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TOWARD A MORE "PERFECT" UNION: THE UNTIMELY DECLINE OF FEDERALISM AND THE RISE OF THE HOMOGENOUS POLITICAL CULTURE

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ABSTRACT

The principle of federalism and the national government's evolving relationship with the states has created many challenging moments over the course of American history. As the Twenty-First Century begins to unfold, however, the decline of this political balance has the potential to generate even greater challenges with far-reaching implications. From the closing battle of the Revolutionary War to the Gun-Free School Zones Act, this article charts the evolution of this intricate national relationship with a view toward better understanding of the rise of the homogenous political culture and the ways such a phenomenon might be reversed.

I. INTRODUCTION

The principle of federalism and the power of the states vis-à-vis the national government has long been a vexatious thorn in the side of the American constitutional structure. While historical experience has certainly demonstrated the need for a government capable of providing a strong common defense—particularly in light of the heightened geo-political uncertainty of the Twenty-First Century world—there are also murkier domestic questions about how much power that central government should wield. To what extent, for example, should the federal government be in the business of regulating the speed limit of a road in rural Kansas? Must a school board in New Hampshire conform its educational program to a federally mandated standard? If the citizens of one state overwhelmingly reject the federal position on an issue of moral or social significance, are they obligated to adhere to it anyway?

These are not small questions, and their resolution today depends in large part on the triumphs and tragedies of the last two hundred years.

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From the adoption of the Articles of Confederation in 1781 to the present day, the political relationship between the states and the federal government has largely been one of uninterrupted national ascendancy. Although there have been intermittent push-backs from the state governments and the occasional Supreme Court decision in their favor, the prevailing trend has been toward a federalization—and homogenization—of the political landscape. In many respects this is an undoubtedly positive development. Were it not for uniform federal standards, modern pharmacology might be more akin to the snake-oil pseudoscience of the late 1800s than the cutting-edge discipline it is today, securities investors might still be wading through a patchwork of fifty different regulatory schemas, and absent decisive federal action, the Civil Rights movement might never have gotten off the ground.

Amidst these positive developments, however, it remains to be asked whether in the push toward federal standardization we have lost some of the benefits of ideological diversity. Is the nation truly better off when only one viewpoint prevails? Is a homogenous political culture really the *best* response to an ever-changing world? What role will the *states* of America serve in the future if they have lost so much of their original autonomy? To answer these questions—and many more—one must first consider the historical ebb and flow of federalism in connection with the hopes and fears that have appeared and evolved over the course of our nation's history.

II. THE RISE AND FALL OF THE ARTICLES OF CONFEDERATION

With the surrender of General Cornwallis at Yorktown on October 19, 1781, major military operations in the Revolutionary War came to a close.[1] The Treaty of Paris brought the conflict to an official end on September 3, 1783, and the independence of the former colonies was recognized.[2] Since March of 1781, the Articles of Confederation

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[1] As recorded by Lieutenant William Feltman of the First Pennsylvania Regiment,

> At one o'clock this day [October 19, 1781] Major Hamilton [Secretary of the Treasury under President Washington] with a detachment marched into town and took possession of the batteries and hoisted the American flag.
>
> The British army marched out and grounded their arms in front of our line. Our whole army drew up for them to march through, the French army on their right and the American army on their left.
>
> The British prisoners all appeared to be much in liquor.

Lieutenant William Feltman, *Journal of Lieut. Wm. Feltman: 1781-2*, at 22 (Henry Carey Baird 1853) (published for the Historical Society of Pennsylvania).

[2] Interestingly enough, as recently as November 1, 2007, the U.S. Department of State still acknowledged Article 1 of the Treaty of Paris (recognizing the independence of the thirteen former colonies) as a "Treaty in Force" between the United States and the United Kingdom. U.S. Dept. of St.,

had been the operational framework for establishing a semblance of national unity with the Continental Congress responsible for prosecuting the war.[3] Unlike its modern counterpart, however, the Continental Congress was not so much a national policy-making organ as it was a fractious assembly frantically trying to recruit donations from its constituent members.[4] "It owned no federal property, not even the house in which it assembled, and after it had been turned out of doors by a mob of drunken soldiers in June, 1783, it flitted about from place to place, sitting now at Trenton, now at Annapolis, and finally at New York."[5] It lacked the power to tax or raise an army, and "[w]hen it wanted money or troops, it could only ask the state governments for them . . . ."[6] In short, the Continental Congress "might issue orders, but it had no means of compelling obedience."[7]

Against this backdrop of political beggaring, it soon became clear that the governmental regime under the Articles of Confederation possessed certain defects—notably the lack of fiscal autonomy—which threatened its survival as a sovereign entity.[8] These fears were only enhanced when Daniel Shay, a former soldier of the Continental Army, raised a rebellion in Massachusetts that nearly succeeded in capturing one of the few arsenals the national government possessed:

> In December, 1786, nearly 1,000 malcontents assembled at Worcester, Mass., and forced the supreme court of that State to adjourn, so as to prevent the collection of debts.
>
> Clamorous for paper money and determined to resist taxation under the State laws, the insurgents, now 2,000 strong [by February 1787], moved against Springfield Arsenal, led by Daniel Shay and other former officers and soldiers of the Revolution. They would have taken the place but for the resolution of its commander, General Shepherd, who opened fire with his artillery and dispersed his assailants, killing three and wounding one.[9]

Treaties in Force, A List of Treaties and Other International Agreements of the United States in Force on November 1, 2007, Section 1: Bilateral Treaties 295, http://www.state.gov/documents/treaties/83046.pdf (Dec. 6, 2007).

[3] John Fiske, *Civil Government in the United States* 213-16 (rev. ed., Houghton Mifflin Co. 1904).

[4] *Id.* at 212-16. "The Continental Congress was not the parent of our Federal Congress; the former died without offspring, and the latter had a very different origin . . . ." *Id.*

[5] *Id.* at 214.

[6] *Id.*

[7] *Id.* at 215.

[8] *Id.* As Fiske aptly stated, "[a] government is not really a government until it can impose taxes and thus command the money needful for keeping it in existence." *Id.*

[9] Bvt. Maj. Gen. Emory Upton, *The Military Policy of the United States* 71 (4th ed., Washington Govt. Printing Off. 1917).

In an embarrassment to the Continental Congress—and in many ways an archetypal display of its impotency under the Articles of Confederation —the rescue of the Springfield Arsenal was not brought about by soldiers of the Continental Army, but rather by the underfunded militia of the State of Massachusetts.[10] Although the rebellion had been put down, it was becoming increasingly obvious that something had to be done if the country was to survive its first decade.

Three months after Shay's unsuccessful uprising, something *was* done. At a meeting called in Philadelphia "for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall . . . render the Federal Constitution adequate to the exigencies of government and the preservation of the Union[,]" delegates from across the country met in secret to forge a new government for the United States.[11] These men "saw that the mere grant of further powers, or the mere consent that the Congress should have jurisdiction over certain new subjects, would be of no avail while the government continued to rest upon the vicious principle of a naked federal league . . . ."[12] Something stronger was needed, and over the course of four sweltering months of political compromise and sometimes raucous debate, the United States Constitution was born.[13]

II. THE CONFEDERACY BECOMES A REPUBLIC

The document that emerged in September 1787 from the arduous labor of the Constitutional Convention was by no means a perfect text, and, in some respects which history would later illuminate, was terribly flawed. It had, however, addressed several of the problems which had plagued the government under the Articles of Confederation, and was considered by many to be a vastly superior improvement.[14] Among its powers, the new federal government could collect taxes, "regulate commerce with foreign nations and among the several States," raise a

[10] *Id.* "Unable to look to Congress for support, the governor of Massachusetts called out 4,000 militia under General Lincoln, who soon restored order. In view of the exhausted condition of the State treasury, the merchants of Boston advanced the necessary funds to defray the expenses of these troops." *Id.*

[11] John Alexander Jameson, *A Treatise on the Principles of American Constitutional Law and Legislation: The Constitutional Convention; Its History, Powers, and Modes of Proceeding* 150 (2nd ed., E. B. Myers & Co. 1869).

