 n. 11.

in the wisest, most just, or most efficient best-of-all-possible worlds. Recent efforts to do so often are quite impressive.¹⁵² But it is a logical flaw, as well as an historical anomaly, to believe that it is possible simultaneously to invest the tenth amendment's capacious language with the power to emanate radiations or to cast penumbræ suitable for judicial framing, while also maintaining that the ninth amendment does no such thing. Indeed, the tenth amendment's text itself contemplates no greater judicial enforcement of federalism constraints than enforcement of constraints premised on its reservation of power to the people.¹⁵³ Furthermore, the track record for judicial efforts on behalf of states' rights is sufficiently appalling that it comes as no surprise that advocates of the New Federalism — such as Justice Powell, Professor Van Alstyne, and their allies — simply avoid talking about the past practice of judicially-enforced federalism limits on congressional power.

IV. CONCLUSION

It may be noted that a pendulum never swings exactly the same way twice. Even in a vacuum, because of the Earth's rotation, each swing is slightly different. It is impossible to reproduce the historic push exactly. If the laws of physics and the paths of pendulums are uncertain and relative, surely the rule of law is in still greater flux. That is partially because the favorite American indoor sport — bemoaning the mistakes made by our various governments — is not played terribly well in judicial chambers. It is also because the judicial hunt for "lack of squarage"¹⁵⁴ in matters of federalism is circular. It is without any identifiable, sensible basis in history, the text of the Constitution, or the development of constitutional law over nearly 200 years. Casey Stengel notwithstanding, one cannot simply "look it up."

Just as there are reasons for judges to avoid deciding who were

152. An illuminating attempt by Kathryn Abrams to reason about the tenth amendment from the structure and relationship approach advocated by Professor Charles Black may be found in her Note, *On Reading and Using the Tenth Amendment*, *supra* note 13. I find it ultimately unpersuasive, however, as I do Robert Nagel's attempt to interweave various threads of concern for federalism values in Nagel, *Federalism as a Fundamental Value*, *supra* note 13, as well as the other sources cited in that footnote. Two recent, sensitive arguments which draw upon visions of federalism of the type I favor may be found in M. BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY 71-6 (1985) (federalism boundaries in aid of community, functioning to designate responsibility rather than acquisition or sovereignty) and Yackle, *supra* note 28 at 1034-40 (federalism as safeguard for individual rights). Significantly, neither makes a claim of constitutional enforceability for his view of federalism.

153. For a powerful and moving recent treatment of the possible constitutional meaning to be derived from ideas associated with the power of the people, see Charles Black's Rubin Lecture, *Further Reflections on the Constitutional Justice of Livelihood*, delivered at the Columbia Law School, March 20, 1986.

154. A. Bickel, *supra* note 75, at 91.

the greatest baseball players,¹⁵⁵ there are good and sufficient grounds for them to shun the role of umpiring our national pastime of comparing the relative demerits of our governments. In debating or playing the politics of federalism, in Yogi Berra's immortal words: "It ain't over 'til its over." We can always hope while we "Wait 'til next year." Arguments about whether Congress invaded the proper sphere of the states are like the old disputes about whether it was Mays, Mantle or Snider who was obviously the best centerfielder — or whether DiMaggio, in his prime, was really the best of all. That debate helped sort out one's friends. But appealing to an adult to settle the argument was simply not acceptable.¹⁵⁶ Only somebody without full understanding of the intricacies and joys of the game could believe that an appeal to higher authority might resolve something so important.

155. The difficulty in naming the great baseball players was illustrated when Justice Blackmun attempted to do just that in his majority opinion in *Flood v. Kuhn*, 407 U.S. 258 (1972). The saga of the efforts by other Justices and their clerks to amend Justice Blackmun's list, and Justice Blackmun's profound regret for the omission of Mel Ott, is recounted in R. WOODWARD & S. ARMSTRONG, *THE BROTHERS* 189-192 (1979). See also *Baseball Club v. National League*, 259 U.S. 200 (1922); Cover, *Your Law-Baseball Quiz*, N.Y. Times, April 5, 1979 at A-23, op. ed.

156. But see B. JAMES, *HISTORICAL BASEBALL ABSTRACT* 397 (1985) (Mantle best in prime; Cobb best over career).