[12] George Ticknor Curtis, *History of the Origin, Formation, and Adoption of the Constitution of the United States with Notices of Its Principle Framers* vol. 2, 18 (Harper & Bros. 1859).

[13] *Id.* at 491.

[14] *Id.* at 513-14. "[I]t was clear that the Confederation had failed, and had failed chiefly by reason of the peculiar and characteristic nature of its representative system, and because the representative system proposed in the Constitution was the only one that could be agreed upon as the alternative" it was deemed the superior choice. *Id.*

standing military, and—most sweepingly—"make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States . . . ."[15] The exigencies of government and the "preservation of the Union" had finally forced the States to realize that surrendering some authority to the new national regime was simply in their best interest.[16]

As the republic moved past the immediacy of the Revolutionary War however, political growing pains began to emerge. John Adams, the second President of the United States, increasingly found himself the target of newspaper criticism. With many of these antagonistic journalists being of foreign origin, there was a growing concern in Adam's administration about the possibly subversive nature of their writings.[17] The response to these perceived threats was the passage of a series of measures known as the Alien and Sedition Acts.[18] The Alien Act provided "for the removal of 'such aliens born, not entitled by the constitution and laws to the rights of citizenship, as may be dangerous to its peace and safety'" (with the ability of the President to imprison those who refused to depart voluntarily), while the Sedition Act made it a crime to "oppose measures of the government, or to intimidate any office-holder."[19]

The reaction from the political opposition was predictably swift and hostile. By the winter of 1798, Thomas Jefferson and James Madison—writing respectively for the Kentucky and Virginia legislatures—had drafted a series of resolutions arguing collectively that "the Constitution was a compact to which the States were parties, and that 'each party has an equal right to judge for itself as well of infractions

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[15] Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 13-14 (Victor H. Lane ed., 7th ed., Little, Brown, & Co. 1903).

[16] Curtis, *supra* n. 12, at 10. "No single State, however great its territory or its population, could have . . . repelled a foreign invasion alone, and the government of one of the most respectable and oldest of them [Massachusetts] . . . had almost succumbed to the first internal disorder [Shay's Rebellion] which it had been forced to encounter." *Id.*

[17] Albert Bushnell Hart, *Epochs of American History: Formation of the Union 1750-1829*, at 168 (2d. rev. ed., Longmans, Green, & Co. 1893).

> The newspapers had now reached an extraordinary degree of violence; attacks upon the Federalists, and particularly upon Adams, were numerous, and keenly felt. Many of the journalists were foreigners, Englishmen and Frenchmen. To the excited imagination of the Federalists, these men seemed leagued with France in an attempt to destroy the liberties of the country; to get rid of the most violent of these writers, and at the same time to punish American-born editors who too freely criticised the administration, seemed to them essential.

Id.

[18] *Id.* at 168-69.

[19] *Id.* at 169.

as of the mode and measure of redress.' "[20] The state legislature in Kentucky declared the Acts not law, void, and of no effect, and argued with greater zeal in 1799 that nullification of all unauthorized acts was the rightful remedy in situations where the federal government oversteps its constitutional authority.[21]

With the election of the Jefferson Administration in 1800, the Alien and Sedition Acts were consigned to the dustbin of history, and the question of the states' ability to nullify federal law was shelved temporarily. Nineteen years later, however, the question of state power would flare up again with the Supreme Court's decision in *M'Culloch v. Maryland*.[22] When Maryland sought to levy a tax on the Bank of the United States, litigation ensued that raised the direct question about the scope of federal power. In determining that "[s]uch a tax must be unconstitutional" because it was "a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution," Chief Justice John Marshall recognized the inherent supremacy of the federal government.[23] Chief Justice Marshall, discussing the question more directly, stated:

> The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion. It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was . . . submitted to the *people*. . . .
>
> From these conventions, the constitution derives its whole authority. . . . It required not the affirmance, and could not be negatived, by the state governments. The constitution, when

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[20] *Id.* at 171.

[21] *Id.* This would not be the last, or even most colorful, time the nullification question would arise; it was, however, the first time the idea of the federal government as a "compact" between the States was clearly articulated. *Id.*

[22] 17 U.S. 316 (1819).

[23] *Id.* at 436-37. In doing so, however, Chief Justice Marshall was also mindful that

> No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps, [or] of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made.

Id. at 400-01.

> thus adopted, was of complete obligation, and bound the state sovereignties.[24]

Although the political pendulum appeared to be swinging firmly in the direction of national supremacy, the delineations of its reach were still unclear. Contemporaneous to this decision, the events surrounding the Missouri Compromise began to take shape. "A vast region [had been] added to the United States by the Louisiana Purchase, and as the time approached for this to be carved into states, the all-important question arose, Slavery or no slavery in the great West?"[25] Beneath the moral significance of this issue, however, a deeper constitutional question was posed.[26] In determining whether Missouri would be admitted to the Union as a slave state, Congress had to consider whether, in establishing the parameters by which the slavery status of future states would be decided, it even had the power to place conditions on the admission of new states:

> Had Congress the power to lay restrictions on new states that were not laid on the original thirteen? Would the new states be coequal with the old if admitted under such limitations? The members from the South took the ground that the Constitution gave Congress no such power. . . . Those from the North, with some exceptions, contended that as Congress had full control in governing the territories, it had the power to place conditions on their admission as states.[27]

With the timely petition of Maine seeking admission as a free state, a joint committee was able to hammer out a compromise by which Maine and Missouri would be admitted under their respective slavery positions—thus preserving the political status quo—while "all the remainder of the Louisiana territory north of thirty-six degrees and thirty minutes north latitude" would be admitted as free states in the future.[28]

Beneath the obvious question of whether slavery would be extended into the western territories, the Missouri Compromise also signified—at a very subtle level—the increasing power of the federal government relative to the states. "The fact that a compromise line had been agreed on, thus giving Congress power over slavery in the territories, and that Missouri was admitted with a condition which was not imposed on the original states . . . opened the eyes of the South to the

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[24] *Id.* at 402-04.
[25] Henry William Elson, *History of the United States of America* 458 (The MacMillan Co. 1915).
[26] *Id.* at 459.
[27] *Id.*
[28] *Id.* at 460.

fact that . . . the status of slavery would, in a great measure, rest henceforth on the will of Congress."[29] Slowly but surely the federal government was assuming a greater level of control over traditional state prerogatives, but as future events would demonstrate, the political pendulum was about to swing back with violence.

IV. THE ROAD TO WAR

A generation before the Civil War began, the long dormant nullification issue once again rose to the political forefront. After Congress passed a series of highly protective tariffs, measures "more violently and openly protectionist, more flagrantly sectional, than any yet attempted"[30] the South Carolina legislature "forbade the application of the new tariff in her ports, and rendered the Federal officers who should attempt to enforce the act of Congress liable to the penalties of State law."[31] Furious at this political impertinence, President Jackson "demanded of Congress what was called a Force Bill, to levy war against the rebellious State."[32] Compounding the increasingly hostile tone of the conflict, Jackson's own former Vice President, John C. Calhoun, argued passionately for the cause of South Carolina: "Resting on the inalienable and unsurrendered sovereignty of the States, he maintained their several right in the last resort to judge each for herself of the purport and limits of the Federal compact, and to protect themselves against the abuse or transgression of Federal powers."[33]

With the timely introduction of a more equitable tariff, the Tariff Nullification Crisis, such as it was, was averted. Although lacking the broad-based political support to be a truly national movement,[34] the combative rhetoric of the Crisis and the near use of force signaled the increasing tensions, which were coming to mark the debate over the scope of federal power. Bloodshed had been avoided, but:

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[29] *Id.* at 461.

[30] Percy Greg, *History of the United States from the Foundation of Virginia to the Reconstruction of the Union* vol. 1, 439 (W.H. Allen & Co. 1887). Popularly referred to as the Tariff of Abominations, this protective measure imposed, on average, duties in excess of twenty-five percent. *Id.* at 441.

[31] *Id.* at 440.

[32] *Id.* It has been argued that much of his ire was not so much the result of South Carolina's affront to principles of constitutional order, but rather its affront to his personal authority; "[t]he Customs officers were *his* subordinates; in forbidding them to obey orders from him [to collect the tariff], South Carolina had infringed his dignity, and he would be avenged as instantly and as fully as possible." *Id.*

[33] *Id.*

[34] "[N]or was [South Carolina] even firmly and vigorously supported by her Southern sisters. . . . Calhoun himself only defended Nullification as an unsurrendered right of sovereignty, an extreme resource against a signal misuse for unconstitutional purposes of the constitutional powers of Congress." *Id.* Interestingly enough, even Jefferson Davis, future President of the Confederate States of America, "distinguish[ed] clearly between nullification and secession, the right of a State to dissolve the League, and her right to remain within it and break its rules. From 1850 down to 1865 the latter was the course of the *North*, the former the claim of the South." *Id.* at 1.

> The substantial victory rested with South Carolina, not only because she had compelled the repeal of the iniquitous tariff, but because her people meant the principle they affirmed; . . . [W]hen the question was once relegated to theoretical discussion, few Northern lawyers or statesmen were disposed seriously to maintain the constitutional legitimacy of war against a recalcitrant State—a measure for which no authority could be found in the Constitution and which its framers had decisively rejected.[35]

The political tension between the federal and state governments would rise even more, however, with the Supreme Court's 1856 decision in *Scott v. Sandford*.[36] After residing for a number of years in free territory with various masters, Dred Scott petitioned the courts for an adjudication of freedom; arguing that because Congress had prohibited slavery in those areas through the Missouri Compromise, he was, by right, no longer a slave.[37] In one of the most controversial decisions of its history—and only the second time it had ever ruled an act of Congress unconstitutional—the Supreme Court held:

> [I]t is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.[38]

The Supreme Court's decision in *Scott v. Sandford* sent shock-waves through all parts of American life. When "the opinion of the court, as written by Chief Justice Taney of Maryland, adjudged the Missouri Compromise law unconstitutional, indignation became open rebellion. The Republican party, the abolitionists, and Northern States repudiated the decision, and declared that . . . Congress should and would treat the decision as a nullity."[39] What had begun as one man's

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[35] *Id.* at 442.

[36] 60 U.S. 393 (1856).

[37] Elbert William R. Ewing, *Legal and Historical Status of the Dred Scott Decision: A History of the Case and an Examination of the Opinion Delivered by the Supreme Court of the United States* 24 (Cobden Publg. Co. 1909).

[38] *Scott*, 60 U.S. at 452. Two years before the Supreme Court made its pronouncement, the Missouri Compromise was actually repealed by legislative action. Ewing, *supra* n. 37, at 28. Despite this occurrence, however, the Court's determination that the Compromise had been an unconstitutional exercise of federal power bolstered the position of the states relative to the national government. *Id.*

[39] Ewing, *supra* n. 37, at 6.

humble quest for freedom had morphed into "nothing short of the nullification of Federal power."[40]

Five years later, the first shells of war were fired at Fort Sumter and eleven states seceded from the Union.[41] The Civil War was finally at hand, and the power of the states was at its apex. No longer would the states chafe under the restrictive yoke of federal governance; secession was their final sovereign right, and it had just been unleashed. In a telling rebuke to federal supremacy, the preamble to the Confederate Constitution openly proclaimed what the earlier Tariff Nullification Crisis and the Kentucky and Virginia Resolutions had only dared allude:

> We, the People of the *Confederate* States, *each State acting in its sovereign and independent character, in order to form a permanent Federal Government*, establish justice, insure domestic tranquility, and secure the blessings of liberty to ourselves and our posterity—*invoking the favor and guidance of Almighty God*—do ordain and establish this Constitution for the *Confederate* States of America.[42]

After four years of bloody conflict and unparalleled destruction, the surrender of General Lee at Appomattox Courthouse on April 9, 1865 brought the War Between the States to a close.[43] Although the Confederate rebellion had been relatively short-lived, its impact on the nation would be far-reaching. Over 620,000 Americans lost their lives by the end of the war, and the disruption to domestic institutions and civilian infrastructure was as severe as it was unprecedented.[44] As the cannon fire subsided and the dust settled, however, "[t]he sudden collapse of the rebellion . . . precipitated upon the country the questions

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[40] *Id.*

[41] The Comte de Paris, *History of the Civil War in America* 138 (Henry Coppée ed., Louis F. Tasistro trans., Jos. H. Coates & Co. 1875).

[42] Jefferson Davis, *The Rise and Fall of the Confederate Government* vol. 1, 648 (Thomas Yoseloff 1881). In writing his history of the Confederate States of America sixteen years after its defeat, Jefferson Davis freely admits to the reader that:

> The object of this work has been from historical data to show that the Southern States had rightfully the power to withdraw from a Union into which they had, as sovereign communities, voluntarily entered; that the denial of that right was a violation of the letter and spirit of the compact between the States; and that the war waged by the Federal Government against the seceding States was in disregard of the limitations of the Constitution, and destructive of the principles of the Declaration of Independence.

Id. at Preface i.

[43] Edward M. Boykin, *The Falling Flag: Evacuation of Richmond, Retreat and Surrender at Appomattox* 62 (3d ed., K.J. Hale & Son Publishers 1874).

[44] William Thaddeus Coleman, Jr., *Truths That Unfortunately Were Not, and Still Are Not, Sufficiently Self-Evident*, 148 Proc. Am. Phil. Socy. 434, 443 (2004) (available at http://www.aps-pub.com/proceedings/1484/480404.pdf).

of reconstruction, restoration and reconciliation."[45] Although it would be slightly melodramatic and more than a bit disingenuous to claim that "[t]o preserve a sectional equilibrium and to maintain the equality of the States was the effort of one side, [while] . . . acquir[ing] Empire was the manifest purpose on the other,"[46] it could not be denied that the relationship between the states and the federal government had been inexorably altered by the course of the war:

> Now that the war was over, what was the status of the States which had attempted secession? Were they still members of the Union, and could their participation in its affairs be resumed just where it had been left off? . . . If, as the Supreme Court subsequently held, in the leading case of *Texas v. White*, the government from which they had sought to withdraw was "an indestructible Union of indestructible States," they had, in legal theory at any rate, succeeded neither in severing their connection with the federal government nor in destroying their own existence as States. They were still States, and States in the Union. But what sort of States, and in what condition? In what relation did they now stand to the government they had sought to destroy?[47]

III. RECONSTRUCTION AND THE RISE OF FEDERAL SUPREMACY

It would be historically inaccurate—and far too premature—to claim that the defeat of the South in the Civil War sounded the death knell of state power. In view of the nearly one hundred and fifty years since the conflict ended, however, it would also be historically obvious to say that the relationship between the states and the federal government had undergone a substantial transformation—with the Union victory in the Civil War often seen as the critical turning point. Though the Reconstruction has sometimes been criticized for the degree of punitive zeal its Congressional supporters often demonstrated in its implementation, "there is a larger meaning" to its impact:

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[45] Henry Wilson, *History of the Reconstruction Measures of the Thirty-Ninth and Fortieth Congresses: 1865-68*, at iii (Hartford Publg. Co. 1868).

[46] Davis, *supra* n. 42, at Preface iii. Although it must be discounted somewhat on account of the author's clear (and largely unrepentant) political bias, *The Rise and Fall of the Confederate Government* is a writing notable for providing an invaluable first-hand examination of the policies and ideological beliefs of the Confederate leadership during the Civil War—particularly with respect to the perceived constitutional justification for secession and the nature of the federal government's relationship with the states.

[47] Woodrow Wilson, *Epochs of American History: Division and Reunion 1829-1889*, at 255 (Albert Bushnell Hart ed., Longmans, Green, & Co. 1901).

> [The] radical readjustment of civil and political forces necessitated by the civil war was obedient to industrial and moral ends. Despite all adverse criticism of the entire policy of reconstruction as formulated by laws of Congress and by amendments to the Constitution, the essential process of reconstruction was organic and humane. It was a national, and not merely a sectional reorganization. It was part of the general and ever slowly developing definition of the rights of men. It raised the white race as well as the black, in America, to a higher plane. . . . It helped to dissipate the obscurities which so long had made difficult the administration of government because of the confusion of State and Federal functions. It recognized the supremacy of the immortal doctrine, —"all men are created equal."[48]

Reconstruction also brought about new changes to the Constitution with the Thirteenth, Fourteenth, and Fifteenth Amendments added in 1865, 1868, and 1870, respectively. Considering that it had been over sixty years since the Twelfth—and last—Amendment to the Constitution had been added, the adoption of three in a mere five years was unprecedented.[49]

Equally unprecedented was the challenge the federal judiciary faced in passing judgment on the propriety of certain actions taken by the Confederate state governments during the Civil War. While the great military battles had been raging across the continent and on the high seas, ordinary life in the Confederate states had also been progressing with people entering into marriages, transferring real estate, and—oddly enough—even buying U.S. Treasury Bonds. In a suit to recover title to certain instruments sold during the Civil War, the State of Texas inadvertently helped trigger one of the landmark political discussions about post-war American federalism.[50]

In 1850, as compensation for "claims connected with the settlement of her boundary," the State of Texas received from the United States "$10,000,000 in five per cent. bonds, each for the sum of

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[48] Peter Joseph Hamilton, *The History of North America: The Reconstruction Period* vol. XVI, at viii-ix (Francis Newton Thorpe ed., author's ed., George Barrie & Sons 1905). It should be noted that this passage of magnanimous introspection was written by a *southern* historian who dedicated the work "to the memory of [his] Father . . . [who] spent a useful and inspiring life of fifty years in Alabama." *Id.* at iv. When Hamilton published this text in 1905, the Civil War and the subsequent acts of Reconstruction were still undoubtedly fresh in the minds of many veterans and former Confederate sympathizers. Thus, the recognition by a southern writer of the national benefits of Reconstruction after such a comparatively short time is particularly telling.

[49] U.S. Const.

[50] *Texas v. White*, 74 U.S. 700 (1868).

$1000 . . . ."[51] These bonds "were dated January 1, 1851, and were all made payable to the State of Texas, or bearer, and redeemable after the 31st day of December, 1864."[52] Given that these bonds could be paid to anyone who held them, an act of the Texas legislature provided as a protective measure that "no bond should be available in the hands of any holder until after indorsement by the governor of the State."[53]

With its secession from the Union and the outbreak of hostilities:

> [T]he insurgent legislature of Texas, on the 11th of January, 1862, repealed the act requiring the indorsement of the governor, and on the same day provided for the organization of a military board . . . and authorized a majority of that board to provide for the defence of the State by means of any bonds in the treasury, upon any account, to the extent of $1,000,000.[54]

On March 12, 1865, George White and John Chiles "received from the military board one hundred and thirty-five of these bonds, none of which were indorsed by any governor of Texas" in exchange for "a large quantity of cotton cards and medicines."[55] After the Civil War's end, Texas, acting on the absence of the governor's signature required by its earlier act, sought to reclaim the bonds and obtain an injunction preventing the defendants from receiving payment from the U.S. Treasury.[56]

In granting the injunction against the defendants and determining that the bonds ultimately belonged to Texas, the Supreme Court had to evaluate the trickier question of Texas' political status during the Civil War: "Did Texas, in consecuence [sic] of these acts, cease to be a State? Or, if not, did the State cease to be a member of the Union?"[57] In considering this difficult—yet critically important—question, the Supreme Court noted:

> The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to

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[51] *Id.* at 717.
[52] *Id.* at 718.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* at 717.
[57] *Id.* at 724.

> "be perpetual." And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?[58]

Although the Constitution had created "an indestructible Union, composed of indestructible States," this "by no means implie[d] the loss of distinct and individual existence, or of the right of self-government by the States."[59] In view of this perpetual Union and national indissolubility, "the ordinance of secession . . . and all the acts of her legislature intended to give effect to that ordinance, were absolutely null."[60]

The decision in *Texas v. White* is notable not only for its holding that "[t]he union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States" with "no place for reconsideration or revocation,"[61] but also for its recognition of the States' "distinct and individual existence [and] the right of self-government."[62] Because the sale of the Treasury Bonds by the military board was an action "in furtherance of its main purpose, of war against the United States," it was a contract "in aid of the rebellion, and therefore, void."[63] Messrs. White and Chiles might have lost the

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[58] *White*, 74 U.S. at 724-25.

[59] *Id.* at 725. "Under the Constitution, though the powers of the States were much restricted [compared to their scope under the Articles of Confederation], still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people." *Id.*

[60] *Id.* at 726. Because Texas "became one of the United States, she entered into an indissoluble relation." *Id.*

[61] *Id.* at 726. The Supreme Court did leave open the possibility of the Union's dissolution "through revolution, or through consent of the States" however. *Id.* Although in one sense the Civil War could be regarded as a "revolution" of the southern states, the Court's opinion seems to suggest something on a more national scale, or the consent of (presumably all) the states would be required to officially dissolve the "indissoluble" Union. *Id.*

[62] *Id.* at 725.

[63] *Id.* at 734. In crafting its opinion, the Supreme Court took great care to avoid the legal and logistical nightmare which would occur if *every* action taken by the Confederate government during the Civil War was declared void:

> It is not necessary to attempt any exact definitions, within which the acts of such a State government must be treated as valid, or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.

Id. at 733.

benefit of their bargain, but the nation as a whole gained a much needed clarification about the status of the state governments and their position in the national order. The doctrines of nullification and secession had been conclusively rejected, but the states still retained the right to self-government and all the powers afforded or reserved to them under the Constitution.[64]

These powers under the Constitution would be defined, however, in light of the new amendments passed during Reconstruction. The first of these, the Thirteenth Amendment, banned slavery within the territory of the United States while the Fifteenth Amendment protected the right of those freed slaves to vote.[65] However, the Fourteenth Amendment was to be the most sweeping in scope. "[B]rief experience sufficed to show that while the Thirteenth Amendment had freed the slaves it would not protect them against a multitude of oppressive and discriminating laws . . . ."[66] In pertinent part, the Amendment thus proclaimed:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[67]

In addition to the sweeping language of the Amendment, Congress would also have the "power to enforce, by appropriate legislation, the provisions of this article."[68] The "prohibitions in the Fourteenth Amendment, section 1, appl[ied] to the states rather than to individuals . . . [and] enable[d] Congress to act against individuals only in so far as [they were] acting in an official capacity as representatives of a state."[69]

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[64] *Id.* at 734.

[65] James DeWitt Andrews, *American Law and Procedure* vol. 8, § 69, 56-66 (La Salle Extension Univ. Chi. 1911) (stating that while the Emancipation Proclamation had freed the slaves in the *Confederate* states, the Thirteenth Amendment was necessary to ensure that *all* slaves were freed, since Kentucky, for instance, was a slave state which had remained loyal to the Union).

[66] *Id.* at 57.

[67] *Id.* at 58 (quoting U.S. Const. amend. XIV, § 1.). Congress had not forgotten the outrage that had been caused by the Supreme Court's decision in *Scott v. Sandford*, in which, on account of his race, the Court had ruled that Dred Scott could never be a citizen of the United States, but merely the property of Sandford. *See* Ewing, *supra* n. 37, 24-31. Accordingly, the Fourteenth Amendment explicitly repudiated this decision by beginning: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . ." Andrews, *supra* n. 67, at 58 (quoting U.S. Const. amend. XIV, § 1.).

[68] *Id.* (quoting U.S. Const. amend XIV, § 5.).

[69] *Id.* at 61-62. "[N]either the amendment, broad as it is, nor any other amendment [however], was designed to interfere with the power of the state, sometimes called the police power, to prescribe regulations, to promote the health, peace, morals, education and good order of the people . . . ." Henry

Much like the Union victory in the Civil War, the adoption of the Fourteenth Amendment marked a turning point in the federal government's evolving relationship with the states. Author Albert H. Putney wrote that:

> Upon its face the first section of this amendment would seem to entirely change the relations which had previously existed between the United States and its component States; and although the Supreme Court . . . gave to this section a restricted application, the amendment has nevertheless had a great influence upon these relations.[70]

Even as early as 1908, it was widely noted that:

> [T]he fourteenth amendment has vastly widened the powers of the Nation over the States. It has 'centralized' the government, to use the expression of those who, in the formation of the Constitution . . . opposed the policy of depositing with the Union so many vital powers directly operating upon the people. This amendment has made the national government federal as distinguished from confederate. [It has] much further widened the federal power over that of the States [and] could never have been adopted prior to the Civil War.[71]

The Civil War had ended, the Fourteenth Amendment had been adopted, and the relationship between the federal government and the states would never be the same.

IV. FEDERALISM IN THE TWENTIETH CENTURY

While the scope and authority of the federal government had undoubtedly been enhanced by the Union's victory during the Civil War and by the adoption of the Fourteenth Amendment, as the Nineteenth Century came to an end on December 31, 1899, the true expansion of federal power was just about to begin. Like most transformational events, the Twentieth Century began quietly enough with little sense of its coming importance. William McKinley had just been elected to a second term as President; the United States had completed the

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Brannon, *A Treatise on the Rights and Privileges Guaranteed by the Fourteenth Amendment to the Constitution of the United States* 321 (W.H. Anderson & Co. 1901).

[70] Albert H. Putney, *United States Constitutional History and Law* 430 (William S. Hein & Co., Inc. 2000, Fred B. Rothman & Co. 1985, Chicago Illinois Book Exch. 1908).

[71] *Id.* The author also observed that even by 1908 "[t]he fourteenth amendment has given rise to more litigation than all of the other amendments to the Constitution combined," a trend which has likely only accelerated during the last one hundred years. *Id.*

annexation of Guam, Puerto Rico, and the Philippines;[72] and over 76,000,000 Americans inhabited the forty-five states which comprised the Union.[73] Reconstruction had been over for nearly a generation, and the national economy was beginning to shift from agrarian to industrial. With the election of President Wilson in 1912, however, the federal government began to take on an ever-increasing role in national affairs.[74] A tariff reduction had created a budget deficit, for instance, and the response to this was the passage of a federal income tax under the newly promulgated Sixteenth Amendment.[75]

The idea of a federal income tax had been tossed around on rare occasions in the nation's history—during the War of 1812 and the Civil War, for instance—but had never become a permanent part of the American government until the ratification of the Sixteenth Amendment in 1913.[76] "Incomes of less than $4,000 were exempt, and incomes over that sum were taxed on a scale beginning with a minimum of one per cent."[77] With the federal revenues secured, Wilson then turned his attention to the state of the nation's banking system:

> [T]he most formidable [domestic] enterprise in which President Wilson succeeded was the reform of the American banking system. This system was detestable. It was, however, acceptable to some powerful banks which had become accustomed to its defects, and were troubled at the thought of a reform which threatened to be far-reaching and also to limit their former freedom.[78]

Since 1832, when Andrew Jackson had emerged victorious from his war against the Bank of the United States, the nation had lacked anything remotely resembling a central monetary institution.[79] States could certainly charter banks and in 1863 an act was passed authorizing individuals to establish national banks, but "[t]he main object of this act was to create a market for United States bonds" and not to ensure any sort of financial stability or economic regulation.[80]

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[72] James Ford Rhodes, *The McKinley and Roosevelt Administrations: 1897-1909*, at 110 (MacMillan Co. 1922).

[73] *Appleton's Universal Cyclopædia*: *United States Census of 1900*, at 1 (D. Appleton & Co. 1901) (representing a series of tables compiled from the official returns giving the distribution of population according to the twelfth census).

[74] Daniel Halévy, *President Wilson* 242 (Hugh Stokes trans., John Lane Co. 1919).

[75] *Id.* at 149.

[76] P.S. Talbert, *Relief Provisions and Treasury Procedure on Appeals*, in Robert Murray Haig et al., *Columbia University Lectures: The Federal Income Tax* 250, 254-55 (Robert Murray Haig ed., Columbia U. Press 1921).

[77] Halévy, *supra* n. 74, at 149.

[78] *Id.* 149-50.

[79] Joseph Ragland Long, *Government and the People* 250 (Charles Scribner's Sons 1922).

[80] *Id.* at 251.

Faced with this highly disorganized state of affairs, Congress passed the Federal Reserve Act in 1913.[81] The purpose of this act "was to improve the existing system by the decentralization of the money power by establishing Reserve banks in convenient commercial centres throughout the country, and also by providing a more elastic currency."[82] Under this legislation, "[t]he thousands of national banks scattered throughout the country like so many separate wells were brought together into one system in which they stand as local conduits from a national reservoir."[83] "[I]t was absolutely imperative to give the country a new banking system," and under President Wilson's direction the federal government did just that.[84]

As the nation entered the Roaring Twenties, it seemed as if the sky was the limit and anything could be possible. The War to End All Wars had come to an end, and the United States had emerged from it with unfettered dominion over the world economy.[85] Between 1925 and 1929, American manufacturing represented approximately 42.5% of the world's total production, and from 1927 to 1930 the United States enjoyed an unprecedented international trade surplus of over $1 billion a year.[86] Times were good in the United States—and with a little luck couldn't anyone become a millionaire?—but as the 1920s prepared to give way to the 1930s, the luck started to run out and the good times came to a screeching halt.

October 24, 1929 began like nearly any other day, but by the time it was over it would be known forever as Black Thursday. In a market panic that began shortly after the start of trading, an unprecedented 12.9 million shares were unloaded by anxious sellers, and by the time Black Tuesday rolled around the following week, more than $30 billion, or ten times the annual federal budget, had been lost by investors.[87] While the national unemployment rate had hovered around 3.3% from 1923 to 1929, by 1930 it had risen to 8.9%, and by the time Franklin Delano Roosevelt was elected President in 1932 it had surged to

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[81] *Id.* at 252.

[82] *Id.* Under this act, "[t]he country is divided into twelve districts, in each of which is established, in a reserve city, a Federal Reserve bank. . . . A Federal Reserve bank has no direct dealings with the public, but deals only with banks, having been well described as a 'bank of banks.' " *Id.*

[83] Halévy, *supra* n. 74, at 150.

[84] *Id.* at 152.

[85] Christian Saint-Etienne, *The Great Depression, 1929-1938: Lessons for the 1980s* xiv (Hoover Instn. Press 1984).

[86] *Id.* at xiv-xv. In comparison, the 2007 American trade *deficit* was nearly $800 billion. *See* U.S. Census Bureau, *Foreign Trade Statistics: Trade in Goods (Imports, Exports and Trade Balance) with World (Seasonally Adjusted): 2007*, http://www.census.gov/foreign-trade/balance/c0004.html#2007 (last modified Oct. 10, 2008).

[87] Brenda Lange, *The Stock Market Crash of 1929: The End of Prosperity* 3 (Infobase Publg. 2007).

over 23.6%.[88] Millions were out of work, the economy was in shambles, and the nation faced a humanitarian crisis of epic proportion.

In the midst of this storm of national chaos, the Roosevelt Administration proposed a bold series of financial reforms and social policies designed to give the American people a "New Deal."[89] The magnitude of the crisis demanded a unified national response, and the functions and powers of the federal government thus began a concomitant expansion. "Social Security, unemployment compensation, federal welfare programs [and] price stabilization programs in industry" were all adopted by the federal government with "[m]any of these programs . . . administered by the states, giving rise to the federal grant-in-aid system."[90]

The reach of some of these programs, however, quickly became a cause of judicial concern. In 1933, Congress had passed the National Industrial Recovery Act (NIRA), which gave the President the power to promulgate "codes of fair competition" for particular industries and trade groups.[91] Violation of any provision of these codes " 'in any transaction in or affecting interstate or foreign commerce' [was] made a misdemeanor punishable by a fine of not more than $500 for each offense, and each day the violation continue[d] [was] to be deemed a separate offense."[92] On April 13, 1934, the President approved the "Live Poultry Code" to establish "fair competition for the live poultry industry of the metropolitan area in and about the City of New York."[93] Shortly thereafter, the A.L.A. Schechter Poultry Corporation and its family

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[88] *See* Robert VanGiezen & Albert E. Schwenk, *Bureau of Labor Statistics: Compensation from Before World War I through the Great Depression*, http://www.bls.gov/opub/cwc/cm20030124ar03p1 htm (posted Jan. 30, 2003).

[89] Ellis Katz, *American Federalism: Past, Present and Future*, 2 Issues of Democracy: Reinventing Am. Federalism 6, 11 (April 1997), http://usinfo.state.gov/journals/itdhr/0497/ijde/ijde0497.pdf.

[90] *Id.*

[91] *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 521 (1935).

[92] *Id.* at 523.

[93] *Id.* As established by President Roosevelt:

> The code fixes the number of hours for workdays. It provides that no employee, with certain exceptions, shall be permitted to work in excess of forty hours in any one week, and that no employees, save as stated, "shall be paid in any pay period less than at the rate of fifty (50) cents per hour." The article containing "general labor provisions" prohibits the employment of any person under 16 years of age, and declares that employees shall have the right of "collective bargaining" and freedom of choice with respect to labor organizations, in terms of section 7(a) of the act (15 USCA s 707(a)). The minimum number of employees, who shall be employed by slaughterhouse operators, is fixed; the number being graduated according to the average volume of weekly sales.

Id. at 524.

operators were found guilty of committing "evil trade practices" in violation of the NIRA's Live Poultry Code.[94]

In reversing the Schechters' conviction, the Supreme Court found that the code making provision under Section Three of the Recovery Act was an unconstitutionally broad delegation of legislative power, and that since the Schechters' activities had only an indirect effect on interstate commerce they were outside the sphere of federal regulation.[95] Although conceding that "[e]xtraordinary conditions may call for extraordinary remedies,"[96] the Supreme Court ruled:

> In determining how far the federal government may go in controlling intrastate transactions upon the ground that they "affect" interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as, e.g., the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce . . . . But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control.[97]

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[94] *U.S. v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617, 618 (2d Cir. 1935).

[95] *A.L.A. Schechter*, 295 U.S. at 551. In U.S. v. A.L.A. Schechter Poultry Corp., Chief Justice Hughes stated that:

> Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry, or activity [but merely] . . . authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion described in section 1. In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.

Id. at 541-42.

[96] *Id.* at 528.

[97] *Id.* at 546.

Simply put, "[e]xtraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate . . . but these powers of the national government are limited by the constitutional grants."[98] To hold otherwise would mean that "there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government."[99]

While the Supreme Court's decision in *Schechter Poultry* was hailed as a triumph of the states against federal encroachment, the victory would be largely symbolic and ultimately short-lived. Just two years later, the Supreme Court would decide another case, *West Coast Hotel Co. v. Parrish*, which would lay the foundation for the most expansive growth of federal regulatory power in American history.[100] After Elsie Parrish, a hotel chambermaid, brought suit against her employer seeking the difference between the amount of pay she had received and the amount she was entitled to under Washington's minimum wage law, the West Coast Hotel Company "challenged the act as repugnant to the due process clause of the Fourteenth Amendment" because it infringed upon the parties' freedom to reach an independent contract.[101]

Although framed as a question about the constitutionality of a *state's* minimum wage law, the decision's invocation of due process under the Fourteenth Amendment ensured that similar federal regulations would pass constitutional muster:

> The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the states . . . . In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in

[98] *Id.* at 528.
[99] *Id.* at 548.
[100] 300 U.S. 379 (1937).
[101] *Id.* at 388.

> relation to its subject and is adopted in the interests of the community *is* due process.[102]

By determining that reasonable regulations adopted in the interests of the community could constitute due process, the Supreme Court signaled a new found willingness to permit many of President Roosevelt's New Deal programs to go forward.[103] In a significant departure from the earlier language of regulatory restraint emphasized in *Schechter Poultry*, the Court concluded that "[l]iberty implies the absence of *arbitrary* restraint, not immunity from *reasonable* regulations and prohibitions imposed in the interests of the community."[104]

Convinced that the majority had been swayed by political pressure and "the economic conditions which [had] supervened," the four dissenting justices noted that "Constitutions cannot be changed by events alone:"[105]

> The meaning of the Constitution [as it relates to federal regulatory power] does not change with the ebb and flow of economic events. . . . [S]pecific [constitutional] provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. . . . It is not competent for any department of the Government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things. . . . If the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable [New Deal] legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. . . . [Otherwise] much of the benefit expected from

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[102] *Id.* at 391 (emphasis added).

[103] In a rather oblique attack on Justice Roberts' switch to the majority's viewpoint—a move perceived to have been motivated by Roosevelt's proposed court-packing plan—Justice Sutherland posited in his dissent that:

> [I]t is the duty of a member of the court, in the process of reaching a right conclusion, to give due weight to the opposing views of his associates; but in the end, the question which he must answer is not whether such views seem sound to those who entertain them, but whether they convince him that the statute is constitutional . . . . The oath which he takes as a judge is not a composite oath, but an individual one. And in passing upon the validity of a statute, he discharges a duty imposed upon him, which cannot be consummated justly by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in, his mind. If upon a question so important he thus surrender his deliberate judgment, he stands forsworn. He cannot subordinate his convictions to that extent and keep faith with his oath or retain his judicial and moral independence.

Id. at 401-02.

[104] *Id.* at 392 (emphasis added).

[105] *West Coast Hotel Co.*, 300 U.S. at 402-03.

> written constitutions would be lost if their provisions were to be bent to circumstances or modified by public opinion. . . . The meaning of the constitution is fixed when it is adopted, and it is not any different at any subsequent time when a court has occasion to pass upon it.[106]

Eloquent though the dissent might have been, a majority of the Court had spoken, and as long as the government's new regulations and social policies could be deemed "reasonable" and "adopted in the interests of the community," they would be upheld.[107]

In the wake of this regulatory victory, the federal government then passed the Agricultural Adjustment Act of 1938.[108] Under the terms of the Act, the Secretary of Agriculture was "directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which [would then be] apportioned to the states and their counties, and . . . eventually broken up into allotments for individual farms," with the goal being control of "the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce."[109] By regulating the collective output on a national scale, Congress could ensure that the price of wheat remained higher than it would have been in a free market, thus raising the fortunes of American farmers still reeling from the impact of the Great Depression.[110]

Under the allocation guidelines for the 1941 wheat crop, Roscoe Filburn was permitted to grow 11.1 acres of wheat on his family farm in Montgomery County, Ohio.[111] Desiring to produce some additional wheat for his own personal use, Filburn sowed twenty-three acres of wheat instead.[112] Upon discovering the excess harvest, the government assessed him with a penalty of $117.11, or forty-nine cents a bushel for each unit harvested in excess of his quota.[113] After refusing to pay the fine, Filburn sued the Secretary of Agriculture, Claude Wickard, and several other state and local agricultural commissioners seeking to enjoin the penalty's enforcement and obtain a declaratory judgment that the quota provisions were unconstitutional under the Commerce and Due

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[106] *Id.* at 402-04.
[107] *Id.* at 391.
[108] 7 U.S.C. §§ 1281-1293 (2006).
[109] *Wickard v. Filburn*, 317 U.S. 111, 115 (1942).
[110] *Id.* at 126. In 1941, for example, this policy meant that the typical American wheat farmer received an average of $1.16 a bushel instead of the forty cents a bushel which was the prevailing price on the world market. *Id.*
[111] *Id.* at 114.
[112] *Id.*
[113] *Id.* at 114-15.

Process Clauses.[114] In the most significant expansion of federal power to date, the Supreme Court ruled that:

> [E]ven if [Filburn's] activity be local and though it may not be regarded as commerce, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this *irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."*[115]

While the notion that a solitary farmer in Montgomery County, Ohio could exert a "substantial economic effect on interstate commerce" by growing wheat for his individual consumption might have seemed laughable to the Court in *Schechter Poultry* seven years earlier, in *Wickard*, the Court found it to be a very serious matter:

> It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. . . . This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.[116]

In a seemingly bizarre and slightly counterintuitive holding, the Supreme Court ruled, in essence, that because Roscoe Filburn was *not* engaging in interstate commerce through the purchase of wheat on the open market, he was in fact exerting a "substantial economic effect" on interstate commerce through his refusal to purchase that wheat.[117] It was completely irrelevant that his personal wheat crop never left Montgomery County and was entirely *intrastate* in nature—the fact that

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[114] *Id.* at 113-14.
[115] *Id.* at 125 (emphasis added).
[116] *Wickard*, 317 U.S. at 128-29.
[117] *Id.* at 125.

it allowed him to *avoid* a transaction in interstate commerce was now enough to subject him to the reach of federal authority.[118]

Like Elsie Parrish before him, it is doubtful that Roscoe Filburn could have ever imagined the full constitutional significance his decision to contest a penalty of $117.11 would have on the course of American history. It would take another fifty years before the Supreme Court would invalidate a federal Commerce Clause regulation after its decision in *Wickard*,[119] and in the interim decades the very *concept* of federalism would begin to undergo a substantial evolution:

> Until the New Deal, the prevailing concept of federalism was "dual federalism," a system in which the national government and the states ha[d] totally separate sets of responsibilities. Thus foreign affairs and national defense were the business of the federal government alone, while education and family law were matters for the states exclusively. The New Deal broke this artificial distinction and gave rise to the notion of "cooperative federalism," a system by which the national and state governments may cooperate with each other to deal with a wide range of social and economic problems.[120]

One of the best known examples of this "cooperative" federalism was the construction of the interstate highway system.[121] "The federal govern-ment provided up to 90 percent of the cost of highway con-struction, gave technical assistance to the states in building the high-ways, and, generally, set standards for the new roads. [But] [t]he high-ways [themselves] were actually built and maintained by the states."[122]

In the mid-1960s, though, this era of "cooperative" federalism began to come to an end. "Under President Lyndon B. Johnson's Great Society, the federal government sometimes enacted grant-in-aid programs in which the states had little interest, or to which they were actually opposed."[123] As federal funding began to flow more directly to local governments (of which there were nearly 80,000) as opposed to the fifty states which had historically been the recipients of such largess, the nature and scope of the federal government's power began to take on a more comprehensive and localized character:

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[118] *Id.*
[119] *See U.S. v. Lopez*, 514 U.S. 549 (1995).
[120] Katz, *supra* n. 89, at 11.
[121] *Id.*
[122] *Id.*
[123] *Id.* at 12.

> [W]hile previous grant-in-aid programs were limited to a few areas on which the federal government and states agreed, the Great Society reached almost every policy area—education, police and fire protection, historic preservation, public libraries, infant health care, urban renewal, public parks and recreation, sewage and water systems and public transit.[124]

By the time President Nixon left office, more than 600 of these federal grant programs exist.[125] Since governments—like all economic actors—are subject to the laws of scarcity (albeit at a much higher level), funding shortages among the ever-expanding retinue of federal programs necessarily led to much of the financial burden being shifted from the national government onto the states.[126] Known as "unfunded mandates," these programs required the states to take certain actions—in the fields of historical preservation, environmental protection, and individual rights, for instance—often without any direct support from the federal government.[127]

Whether funded or unfunded, the scope of federal dominion over the states had reached an unprecedented height. Because of the Supreme Court's broad interpretation of its regulatory power, "the national government [could now] reach almost any economic, social, or even cultural activity it wishe[d]. Thus, national laws [now affected] such traditionally local matters as crime, fire protection, land use, education, and even marriage and divorce;" areas which previously would have been within the exclusive purview of state constitutional power.[128] As the federal government has continued to take on even greater roles in traditional state matters, the question has inevitably arisen about what role—if any—will be left for the states in the future.

The answer to this question is by no means a constitutional certainty, but the political debate will undoubtedly be affected by the Supreme Court's historic decision in *United States v. Lopez*.[129] After Alfonso Lopez, Jr., a twelfth-grade student at San Antonio's Edison High School, arrived one morning with a concealed .38-caliber handgun, he was detained by local authorities and indicted on one count of "knowing possession of a firearm at a school zone" under the Gun-Free School Zones Act of 1990.[130] Challenging his indictment under the Act, Lopez argued that it was "unconstitutional as it is beyond the power of

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[124] *Id.*
[125] *Id.*
[126] *Id.* at 13.
[127] *Id.*
[128] *Id.*
[129] *Lopez*, 514 U.S. at 549.
[130] *Id.* at 551.

Congress to legislate control over our public schools."[131] The district court disagreed with his argument, however, finding that the Act was "a constitutional exercise of Congress' well-defined power to regulate activities in and affecting commerce, and the 'business' of elementary, middle and high schools . . . affects interstate commerce."[132]

In reversing Lopez's conviction, the Supreme Court rejected—for the first time since *Wickard*—the notion that Congress had the power to issue such a sweeping regulation under the Interstate Commerce Clause:

> [This] Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "to regulate Commerce . . . among the several States . . . ."[133]

Because the Gun-Free School Zones Act of 1990 neither regulated "the use of the channels of interstate commerce [,] . . . the instrumentalities of interstate commerce [,] . . . [nor] activities having a substantial relation to interstate commerce," it could not be sustained under the line of cases "upholding regulations of activities that arise out of or are connected with a commercial transaction."[134] In reaching this conclusion, the Supreme Court also had occasion to pass upon the validity of the government's argument:

> The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government

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[131] *Id.*

[132] *Id.* at 551-52 (quoting App. to Pet. for Cert. 55a).

[133] *Id.* at 551 (quoting U.S. Const. art. I, § 8, cl. 3). The Court noted that "[e]ven *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not." *Id.* at 560.

[134] *Id.* at 558-61.

> argues that Congress could rationally have concluded that [the Act] substantially affects interstate commerce.[135]

In considering the ultimate implication of the government's arguments, the Supreme Court noted that:

> Under the theories that the Government presents in support of [the Act], it is difficult to perceive *any* limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.[136]

"[D]epending on the level of generality, any activity can be looked upon as commercial," and "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. . . . This we are unwilling to do."[137]

V. CONCLUSION

At the height of its power and glory, the Roman Empire controlled more than two million square miles of territory and ruled over untold millions of subjects. In a time of delayed communication and limited infrastructure, the functions of government necessarily devolved from the imperial throne to provincial governors tasked with maintaining order but possessing some degree of autonomy in determining how to implement policy edicts in their regions. This partial delegation of sovereignty was, to be sure, *not* motivated by the lofty merits of constitutional sharing between divisions of political authority, but rather by the geographic and technological realities of the day. Dacia was a different place than Aquitania, for instance, and the economic and religious sensibilities of the average Galatian could easily differ from

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[135] *Lopez*, 514 U.S. at 563-64.

[136] *Id.* at 564 (emphases added). Taking the argument to its logical conclusion would mean:

> Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant "effect on classroom learning," and that, in turn, has a substantial effect on interstate commerce. . . . [Additionally Congress] could just as easily look at child rearing as "fall[ing] on the commercial side of the line" because it provides a "valuable service-namely, to equip [children] with the skills they need to survive in life and, more specifically, in the workplace."

Id. at 565.

[137] *Id.* at 565-68.

those of a citizen in Sicilia. In spite of its disparate cultures and geographic breadth, however, the Empire functioned and indeed flourished for the better part of several centuries.[138]

The genius of the Roman Empire's overall stability, and what distinguished it in so many ways from the other great civilizations of classical antiquity, lay in its policy of provincial accommodation. The Romans knew that imposing a uniform culture on a conquered province would often breed resentment and hostility, so to avoid these unnecessary complications, it would frequently leave the old regime's political and cultural vestiges in place. The people of a town were less likely to rebel, after all, if the comfortable familiarities of daily life were left undisturbed.[139] While this policy of cultural sensitivity was being practiced at the local level, however, the military legions responsible for the Empire's defense were a highly trained homogenous group. Contradictory though it might have appeared, the Roman Empire was strong enough to respond to external threats but flexible enough to foster internal diversity.

Crude though the analogy might appear, there is much that an American scholar of federalism could learn from the political structure of Imperial Rome. Much like the ancient empire, the United States controls a landmass of enormous size and a population of divergent cultures. Although the circumstances and historical pressures which gave rise to the respective governments are decidedly different, all governments face the same challenges of administering the laws and maintaining order throughout their territory. To this end, the birth of the United States Government came about through a historically abnormal method—the people of its component states *came together* to determine the collective national policy, or to form "a more perfect Union" as the Constitution so eloquently puts it, rather than having the national policy thrust upon them by an actor without their consent.[140]

The careful preservation of the states' powers in connection with the federal government's exercise of its enumerated ones was a political stroke of genius. Government—or rather the lack thereof—under the Articles of Confederation had demonstrated the dangers of depositing too much power in the hands of the individual states. Could Massachusetts really trust New York after all these years? Didn't Virginia's trading policies come at South Carolina's expense? Could a

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[138] F.W. Bussell, *The Roman Empire: Essays on the Constitutional History from the Accession of Domitian (81 A.D.) to the Retirement of Nicephorus III (1081 A.D.)* vol. I, 385 (Longmans, Green & Co., 1910).

[139] *Id.*

[140] *See generally* Jameson, *supra* n. 11.

citizen of Rhode Island *really* receive a fair trial in Delaware? If nothing else, Shay's Rebellion certainly illustrated that a relatively small insurgency could pose a serious danger to the political order in the absence of a strong national authority.[141] Also, like an animal that strays too far from the herd, an independent state outside the protection of the Union would have been much easier to defeat in the event of a foreign invasion. The federal system of government thus allowed the United States to be strong enough to respond to national challenges, while still adaptive enough to be administered responsibly by its citizenry.

Respecting this last point, the Union's victory in the Civil War demonstrated the inherent dangers and ultimate fallacy of state secession. Had the War turned out differently, there is a rather strong chance that one if not both of the national halves would have faced a substantial threat at some point that, by itself, would have been difficult to defeat. Although the nation might sometimes pursue a political course of action, which an individual state might disagree with, the united whole is still vastly stronger and more effective than the mere sum of its parts.

In view of the undisputed benefits of a strong national union, why does this article lament the increase of such a phenomenon? Doesn't the Twenty First Century world highlight the dangers that can come from political disunion? Aren't the challenges currently facing the nation so epic in size as to warrant a national or even a *global* response? While the benefits of a centralized government are many, the rise of a "perfectly" centralized Union carries with it a significant undesirable truth: in a perfectly centralized government, a homogenous political culture prevails and only *one* viewpoint can exist. It was not too long ago in our nation's history, for example, that the northern states (along with many individuals in the South) felt the political discomfort imposed by the obligations of the Fugitive Slave Law, yet under the federal regulation they were duty-bound to return those slaves who tried to escape.

Substituting any other issue of moral or social controversy, the danger of having only one political viewpoint becomes as clear today as it was at the nation's founding. Under a policy of provincial accommodation, or what would now be known as federalism, the citizens of the fifty states can determine—on issues reserved to them by the Constitution—what course of action their state community should take on a particular topic. Do the voters of State X overwhelmingly favor a mandatory life sentence for certain crimes instead of the death penalty? So be it. Do the citizens of State Y prefer that marriage be

[141] *See* Upton, *supra* n. 9, at 71.

defined as between ____ and ____? That is okay too. In each of these instances, the people have voted to articulate the policies and values under which they believe their state should be organized. Other states might very well disagree with the wisdom of their decision, but they are equally free to adopt a different policy.

In a homogenous political culture, only one viewpoint can be possible. In a perfect Union in which the federal government's regulatory powers have subsumed those of the states, the citizens of State Y may find the federal definition of marriage imposed upon their community to be very different from the one they elected to have, while the people of State X might get a vastly dissimilar criminal code that they cannot support on moral grounds. The genius of federalism is that it allows the fifty states to have—in their respective spheres of influence—a win-win situation in which the people vote to have the laws they want without detriment to the choices of other states. In a world in which the federal government's regulatory powers are limitless, however, forty-nine percent of the country may vehemently disagree with the national position yet be powerless to challenge it. The powers of the state governments under federalism at least provide a course of redress for those who disagree with the wisdom of the federal policy.

The decline of the original constitutional relationship between the states and the federal government has in some ways merely been the unavoidable result of a modernizing world. However, as the rise of federal supremacy during the Twentieth Century has revealed, the ability of the federal government to achieve desired policy results through financial grants-in-aid or the ever-popular unfunded mandate has created a carrot-or-the-stick incentive plan in which the states must increasingly adhere to the federal viewpoint or risk the loss of funding necessary to meet their annual budgets. You want a new highway? Set the alcohol limit at ____. Need a new sewer treatment plant? Impose these regulations. While the constitution guarantees to each state a republican form of government, it does not guarantee the avoidance of impoverishment.

To this end, it may be argued that the best form of government for the United States is that which it originally established—a federal system in which the national government has its enumerated powers and the states have their general ones; a system of government strong enough to meet external challenges yet flexible enough to support internal political diversity. As history has shown, the response to federal encroachment does not lie in secession or nullification but rather through the adjudication of state interests by the Supreme Court. The United

States does not have to have a homogenous political culture if it does not want it, but the rising tide of federal power must be hemmed in now if that future is to be avoided. As historian and constitutional scholar Roscoe Ashley poignantly observed in 1913:

> Whether the effort made in the Federal State to maintain a balance between the national and commonwealth governments will prove to be futile, history will decide. If with the powerful aid given by the strong local spirit in America and a constitution of extreme rigidity, the United States cannot hold in check the forces of centralization, we may well come to the conclusion that Federalism is after all but a transitory phase in the development of centralized States with powerful central governments.[142]

[142] Roscoe Lewis Ashley, *The American Federal State* 16 (MacMillan Co. 1902).